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RELEVANT LAW AND STANDARDS

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The Constitution of the United States, federal statutes, and federal regulations serve to proscribe abuses of power and other species of misconduct on the part of the President and other Executive Branch officials. Each of these measures provides not only for different remedies against malefactors but also for different adjudicators of such offenses.

A. Federal Statutes and Regulations, and International Treaty Obligations

Aside from the express dictates of the Constitution, federal criminal and civil statutes as well as executive orders also regulate the Executive Branch. A number of these provisions prohibit the abuse of executive power through deception of Congress and the public, the mistreatment of individuals, and the misuse of intelligence and other government information.

1. Deception of Congress and the American Public

a. Committing a Fraud Against the United States (18 U.S.C. § 371)

This statute makes it a crime to conspire "to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy."[1] "Defrauding the government" has been defined quite broadly and does not need an underlying criminal offense and alone subjects the offender to prosecution.[2]

For nearly 80 years this statute has been used to prosecute government officials and citizens alike who commit a fraud in the most liberal use of the term. The law is clear: the government need not be defrauded of money or property to trigger this statute. It is enough that the government was prevented from being able to exercise its lawful duties and authorities. As the Supreme Court stated, the law applies to those who:

> ***interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest***. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that ***its legitimate official action and purpose shall be defeated by misrepresentation***, chicanery or the overreaching of those charged with carrying out the governmental intention.[3]

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[1]This offense is punishable by a fine and five years in prison.

[2]United States v. Harmas, 974 F.2d 1262, 1266 (11th Cir. 1992).

[3]Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (emphasis added). Numerous additional cases and authorities support the proposition that 18 U.S.C. § 371 applies broadly to apply to a series of misstatements by government officials:

- Charge of conspiracy to commit offense or to defraud United States requires proof of agreement among two or more persons to commit offense against United States, overt act in furtherance of conspiracy, and knowing participation in conspiracy by defendant. United States v. Hinkle, 37 F.3d 576 (10th Cir. 1994).

- "Defrauding" the government, within meaning of statute prohibiting conspiracies to defraud the United States or any agency thereof in any manner or for any purpose, means obstructing operation of any government agency by any deceit, craft or trickery, or at least by means that are dishonest. United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993). Conspiracy.

- To convict defendant of conspiracy to defraud Government, Government must prove agreement to accomplish illegal objective against United States, one or more overt acts in furtherance of illegal purpose, and intent to commit substantive offense; Government, however, need not prove that defendant knew of details of conspiracy, but only that he knew of conspiracy's essential objective. United States v. Gaddis, 877 F.2d 605 (7th Cir. 1989).

- Term "defraud" as used in this section proscribing conspiracy to defraud the United States not only reaches financial or property loss through employment of a deceptive scheme, but also is designed and intended to protect integrity of the United States and its agencies, programs and policies. United States v. Burgin, 621 F.2d 1352 (5th Cir. 1980).

- The term "defraud," as used in former section 88 of this title [now this section] was not construed as limited to frauds respecting property rights, but included the deprivation of any right by deception or artifice and was intended to secure the wholesome administration of the laws and affairs of the United States in the interests of the government. United States v. Moore, 173 F. 122 (C.C.Or.1909). *See also* Haas v. Henkel, 166 F. 621 (C.C.A.N.Y. 1909), aff'd, 216 U.S. 462; United States v. Bradford, 148 F. 413 (C.C.La.1905), aff'd, 152 F. 616; United States v. Stone, 135 F. 392 (D.C.N.J.1905); McGregor v. United States, 134 F. 187 (Md. 1904); Curley v. United States, 130 F. 1 (Mass. 1904).

- Former § 88 of this title [now this section] was not limited in its operation to conspiracies to defraud the United States of its "revenue," but applied to all conspiracies to deprive the United States of any property or dues by means of misrepresentation or concealment of material facts. United States v. Owen, 32 F. 534 (D.C.Or. 1887).

- A conspiracy to defraud the United States comprehends defrauding the United States in any manner whatever, whether the fraud has been declared a criminal fraud or not. United States v. Newton, 48 F. 218 (D.C. Iowa 1891). *See also* United States v. Thompson, 29 F. 86 (C.C.Or. 1886); United States v. Gordon, 22 F. 250 (D.C.Minn.1884).

- Federal conspiracy statute prohibits two types of conspiracies: conspiracy to commit any

Another more recent cases repeat that principle of law. The Second Circuit held that "this statute does not restrict its application to documents that are required to be given to Congress, does not require proof that any statements made to effect the object of the conspiracy were made directly to Congress, and does not require that the conspiracy was successful."[4] One treatise has defined fraud as "a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth."[5]

Lawrence E. Walsh, Independent Counsel in charge of the Iran-Contra investigation pointed out that the deception of Congress statute applies even when the official is involved in official government policy. In his final report, he concluded, "Fraud is criminal even when those who engage in the fraud are Government officials pursuing presidential policy."[6]

Under these precedents, anyone – including the President and his Administration – is prohibited from intentionally misleading the Congress or any other part of the government in pursuit of his or her policy. While this statute is similar to obstructing or lying to Congress

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offense against United States; and conspiracy to defraud United States or any agency thereof. United States v. Ashley, 905 F. Supp. 1146 (E.D.N.Y. 1995).

- "Defraud," as used in former § 88 of this title [now this section] was not limited to thought of deprivation of property by acts of wile or deceit, or to depredations upon property rights, but was broad enough to include any act which interferes with or hampers United States in successful prosecution of any policy established by law. United States v. Soeder, 10 F.Supp. 944 (W.D. Mo.1935). *See also* United States v. Slater, 278 F. 266 (D.C.Pa.1922).

- To constitute conspiracy to defraud United States, it is not necessary that conspiracy should have been to violate a criminal statute. United States v. Terranova, 7 F. Supp. 989 (N.D. Cal.1934). *See also* United States v. Stone, 135 F. 392 (D.C.N.J.1905).

[4]United States v. Ballistrea, 101 F.3d 827, 831-832 (2nd Cir. 1996), *cited by* Francis T. Mandanici, *Bush's Uranium Lies: The Case for a Special Prosecutor That Could Lead to Impeachment* (June 29, 2005), *available at* http://democracyrising.us/content/view/269/164.

[5]CORPUS JURIS SECUNDUM § 2. Francis T. Mandanici, "Bush's Uranium Lies: The Case for a Special Prosecutor That Could Lead to Impeachment," (June 29, 2005).

[6]LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, VOLUME I: INVESTIGATIONS AND PROSECUTIONS, Aug. 4, 1993. *See* Part III: The Operational Conspiracy: A Legal Analysis, for a full discussion on § 371 and its application to the Oliver North scandal.

(described below), it is broader. It covers acts that may be not be technically lying or communications that are not formally before Congress. Indeed, it need only be "overreaching," in the words of the Supreme Court,[7] an exaggeration, if you will, if the intent is to influence the government.

This statute was used in the prosecution of numerous Administration and military officials in the Iran-Contra scandal.[8] It was also used by the Justice Department to prosecute members of the Nixon Administration who used the CIA to interfere with the FBI investigation of the Watergate break-in.[9] One commentator has explained further how the statute was applied in the Watergate context:

> In criminal law, a conspiracy is an agreement "between two or more persons" to follow a course of conduct that, if completed, would constitute a crime. **The agreement doesn't have to be express; most conspiracies are proved through evidence of concerted action**. But government officials are expected to act in concert. So proof that they were conspiring requires a comparison of their public conduct and statements with their conduct and statements behind the scenes. A patterns of double-dealing proves a criminal conspiracy. The concept of interfering with a lawful government function is best explained by reference to two well-known cases where courts found that executive branch officials had defrauded the United States by abusing their power for personal or political reasons. **One is the Watergate case, where a federal district court held that Nixon's Chief of Staff, H.R. Haldeman, and his crew had interfered with the lawful government functions of the CIA and the FBI by causing the CIA to intervene in the FBI's Investigation into the burglary of Democratic Party headquarters. The other is U.S. v. North, where the court found that Reagan Administration National Security Adviser John Poindexter, Poindexter's aide Oliver North and others had interfered with Congress's lawful power to oversee foreign affairs by lying about secret arms deals during Congressional hearings into the Iran/contra scandal**.[10]

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[7]*Hammerschmidt*, 265 U.S. at 188.

[8]*Id.* Special Counsel Walsh eventually withdrew these charges because their ultimate proof was in classified documents that the Administration refused to declassify.

[9]United States. v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (upholding conviction of violation of 18 U.S.C.A. § 371).

[10]Elizabeth De La Vega, *The White House Criminal Conspiracy*, THE NATION (Nov. 14, 2005)

b. Making False Statements to Congress (18 U.S.C. § 1001)

Federal law proscribes the submission of false statements or evidence to Congress or congressional committees. It is a criminal offense to knowingly and willfully:

> (1) falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact; (2) make[] any materially false, fictitious, or fraudulent statement or representation; or (3) make[] or use[] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.[11]

With respect to the proceedings before Congress, this prohibition applies to administrative matters and to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate."[12] The statute's parameters were extended to Congress only in 1996.[13]

There is no limitation on the definition of what constitutes an "investigation or review" by Congress. As such, the term could encompass any hearing, markup, deposition, interrogatory, informal request for information, or speech before Congress or one of its committees or subcommittees. For example, Article II of the Constitution directs the President "from time to time [to] give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[14] To further this requirement, a House concurrent resolution is agreed to by both chambers directing both Houses of Congress to assemble in the Hall of the House on the date and time for the address.[15] As a result, even the President's State of the Union address could be considered an "investigation or review" conducted pursuant to Congress's authority.

In addition, legal treatises have further explained the meaning of the term "fraudulent misrepresentation." The term "fraudulent misrepresentation" includes "half truths calculated to deceive; and a half truth may be more misleading than an outright lie. A representation literally

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[11] 18 U.S.C. § 1001(a). The penalty includes a fine, imprisonment for not more than five years, or both. *Id.*

[12] *Id.* § 1001(c).

[13] False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996); *see also* United States v. Oakar, 111 F.3d 146, 151 (1997).

[14] U.S. CONST. art. II, § 3.

[15] *See* H.R. Con. Res. 20, 109th Cong., 1st Sess. (2005).

true is actionable if used to create an impression substantially false, as where it is accompanied by conduct calculated to deceive or where it does not state matters which materially qualify that statement."[16]

c. War Powers Resolution (Public Law 93-148)

It is unconstitutional and illegal for the President to engage the U.S. Armed Forces without timely congressional authorization. As a constitutional matter, the War Powers Clause, contained in article I, section 8, of the Constitution, gives Congress the sole authority to declare war.

As a statutory matter, in 1973 Congress passed the War Powers Resolution ("WPR"), which governs what powers the President is provided in order to send armed forces into hostilities absent a congressional declaration of war.[17] The WPR requires the President to consult with Congress "in every possible instance" before sending troops into hostilities and to submit reports to Congress whenever forces are introduced.[18] Under the WPR, within sixty days after an initial report to Congress is submitted or should have been submitted, the President must terminate any use of armed forces unless Congress (1) declares war or authorizes the use of force, (2) extends the sixty-day period, or (3) cannot meet due to an attack on the United States.[19]

d. Misuse of Government Funds (31 U.S.C. § 1301)

Federal law makes it illegal to use government funds appropriated to the government for any purpose other than those specifically permitted by the appropriations. It specifically states that "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[20]

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[16]CORPUS JURIS SECUNDUM § 24. Francis T. Mandanici, "Bush's Uranium Lies: The Case for a Special Prosecutor That Could Lead to Impeachment," (June 29, 2005).

[17]War Powers Resolution, Pub. L. No. 93-148 (1973).

[18]*Id.*

[19] The D.C. Circuit Court of Appeals has interpreted this to mean that if the President engages U.S. armed forces, he has sixty days in which to obtain congressional authorization for the use of force or to cease such military activity. See Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000).

[20]31 U.S.C. § 1301. The illegal use of funds would cause an automatic diminution in funds available to the guilty agency. *Id.*

To determine whether a government activity is legal, it is important to understand whether the agency or office that engaged in the activity was permitted to expend funds for that specific purpose.[21] As a general rule, of course, none of the functions of government offices include the dissemination of false information, the dissemination of information for political ends, or retribution against political opponents. For example, the Constitution provides that the President shall be commander-in-chief of the Armed Forces, have the authority to grant pardons, have the power to sign treaties, and nominate civil officers and ambassadors and judges.[22] Congress has provided funds to the President to hire staff and carry out his responsibilities; none of these appropriated funds is conditioned upon the President misleading the public or manipulating government agencies.[23] The Constitution or federal law similarly describe the functions of other government officials.[24]

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[21]*See* U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-9 (3d ed. 2004).

[22]U.S. CONST. art. II, § 2.

[23]*See* Pub. L. No. 108-7, Division J, title III (appropriations for fiscal year 2003 enacted in early 2003).

[24]The Constitution directs that the vice president will vote as a tie-breaker in instances in which the Senate has a tie vote. U.S. CONST. art I, § 3. In addition, the vice president becomes the President when the President either is removed or otherwise unable to perform his duties. *Id.* amend. XXV.

For his part, the Secretary of Defense is charged with the role of principal assistant to the President for the Department of Defense. 10 U.S.C. § 113(b). The Secretary's general role is to report to the President and Congress on the work and accomplishments of the Defense Department, recommend changes to the duties of the Department, describe major military missions and force structures relevant to such missions, provide written policy guidance to the heads of Department components, review military operations and activities, and monitor all potential threats to the national security of the United States. *Id.* § 113.

The Attorney General of the United States is charged with advising the President on matters of law when required. 28 U.S.C. § 511. He or she does so as head of the U.S. Department of Justice. *Id.* § 503.

Under the controlling federal law prior to the establishment of a Director of National Intelligence, the Central Intelligence Agency was charged with providing intelligence information that was "timely, objective, independent of political considerations, and based upon all sources available to the intelligence community." 50 U.S.C. § 403-3(a)(2).

Thus, the use of government funds for anything other than these enumerated purposes would violate the law. Using appropriated funds to criticize other officials or private citizens or to disseminate information for political purposes would be illegal.

2. Torture and Other Inhumane Treatment

Pursuant to federal law and numerous international treaties and conventions, the United States has the authority to prohibit and punish acts of torture and other inhumane treatment.[25]

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[25]The Justice Department has the authority to prosecute military contractors and other officials applying torture techniques in numerous ways: First, under the Military Extraterritorial Jurisdiction Act, which provides for the prosecution of anyone accompanying the military overseas, including military contractors. 18 U.S.C. §§ 3261-67 (2005). It was extended in 2004 to include contractors of other agencies, such as the CIA. Pub. L. No. 108-375, Div. A, Title X, § 1088, 118 Stat. 2066 (2004). Moreover, the Justice Department does have the authority to charge members of the military for their criminal acts over seas if either a) they are no long in the military, or b) committed the acts with non-military accomplices. Specifically, it allows the Justice Department to prosecute those acts over seas that would be felonies, crimes punishable by at least 6 months in prison, if committed on American soil. 18 U.S.C. §§ 3261-67 (2005).

Second, the PATRIOT Act extended the Justice Department's jurisdiction to enforce criminal law to include "diplomatic, consular, military or other U.S. government missions or entities in foreign states, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership." USA PATRIOT Act § 804.

These two statutes cover significant acts committed by civilians representing or assisting the military. Therefore, it is unclear why only one person has been indicted, Letter to Congressman John Conyers, Jr. from William Moschella, Assistant Attorney General (July 11, 2005), despite numerous reports of civilian perpetrated abuse. In fact, the Justice Department is still touting the same indictment from 15 months ago, and has apparently made no further progress in charging anyone else.

As Professor Mary Ellen O'Connell, has noted, "where a state fails to enforce international law against its own citizens, other states are increasingly stepping in to hold individuals accountable. The Geneva Conventions . . . mandate that those guilty of grave breaches be held accountable before the courts of any of the 190 parties." Mary Ellen O'Connell, *Affirming the Ban on Coercive Interrogation*, 66 OHIO ST. L. J. ___ (2005). This failure of our government to even attempt to prosecute those responsible has led foreign nations to issue warrants for CIA operatives for their role in abductions and renditions. *Italy Orders Further CIA Warrants*, BBC NEWS, at http://news.bbc.co.uk/2/hi/europe/4297966.stm. (reporting a total of 22 warrants issued for those found involved in the abduction of Osama

a. Anti-Torture Statute (18 U.S.C. §§ 2340-40A)

Federal law prohibits torture, which is defined as: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control."[26] This statute's application does not rely on the location of the abuse, the nationality of the victim, nor the combat or civilian status of the person in custody; all U.S. citizens are subject to the jurisdiction of this statute if they abuse those lawfully in their custody.[27]

In practice, "torture" has been defined broadly by our own government. The military's own manual lists techniques such as the abuse of stress positions and sleep deprivation as torture and prohibits their use.[28] Further, our State Department has categorized other nations as human rights violators for practicing these precise techniques, including food, sleep and sensory deprivation, isolation and stress positions.[29]

It is also important to note that we have prosecuted others for war crimes for the same behavior. After World War II, the United States prosecuted hundreds of Japanese military members for abuse such as stress positions, sleep and sensory deprivation, forced nudity, solitary confinement and failure to notify the Red Cross of detainees.[30]

Those who order torture, or in other ways conspire to commit torture, can be held criminally liable under this statute – the statute doesn't require a person to actually commit

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Mustafa Hassan on Italian soil and his rendition to Egypt for interrogation).

[26]18 U.S.C. § 2340(1).

[27]AMNESTY INTERNATIONAL, DENOUNCE TORTURE (Nov. 2001), *available at* www.amnestyusa.org/stoptorture/law.html; Human Rights First, U.S. Law For Prosecuting Torture and Other Serious Abuses Committed by Civilians Abroad, *available at* www.humanrightsfirst.org/us_law/detainees/us_toture_laws.htm. This statute can also be used to prosecute foreign nationals who are apprehended on U.S. soil.

[28]HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, Apr. 2005 at 34 (citing Army *Field Manual 34-52*).

[29]Country Reports, U.S. Department of State, *available at* http://www.state.gov/g/drl/hr/c1470.htm.

[30]Jess Bravin, *Will Old Rulings Play a Role in Terror Case?*, WSJ, Apr. 7, 2005 at B1.

torture with his own hands.[31] Conspiring to violate this prohibition is explicitly recognized in the statute and is punishable up to life in prison if death results, and for twenty years in prison otherwise.[32]

Notably, the Administration itself has recognized that its officials could be prosecuted for their role in condoning torture under this statute in particular. In fact, the Bush Administration has taken great pains to craft a legal defense to a charge under this statute noting that someday officials in the Bush Administration may be prosecuted for their role in the abuse of detainees.

b. The War Crimes Act (18 U.S.C. § 2441)

The War Crimes Act of 1996 criminalizes actions that would be either "grave breaches"of
the Geneva Conventions[33] or violations of Common Article 3 of the Geneva Conventions.[34] As President Bush has admitted himself, Iraqi detainees held in Iraq are covered by the Geneva Conventions.[35]

Grave breaches are defined within the Conventions as "wilful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health;"[36] and "wilfully depriving a protected person of the rights of fair and regular trial

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[31]AMNESTY INTERNATIONAL, DENOUNCE TORTURE (Nov. 2001), *available at* www.amnestyusa.org/stoptorture/law.html. In addition to the traditional conspiracy and aiding and abetting charges, military personnel and officials can be held liable under the command responsibility doctrine. *See* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (Apr. 2005), *available at* http://www.hrw.org/reports/2005/us0405/.

[32]18 U.S.C. § 2340A(c).

[33]Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter "GC III"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, [hereinafter "GC IV"], (*entered into force* Oct. 21, 1950). The U.S. and Iraq are both parties to the Conventions.

[34]18 U.S.C. § 2441

[35]However, he maintains that non-Iraqis captured in Iraq are not. *See* Terry Frieden, *Justice Dept: Geneva Conventions Limited in Iraq*, CNN.COM, Oct. 26, 2004, *available at* http://www.cnn.com/2004/LAW/10/26/noniraqi.prisoners/.

[36]GC III, art. 130; GC IV art. 147.

prescribed in the present Convention."[37] Further, it is a grave breach to remove a detained from the country where he is located, except when his removal is necessary for his own safety.[38]

Common Article 3 prohibits "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;...outrages upon personal dignity, in particular humiliating and degrading treatment."[39]

The Administration has admitted it is subject to prosecution under this statute. The Attorney General in fact cited his concern with prosecution under the War Crimes Act as a justification for declaring Afghan detainees devoid of protection under the Geneva Conventions.[40] Because this provision can only be used to prosecute abuse of those protected by the Conventions, withholding those protections would allow the government to use techniques barred by international law without fear of prosecution in American courts.

It is important to note that despite the focus in the media concerning what exactly constitutes "torture," "torture" isn't necessary to a conviction under this statute. It is just as much a war crime to:

1. treat a detainee "inhumanly"
2. cause "great suffering" or "serious injury"
3. denying detainees the right to a fair trial
4. practice "cruel treatment"

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[37]GC IV, art. 147. *See also* GC III, art. 130 which requires that Prisoners of War also receive fair trials.

[38]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 85, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention").

[39]GC III, art. 3; GC IV, art. 3.

[40]Memorandum from White House Counsel Alberto R. Gonzales to President George W. Bush (Jan 25, 2002), *available at* http://www.humanrightsfirst.com/us_law/etn/gonzales/memos_dir/memo_20020125_Gonz_Bush.pdf.

5. commit "outrages upon personal dignity, in particular humiliating and degrading treatment"[41]

c. The Geneva Conventions and Hague Convention: International Laws Governing the Treatment of Detainees

The United States, along with 191 other countries, is a party to the Geneva Conventions.[42] The Geneva Conventions provide basic human rights to everyone in Iraq. Whether a combatant covered by the third Geneva Convention as a prisoner of war, or as a protected person (civilian) under the fourth Geneva Convention, detainees must be treated humanely.[43] Detainees are protected against "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;...outrages upon personal dignity, in particular, humiliating and degrading treatment..."[44] and "wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention."[45] Additional protocols accepted by the United States clarify that no matter a person's status, they are to be protected against the above mentioned abuses.[46]

Violation of the above provisions are considered "grave breaches" and obligate our government to investigate and punish those responsible. The Conventions make clear that it is up to participating countries to enforce its provisions, as it is the only way that those protections

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[41]GC III, art. 130; GC IV, art. 147; Additional Protocol 1, arts. 11, 85. *See* International Committee of the Red Cross, *How 'Grave Breaches' are Defined in the Geneva Conventions and Additional Protocols*, June 6, 2004, *available at* www.icrc.org.

[42]The United States ratified the Conventions on February 8, 2005.

[43]GC III, art. 13; GC IV, art. 27.

[44]GC III, art. 3; GC IV, art. 3.

[45]GC IV, art. 147. *See also* GC III, art. 130 which requires that prisoners of war also receive fair trials.

[46]Additional Protocol I, art. 75.

will be observed.[47] Member nations are required to provide the framework for such enforcement and then to use it once violations occur.

The Geneva Conventions afford many other protections that the U.S. is obligated to enforce, even if not through criminal prosecution. Those include:

- Holding civilians only as long as they are a demonstrable security risk, and then reviewing their detention at least every six months in an independent tribunal;[48]

- Allowing the International Committee of the Red Cross access to detainees/internees;[49]

- Preventing the use of weapons that cause the "superfluous injury or unnecessary suffering" of combatants.[50] Similarly, civilians "shall enjoy general protection against dangers arising from military operations."[51]

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[47]JENNIFER ELSEA, U.S. TREATMENT OF PRISONERS IN IRAQ: SELECTED LEGAL ISSUES, CONG. RESEARCH SERV. 9-10 (May 24, 2004) ("The Geneva Conventions obligate detaining powers to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed' grave breaches, and to 'search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.' (GPW art. 129). In addition to the foregoing penal provisions for grave breaches, Article 129 directs each party to take measures to suppress all violative acts short of grave breaches. Article 127 obligates parties to instruct their people, in particular members of the military, about the requirements of the GPW."); s*ee also* GC IV, art. 146 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions per persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article...[they] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless fo their nationality, before its own courts... Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches.").

[48]GC IV, art. 41- 42.

[49]GC IV, art. 143.

[50]GC Protocol I, art. 35(2).

[51]GC Protocol I, art. 51.

Similarly, the Hague Conventions regulate the laws of war. An Annex to the Hague Conventions, entitled Respecting the Laws and Customs of War on Land, prohibits the use of weapons or other devices that cause unnecessary suffering.[52]

d. United Nations Convention Against Torture, and Cruel, Inhuman and Degrading Treatment: International Laws Governing the Treatment of Detainees

The United States is also a party to the UN's Convention Against Torture and Cruel, Inhuman and Degrading Treatment, which prohibits the use of torture, defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[53]

Most notably, it also bans the use of cruel, inhuman and degrading treatment of those in U.S. custody, regardless of the nationality of the detainee or his combatant status. Although those terms are not defined, they have been limited in scope to those practices that are banned by the Fifth, Eighth and Fourteenth Amendments, which the Senate noted generally reflect the international case law interpreting at least the terms cruel and inhuman.[54] U.S. courts have stated that, "Generally, cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture.'"[55]

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[52]Convention on the Laws and Customs of War on Land (Hague IV Annex); October 18, 1907 (it is forbidden "to employ arms, projectiles, or material calculated to cause unnecessary suffering.).

[53]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art.1, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter "CAT"]. The United States ratified the CAT on October 21, 1994.

[54]When the Senate ratified this treaty it clarified "That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Aug. 30, 1990, S. DOC. NO. 101-30, at 25-26.

[55]Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (finding the following treatment to violate the prohibition on cruel, inhuman and/or degrading treatment: carving a crescent into the head of the detainee, forcing a detainee to lick his own blood of his captor's boots, beatings not rising to the severity of torture, forcing a detainee's head into a toilet, and forcing a detainee to watch his friends and neighbors endure the same); Tachiona v.

As Amnesty International explains, there is no distinct line between torture and CID, although the latter has been defined broadly to make sure nothing abhorrent can slip through a "loophole" in the definition.[56] Behavior of this nature is prohibited by the Geneva Conventions and the Convention Against Torture.

However, Human Rights First has noted that other nations that have been subjected to terrorism for decades have refrained from using CID techniques.[57] Israel and the United Kingdom, for example, have been fighting terrorism for years, yet their courts have upheld bans on CID treatment.[58] Noted legal expert and professor Mary Ellen O'Connell reviewed the history of CID techniques and noted that "military and U.S. law enforcement officers know how to interrogate without using coercive or cruel techniques – as do the military and police of our peer nations. They have done so successfully for decades."[59]

Our own courts interpreting these phrases will look at a totality of the circumstances to see if treatment rises to the level of a CID violation.[60] For example, a federal court found cruel and inhuman treatment in a New Jersey prison used to hold illegal immigrants.[61] The court found the following treatment violated the ban on CID: sleep deprivation; forced nakedness; ethnic and sexual taunts; sexual touch less than and including sexual assault; deprivation of clothing; deprivation of fresh food; shackling of detainees to their beds; months of solitary

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Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (finding that forcing relatives "to bear witness to the torture and degradation of their kin, or the ransacking of their common property" to be cruel and inhuman); Jama v. INS, 22 F. Supp. 2d 353 (D. N.J. 1998) (finding the totality of the circumstances to be cruel, inhuman and degrading, where treatment included 24-hour light in cells; forcing women to shower in front of male guards; sexual touching of detainees (short of rape); absence of edible food or wearable clothes, and other acts of a primarily nonviolent nature).

[56]AMNESTY INTERNATIONAL, TORTURE AND THE LAW (November 2001) *at* www.amnestyusa.org/stoptorture/law.html.

[57]HUMAN RIGHTS FIRST, U.S. LAWS PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, *at* www.humanrightsfirst.org.

[58]*Id.*

[59]Mary Ellen O'Connell, *Affirming the Ban on Coercive Interrogation*, 66 OHIO ST. L. J. ___ (2005) (forthcoming article on file with the House Judiciary Committee Democratic staff).

[60]Jama v. INS, 22 F. Supp. 2d 353 (D. N.J. 1998).

[61]Jama v. INS, 22 F. Supp. 2d 353 (D. N.J. 1998).

confinement; and the trading of sexual favors from female detainees in exchange for the ability to contact their lawyers.[62]

This is consistent with international tribunals and other courts that have interpreted the ban on CID treatment. They have found that acts, which may not be illegal alone, when applied in concert can rise to the level of CID, including hooding, sleep deprivation, loud music, and long durations in stress positions.[63]

Again, the onus is on the member countries to enact whatever framework is necessary to deter and punish not only those who commit these acts, but those who are "complicit" in their execution.[64] This includes instituting "prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."[65]

Columnist Bob Herbert further noted:

> The Universal Declaration of Human Rights, adopted in 1948, states simply that "No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment." The International Covenant on Civil and Political Rights, to which the U.S. is a signatory, states the same. The binding Convention Against Torture, negotiated by the Reagan administration and ratified by the Senate, prohibits cruel, inhuman and degrading treatment. . . . But since last year's [defense] bill, a strange legal determination was made that the prohibition in the Convention Against Torture against cruel, inhuman, or degrading treatment does not legally apply to foreigners held outside the U.S. They can, apparently, be treated inhumanely. This is the [Bush] administration's position, even though Judge Abe Sofaer, who negotiated the Convention Against Torture for President Reagan, said in a recent letter that the Reagan administration never intended the prohibition against cruel, inhuman or degrading treatment to apply only on U.S. soil.[66]

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[62]*Id.* at 358-59.

[63]*Id.*

[64]CAT, art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.").

[65]*Id.* at art. 12.

[66]Bob Herbert, *Who Isn't Against Torture?*, N.Y. TIMES, Oct. 10, 2005, at A19.

e. Command Responsibility

The United States has long recognized the legal principle of command responsibility – that military officials can be held criminally responsible for acts of their subordinates if they knew - or should have known - of the transgressions and failed to stop them or even punish them after the fact.[67]

In re Yamashita,[68] the preeminent case on command responsibility, held that a commander could be held criminally responsibility for the actions of his subordinates. General Tomoyuki Yamashita, the military governor of the Philippines and commander of Japanese forces, argued that he could not be prosecuted for the war crimes committed by his soldiers during World War II.[69] However, the Supreme Court stated that the laws of war would be eviscerated if commanders could turn a blind eye to the criminal acts of their subordinates:

> Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence **the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders** who are to some extent responsible for their subordinates.[70]

Deciding that Yamashita would stand trial before military commissions for the atrocities committed by his soldiers, the court held that a commander has **"an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."**[71] Yamashita was eventually found guilty of war crimes for failing to control his troops and executed.[72]

U.S. and international law has since developed a three prong test to impose command responsibility for military commanders and civilian officials with constructive control over

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[67]For a complete discussion on the history of command responsibility law, please see HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, Apr. 2005.

[68]In re Yamashita, 327 U.S. 1 (1946).

[69]*Id.*

[70]*Id.* at 15.

[71]*Id.* at 16.

[72]HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, Apr. 2005, Annex – A Note on Command Responsibility.

military forces: (1) a superior-subordinate relationship must exist, (2) the superior must have knowledge or reason to know that a crime was about to be committed or had been committed, and (3) the superior failed to prevent the crime or punish it after the fact.[73] This doctrine is reflected in the current Army Field Manual,[74] guidelines for U.S. instituted military tribunals,[75] individual recovery under the Alien Tort Claim Act[76] and the Torture Victim Protection Act,[77] and international law.[78] As the Ninth Circuit stated, "The principle of 'command responsibility' that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law in connection with acts committed in wartime."[79]

First, there must be a superior-subordinate relationship. Courts will find such a relationship where it is explicit, such as in the military command structure, but also where actual or effective control exists.[80] It therefore can be extended to civilian and political superiors.[81]

Second, the superior must know, or have reason to know, that a crime was about to be committed, or had been committed. One military commentator has explained that the "should have known" standard "is primarily linked to time. Where reports are received over time or

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[73]*Id.*

[74]U.S. Army Field Manual 27-10, The Law of Land Warfare (July 18, 1956), § 501.

[75]Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military commission, Apr. 30, 2003, *available at* www.defenselink.mil.

[76]Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass.1995).

[77]Ford v. Garcia, 289 F3d 1283, (11th Cir. 2002) (defining the three elements of command responsibility in an action under the Torture Victim Protection Act); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass.1995).

[78]Study on Customary International Law, International Committee of the Red Cross, July 21, 2005, *available at* www.icrc.org.

[79]Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996).

[80]Ford, 289 F.3d at 1290-91.

[81]Major Michael L. Smidt, *Yamashita Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000); HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, Apr. 2005, Annex – A Note on Command Responsibility.

where large numbers of crimes are committed by large numbers of subordinates, creating a basis of constructive notice, it is reasonable to say that the commander should have known."[82]

Finally, the superior must have either failed to prevent the violation he foresaw or failed punish it after it occurred. It is customary international law and now standard in U.S. courts that a superior has a duty to take all measures that are "necessary and reasonable" to prevent a crime by his subordinates.[83] In other words, "[I]f the commander gains actual knowledge and does nothing, then he may become a principal in the eyes of the law in that by his inaction he manifests an aiding and encouraging support to his troops, thereby indicating that he joins in their activity and wishes the end product to come about."[84] Some international courts have held that superiors "are even responsible for failure to prevent if they fail to take into account factors such as the age, training or similar elements that point to obvious conclusions regarding the likelihood that such crimes would be committed"[85]

This third prong may also be met when a superior to fails to investigate and punish a crime once it has occurred.[86]

3. Retaliating against Witnesses and Other Individuals

a. Obstructing Congress (18 U.S.C. § 1505)

It is a federal criminal offense to impede any due exercise of congressional authority. More specifically, section 1505 of title 18 makes it illegal to:

> corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or

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[82]*Id.* at 199.

[83]Ford, 289 F.3d at 1292-93.

[84]Major Michael L. Smidt, *Yamashita Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 198 (2000) (*citing* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 16 (1972).

[85]Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L. L. 573, 590 (1999).

[86]Ford, 289 F.3d at 1292-93.

> investigation is being had by either House, or any committee of either House or any joint committee of the Congress.[87]

In general, the statute prohibits persons from "corruptly" influencing or impeding the exercise of congressional power. This has been construed to apply to situations when the defendant causes another to violate his or her legal duty to Congress, such as by coercing or threatening a witness before Congress to testify falsely or inaccurately.[88] It is not required that the defendant have gained anything from his or her conduct in order for that conduct to be corrupt within the meaning of the statute.[89]

Finally, it is important to recognize that a congressional inquiry does need not be formally authorized for the section 1505 prohibition to apply. Instead the courts have found:

> the question of whether a given congressional investigation is a 'due and property exercise of the power of inquiry' for purposes of § 1505 cannot be answered by a myopic focus on formality. Rather, it is properly answered by a careful examination of all the surrounding circumstances. If it is apparent that the investigation is a legitimate exercise of investigative authority by a congressional committee within the committee's purview, it should be protected by § 1505. . . . To give § 1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization.[90]

Thus, any exercise of a committee or Congress' power, formal or informal, is protected from corruptive influence or obstruction. It would be unlawful, therefore, for any person in an official or unofficial capacity to coerce another individual to provide false statements or testimony to Congress or to force such individual to respond inaccurately to any congressional inquiry. Such

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[87]18 U.S.C. § 1505. The penalty for violations of this prohibition include a fine, imprisonment for not more than five years, or both. *Id.*

[88]United States v. Poindexter, 951 F.2d 369, 385 (D.C. Cir. 1991) ("The legislative history we have reviewed may not mandate the 'subornation' interpretation of § 1505, which would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty. Still, that interpretation may be useful as a description of the 'core' behavior to which the statute may constitutionally be applied."). Another statute, section 1001 of title 18, already prohibits persons from themselves making false statements to Congress. *Id.* at 378.

[89]*See id.* at 386.

[90]United States v. Mitchell, 877 F.2d 294, 300 (4th Cir. 1989).

inquiry could be initiated pursuant to formal Committee action or merely as part of an informal investigation.

b. Whistleblower Protection (5 U.S.C. § 2302)

In 1989, Congress passed the Whistleblower Protection Act to ensure that those who came forward to expose lawlessness and waste in the federal government would not be discouraged by fear of reprisal.[91]

5 U.S.C.A. § 2302 delineates different "prohibited personnel practices" and applies to almost every government agency employee. Excepted positions include those within the FBI, the CIA, the Defense Intelligence Agency, the National Security Agency and military employees of the Department of Defense.[92]

One of those prohibited practices is adverse employment actions for whistleblowing activities. For positions besides those listed above, the government is barred from taking, or failing to take, a personnel action in retaliation for the employee's:

> Disclosure of information…which the employee or applicant reasonably believes evidences—
>
> > (i) a violation of any law, rule or regulation, or
> > (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to pubic health or safety[93]

The head of the applicable agencies are responsible for ensuring these prohibited practices do not take place.[94] However, if they do, the employee may seek redress from the Office of Special Counsel, the Merit Systems Protection Board, and the federal court system.[95]

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[91] 5 U.S.C. § 2302.

[92] *Id.* at (a)(2)(B)-(C); Homeland and National Security Whistleblower Protections: The Unfinished Agenda, Project on Government Oversight, Apr. 28, 2005 at 5, 8 [hereinafter POGO Report]. Other non-covered agencies include the Government Accountability Office, Defense Mapping Agency, Airport Baggage Screeners and government contractors.

[93] 5 U.S.C.§ 2303(a). However, the employee's disclosure must be lawful itself for the employee to receive the statutory protection.

[94] *Id.* at (c).

[95] POGO Report, at 8.

c. The Lloyd-LaFollette Act (5 U.S.C.A. § 7211)

Also known as the "anti-gag rule," this statute passed in response to the Taft and Theodore Roosevelt Administrations' attempt to silence their employees. It ensures that agency employees can provide Congress with the information necessary to do its job.[96] It states that:

> The Right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress or to a committee or Member thereof, may not be interfered with or denied.[97]

Far broader than the Whistleblower Protection Act, this statute applies to ***everyone*** in the government's employ, even those in the intelligence field that are not protected under that statute. Moreover, it does not limit the sort of information that is protected. It reflects what the Supreme Court has found to be the fundamental right and necessity of Congress receiving information: "a legislative body cannot legislate wisely or effectively in the absence of information regarding conditions which the legislation is intended to affect or change."[98] In fact, this right is so paramount that the Court has presumptively construed every statute in the U.S. banning information disclosure to not apply to Congress unless it very specifically states so.[99]

To give teeth to the Lloyd-LaFollette Act, Congress has repeatedly passed a spending restriction in the annual Treasury Appropriations bill to prevent paying anyone's salary who interferes with an employee's effort to provide information to the Congress. The requirement is clear: federal money shall not be spent to help suppress the first amendment rights of federal employees:

> No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who--
>
> (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact

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[96]Memorandum from Jack Maskell, Cong. Research Serv., to the Honorable Charles Rangel at 4 (Apr. 26, 2004) [hereinafter Maskell Memo], *available at* http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf.

[97]5 U.S.C. § 7211.

[98]Maskell memo *supra* at 3.

[99]*Id.*

> with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or
>
> (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).[100]

d. Retaliating against Witnesses (18 U.S.C. § 1513)

The government may not retaliate against individuals who provide truthful information to law enforcement officials. Section 1513(e) of title 18 prohibits anyone from "knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense . . . ."[101] The term "law enforcement officer" is defined as "an officer or employee of the Federal Government . . . or serving the Federal Government as an adviser or consultant (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an

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[100] *See e.g.* H.R. 3058, 109th Cong. § 918 (2005) (as engrossed by the House); S. 1446, 109th Cong. (2005); s*ee also*, for example, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 618 of Division H, 118 Stat. 2809 (2004); Consolidated Appropriations Act, 2004, Pub. L. No. 108-99, § 618 of Division F, 117 Stat. 1176 (2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, §§ 617, 620, 117 Stat. 11 (2003); Treasury and General Government Appropriations Act of 2002, Pub. L. No. 107-67, §§ 617, 620, 115 Stat. 514 (2001).

[101] 18 U.S.C. § 1513(e).

offense; or (B) serving as a probation or pretrial services officer under this title."[102] The penalty for witness retaliation consists of a fine, imprisonment for not more than 10 years, or both.[103]

Because of the definition of "law enforcement officer," this statute would apply to retaliating against any federal employee with investigative authority. For instance, a "law enforcement officer" would include any Justice Department employee (including attorneys, FBI agents, DEA agents, and ATFE agents) as well as inspectors general. This is because each inspector general must "provide policy direction for and *to conduct, supervise, and coordinate audits and investigations* relating to the programs and operations of [the relevant office]."[104] Any person who informed such officials of violations of federal law would be protected from any form of retaliation, such as firing, demotion, or rescission of security clearance or other tools necessary for job performance.

A violation of section 1513 is a predicate offense under RICO.[105] It thus is unlawful to acquire and invest income or to acquire any interest in any enterprise through a pattern of section 1513 violations.[106] Penalties for violating RICO include a fine, imprisonment for not more than twenty years, or both, as well as forfeiture of any proceeds from the illegal activity.[107]

Finally, it is a separate criminal offense to conspire to commit the crime of witness retaliation.[108] The penalty for conspiring to commit such an offense is the same as for the crime that was the object of the conspiracy.

4. Leaking and other Misuse of Intelligence and other Government Information

Numerous federal laws and regulations make it a crime to disclose national security or intelligence information without proper authorization.

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[102] 18 U.S.C. § 1515(a)(4).

[103] 18 U.S.C. § 1513(e).

[104] 5 U.S.C. app. 3, § 4 (emphasis added).

[105] 18 U.S.C. § 1961.

[106] *Id.* § 1962.

[107] *Id.* § 1963.

[108] *Id.* § 1513.

a. Revealing Classified Information in Contravention of Federal Regulations (Executive Order 12958/ Classified Information Nondisclosure Agreement)

First, there are administrative sanctions for misuse of classified information. Presidential Executive Order 12958 prescribes a uniform system for classifying, declassifying, and protecting information related to the national defense.[109] It requires each agency head to implement controls over the distribution of classified information.[110] Section 5.5 provides that, if the Director of the Information Security Oversight Office finds a violation of the Order has taken place, the Director must report to the appropriate agency head so correction action may occur.[111] Further, sanctions for such violations include: "reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation."[112]

The Order further requires that the supervisors of those who divulge classified information take remedial action against such officials. Such action can include the removal of security clearance and other measures to prevent further disclosure.[113]

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[109]Exec. Order No. 12948, 32 C.F.R. § 2001.10 *et seq*. (2005). Executive Order 12958 governs how federal employees are awarded security clearances in order to obtain access to classified information. It was last updated by President George W. Bush on March 25, 2003, although it has existed in some form since the Truman era. The executive order applies to any entity within the executive branch that comes into possession of classified information, including the White House. It requires employees to undergo a criminal background check, obtain training on how to protect classified information, and sign a "Classified Information Nondisclosure Agreement," also known as a SF-312, promising not to reveal classified information.

[110]*Id.*

[111]*Id.*

[112]*Id.*

[113]Section 5.5 of the Order provides that:

> (d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.
>
> (e) The agency head or senior official shall: (1) take appropriate and prompt corrective action when a violation or infraction . . . occurs; and (2) notify the

In effect, any supervisor of an individual with access to classified information must sanction such individual if he or she illegally discloses the information. For instance, the President would be responsible for ensuring that White House officials and staff having access to classified information complied with the Executive Order and would have to punish any such individual who violated the Order.

Also, prior to obtaining access to classified information, government officials must sign a Classified Information Nondisclosure Agreement, known as a Standard Form 312 or SF-312. The Agreement states that breaches (i.e., disclosure of classified information) could result in the termination of security clearances and removal from employment. The Agreement, signed by White House officials such as Mr. Rove, states: "I will never divulge classified information to anyone" who is not authorized to receive it.[114]

It also is important to note that **even confirming the accuracy of classified information in a public source is a violation of the agreement**.[115] The agreement specifically states:

> However, before disseminating the [classified] information elsewhere or confirming the accuracy of what appears in the public source, the signer of the SF 312 must confirm through an authorized official that the information has, in fact, been declassified. If it has not, further dissemination of the information or confirmation of its accuracy is also an authorized disclosure.[116]

In short, if a White House official signs the agreement yet proceeds to disclose or confirm classified information, the President would be required to terminate that individual's security clearance and remove him or her from their position.

> Director of the Information Security Oversight Office when a violation . . . occurs. *Id.*

[114]Classified Information Nondisclosure Agreement, Standard Form 312 (Prescribed by NARA/ISOO)(32 C.F.R. 2003, E.O. 12958), *available at* http://contacts.gsa.gov/webforms.nsf/0/03A78F16A522716785256A69004E23F6/$file/SF312.pdf).

[115]INFORMATION SECURITY OVERSIGHT OFFICE, CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT (STANDARD FORM 312): BRIEFING BOOKLET 73 (emphasis added). *See also* The Honorable Henry A. Waxman, Ranking Member, U.S. House Comm. on Gov't Reform, Fact Sheet: Karl Rove's Nondisclosure Agreement 1-2 (July 15, 2005).

[116]INFORMATION SECURITY OVERSIGHT OFFICE, CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT (STANDARD FORM 312): BRIEFING BOOKLET 73.

b. Statutory Prohibitions on Leaking Information

Numerous federal statutes make it a criminal offense to convey anything of value that belongs to the United States. Section 641 of title 18 imposes criminal penalties on anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof."[117]

This statute has been interpreted broadly, giving latitude to what constitutes a "thing of value." The Fourth Circuit Court of Appeals has held that the classification of information is, in and of itself, relevant to determining whether that information is a "thing of value" to the United States.[118] Similarly, the Sixth Circuit ruled that the term pertains to both tangible and intangible property.[119] The Bush Justice Department has already determined that government information is a "thing of value."[120]

Because "thing of value" is a broad term, the prohibition in turn is broad. Information such as U.S. intelligence data or analyses could be considered "of value" and thus prohibited from disclosure, even such information is not classified. Even analyses of foreign military and defense capabilities would be protected as "of value" to the United States.

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[117]18 U.S.C. § 641. The penalty for a violation of this statute is a fine, imprisonment for not more than ten years, or both; however, if the value of the property is less than $1,000, then the prison term cannot exceed one year. *Id.*

[118]United States v. Zettl, 889 F.2d 51, 54 (4th Cir. 1989).

[119]United States v. Jeter, 775 F.2d 670 (6th Cir. 1985).

[120]*See* John Dean, *It Doesn't Look Good for Karl Rove*, CNN.COM, July 15, 2005, *available at* http://www.cnn.com/2005/LAW/07/15/dean.rove/. Jonathan Randel, a former Drug Enforcement Administration employee, leaked to the British media the fact that the name Lord Michael Ashcroft of Great Britain appeared in the DEA's money laundering files. Press Release, U.S. Attorneys' Office, Northern District of Georgia, Former DEA Worker Sentenced to Prison for Selling Information (Jan. 9, 2003), *available at* http://www.usdoj.gov/usao/gan/press/01-09-03_2.html. In 2002, the Justice Department obtained an indictment against Mr. Randel for violating section 641. Mr. Randel ultimately pled guilty and was sentenced to one year in prison and three years of probation. *Id.* While he was sentencing Mr. Randel, U.S. District Judge Richard Story stated, "Anything that would affect the security of officers and of the operations of the agency would be of tremendous concern, I think, to any law-abiding citizen in this country." John Dean, *supra.*

The *mens rea*, or intent, requirement under the statute also is interpreted broadly. The government need only establish that the defendant transmitted information without authority.[121] It is irrelevant whether the defendant knew the information was "of value" to the United States.[122]

Second, it is illegal for any person to willfully disclose information related to the national defense. Subsection 793(d) of title 18 applies to persons having lawful possession of vital information. Criminal liability assigns to anyone:

> who has lawful possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, [and] willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, or transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it."[123]

This means that it is unlawful to divulge any information related to U.S. military bases, defense installations, war plans, intelligence capabilities, or intelligence information. As stated above this prohibition applies to officials and employees who have lawful access to the information in question.

Courts have construed this prohibition broadly. For instance, prohibited disclosures are not limited to foreign agents; it is illegal to disclose defense information to the media, as well.[124]

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[121] *Jeter*, 775 F.2d at 681.

[122] *See id.*

[123] 18 U.S.C. § 793(d). The penalty for violating this prohibition includes a fine, imprisonment for not more than ten years, or both. *Id.* § 793. The penalty for conspiring to commit such an offense, and engaging in any act in furtherance of such, is the same as for the underlying offense. *Id.* § 793(g).

[124] United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). "There is no basis in the legislative record for finding that Congress intended to limit the applicability of sections 793(d) and (e) to 'classic spying' or to exempt transmittal by a government employee, who entrusted with secret national defense material, had in violation of the rules of his intelligence unit, leaked to the press." *Id.* at 1070.

Further, it is not necessary for the information in question to be classified for it to be protected from disclosure.[125]

Third, it is a highly serious offense to transmit any defense information to a foreign agent or foreign government, regardless of whether the foreign entity is friendly or an enemy.[126] Subsection 794(a) of title 18 prohibits the transmission or delivery of any document or information related to national defense to any foreign government or foreign agent.[127] Such conduct is illegal if the transmission is direct or indirect.[128] The disclosure must occur with the intent or reason to believe that it would be used to injure the United States or to the advantage of a foreign nation.[129]

In other words, government officials and private citizens are prohibited from leaking to foreign governments any information related to our national defense. This prohibition applies to information about U.S. intelligence capabilities, military plans, defense strategy, or knowledge of foreign military assets. Any person who released such information with the result that it was obtained by a foreign government, whether through speeches or press releases or leaks to the news media, would be acting unlawfully.

Finally, it also can be a specific federal crime to disclose the name of a covert U.S. agent. Subsection 421(a) of title 50 makes it unlawful for someone, having or having had access to classified information that identifies a covert agent, to intentionally disclose such information to an unauthorized recipient knowing the disclosure identifies the agent and knowing that the government is taking affirmative measures to conceal the agent's relationship to the United States.[130] Similarly, subsection 421(b) of title 50 makes it unlawful for someone who, as a result of having access to classified information, learns the identity of a covert agent and intentionally discloses any information disclosing that identity to any person not authorized to receive it. The defendant must know that the information disclosed identifies the agent and that the government

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[125]United States v. Harris, 40 C.M.R. 308 (1969).

[126]*See* United States v. Rosenberg, 195 F.2d 583 (2d Cir.1952).

[127]18 U.S.C. § 794(a). The penalty includes death (in cases involving death of an American agent or military systems) or imprisonment for any term of years. *Id.* The penalty for conspiring to commit such an offense, and engaging in any act in furtherance of such, is the same as for the underlying offense. *Id.* § 794(c).

[128]*Id.* § 794(a).

[129]*Id.*

[130]50 U.S.C. § 421(a). The penalty includes a fine, imprisonment for not more than ten years, or both. *Id.*

is taking steps to conceal the identity.[131] As such, it is a crime to intentionally disclose the identity of a covert agent to someone who is not allowed to have the information. Our review indicates that no prosecutions have been brought under this section 421 of title 50.

5. Laws and Guidelines Prohibiting Conflicts of Interest

Existing law and rules of professional conduct govern when Department attorneys must recuse themselves from particular investigations. Federal law requires the Attorney General to promulgate rules mandating the disqualification of *any* officer or employee of the Justice Department "from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof."[132] Pursuant to this requirement, the Department has promulgated regulations stating that:

> no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: (1) any person . . . substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) any person . . . which he knows or has a specific and substantial interest that would be affected by the outcome of the investigation or prosecution.[133]

To reiterate the importance of preventing conflicts of interest, the Justice Department has further explicated the guidelines in its U.S. Attorneys' Manual. The Attorneys' Manual provides that:

> When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of a personal interest or professional relationship with parties involved in the matter, they must contact General Counsel's Office (GCO), EOUSA. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality.[134]

Furthermore, rules of professional conduct bar lawyers from matters in which they have conflicts of interest. Because Department attorneys must follow the ethical rules of the bar in

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[131] *Id.* § 421(b). The penalty includes a fine, imprisonment for not more than five years, or both. *Id.*

[132] 28 U.S.C. § 528 (emphasis added).

[133] 28 C.F.R. § 45.2.

[134] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 3-2.170.

which they practice,[135] officials at Main Justice are obligated to comply with the District of Columbia Bar's Rules of Professional Conduct. These Rules state that, without consent, a lawyer shall not represent a client if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."[136]

B. Impeachment

Congress, specifically the U.S. House of Representatives, has the authority to impeach Presidents, vice presidents, and civil officers of the United States for abusing their power, including violations of public trust or misusing federal resources; this may occur for conduct that may not be criminal in nature. This authority is provided by the Constitution, which states that "the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[137] The Constitution further provides that "the House of Representatives . . . shall have the sole Power of Impeachment."[138] To date, the House has impeached two presidents; and the House Judiciary Committee approved articles of impeachment against a third president[139] each of these occurred while the House was controlled by the political party in opposition to the president. In 1876, the House approved and the Senate tried articles of impeachment against Secretary of War William Belknap despite the fact that he already had resigned.[140]

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[135]28 U.S.C. § 530B.

[136]DISTRICT OF COLUMBIA BAR, RULES OF PROFESSIONAL CONDUCT 1.7(b)(4). The American Bar Association mimics this guideline in Rule 1.7 of its own Model Rules of Professional Conduct. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 1.7(a)(2).

[137]U.S. CONST. art. II, § 4. While not settled law, it is believed that "civil officers" pertains to presidentially-nominated, Senate-confirmed officials but not other high-ranking officials, such as White House staff.

[138]*Id.* art. I, § 2.

[139]The presidents in question are: Andrew Johnson, Richard Milhaus Nixon, and William Jefferson Clinton.

[140]III HINDS §§ 2444-68. The charge against Secretary Blount related to selling an appointment to a military position. No article of impeachment received the necessary two-thirds vote in the Senate.

While treason[141] and bribery[142] are defined in law, the phrase "high Crimes and Misdemeanors" has been interpreted through application and through examination of the Founding Fathers' intent. A review of applicable legislative history and congressional interpretations finds significant support for the proposition that impeachment would lie for abuses and misuse of public office and that, in particular, this would include giving false information to Congress and misusing government agencies like the CIA.

For example, in 1974, the House Judiciary Committee approved three articles of impeachment against President Nixon.[143] The Committee recommended impeachment because it found that the President caused false statements to be made to federal investigators, withheld relevant information from investigators, approved false statements to be made by others to investigators, endeavored to misuse the Central Intelligence Agency, made false statements to the public to deceive the public into believing a thorough investigation had been conducted into potential illegalities.[144] He also was found subject to impeachment for failing to ensure the laws were faithfully executed when he had reason to know his subordinates were impeding lawful inquiries.[145] Finally, the House passed impeached President Andrew Johnson for his removal of a cabinet secretary in violation of the Tenure of Office Act.[146]

Our review of relevant law indicates that conduct in question need not fit within a criminal statute in order for it to be a "high Crime and Misdemeanor" and thus impeachable. Founding Father James Iredell, later an Associate Justice of the Supreme Court, noted that "in the case of the president, or any executive or judicial officer wantonly abusing his trust, he is

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[141]Treason is defined as levying war against the United States or giving aid to the enemy when owing allegiance to the United States. 18 U.S.C. § 2381 (2005).

[142]Bribery is the receipt of anything of value in exchange for the performance of an official act. 18 U.S.C. § 201.

[143]H.R. REP. NO. 93-1305 (1974). The President resigned before the full House could consider the articles.

[144]*Id.* The charges with respect to the CIA were that he: "endeavored to misuse the Central Intelligence Agency, an agency of the United States" (article I); maintained a secret investigative unit that "unlawfully utilized the resources of the Central Intelligence Agency" (article II); and "knowingly misused the executive power by interfering with agencies of the executive branch, including . . . the Central Intelligence Agency" (article II). *Id.*

[145]James Iredell, 2 Debate in North Carolina Ratifying Convention 160 (July 28, 1788).

[146]III HINDS §§ 2408-43. The articles did not pass in the Senate.

liable to impeachment."[147] In the Federalist Papers, Alexander Hamilton explained that the subject of impeachment would be "**those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself**."[148] Representative Barbara Jordan, who spoke during the impeachment debate on President Richard Milhaus Nixon, referred to Alexander Hamilton and noted that impeachment "is designed to bridle the executive if he engages in excesses. It is designed as a method of national inquest into the conduct of public men."[149]

Relying upon readings of English law and the Framers' debates over the impeachment clause, legal commentators have echoed this interpretation. Leading scholar on impeachment, Yale Law School professor Charles Black argued that impeachable offenses are those that "(1) . . . are extremely serious, (2) . . . in some way corrupt or subvert the political and governmental process, and (3) . . . are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books."[150] **He summarized the nature of such offenses as that "are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator."**[151] Similarly, Professor Michael Gerhardt looked to Justice Joseph Story, who said, "the jurisdiction is to be exercised over [impeachable] offences, which are committed by **public men in violation of their public trust and duties**. Those . . . duties are, in many cases, political. . . Strictly speaking, then, the power partakes of a political character, as it respects injuries to society in its political character."[152]

Further, contemporary experts agree that there are different standards for impeachable and criminal conduct. Dean John D. Feerick of Fordham University School of Law, in an article published in 1984, wrote:

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[147]9 Fed. Cas. 826, no. 5,126 C.C.D.Pa. (1799)

[148]THE FEDERALIST NO. 65, at 426 (Alexander Hamilton) (emphasis added).

[149]*Debate on Articles of Impeachment: Hearings Before the H. Comm. on the Judiciary*, 93rd. Cong., 2d Sess. 111 (1974) (statement of Rep. Barbara Jordan) (citing THE FEDERALIST NO. 65 (Alexander Hamilton)).

[150]CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 37 (1974).

[151]*Id.* at 39-40 (emphasis added).

[152]MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 105 (Princeton University Press, 1996) (quoting Justice Joseph Story, *Commentaries*, § 385, 272-73) (emphasis added).

> Most authorities agree – and the precedents are in accord – that an impeachable offense is not limited to conduct which is indictable. Conduct that undermines the integrity of a public office or is in disregard of constitutional duties or involves abuse of power is generally regarded as grounds for impeachment. Since impeachment is drastic sanction, the misconduct must be substantial and serious.[153]

It is a fundamental principle that the House may impeach presidents for misusing government resources and agencies and for providing false information to the American public.[154] Importantly, Mr. Iredell indicated that the President would be subject to impeachment for misleading Congress:

> **The President must certainly be punishable for giving false information to the Senate**. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them, – in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.[155]

C. Censure

Censure also lies as a remedy for Congress in situations where the President or other public officials have abused their power or otherwise violated the Constitution or laws of the United States. Each House of Congress can censure the official in question separately or the Houses can pass identical measures. The typical vehicle for censure is a sense of Congress resolution expressing disapproval or reproof for the official's conduct. In this manner, Congress

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[153]John D. Feerick, *Impeachment, in* THE GUIDE TO AMERICAN LAW (1984), *quoted at* http://www.dailykos.com/storyonly/2005/9/14/65628/3078 (posting by RenaRF).

[154]Speaking on the House's role in impeachment, James Iredell told the North Carolina Ratifying Convention that the "power [of impeachment] is lodged in those who represent the great body of the people, because the occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal." James Iredell, 4 North Carolina Ratifying Convention 17 (July 28, 1788).

[155]James Iredell, 2 Debate in North Carolina Ratifying Convention 160 (July 28, 1788) (emphasis added).

has censured or attempted to censure eight presidents in U.S. history[156] and at least one senator.[157]

Conduct that has been found censurable includes the misuse of official power and actions in derogation of the Constitution and federal law, including the waging of unnecessary wars.[158] For instance, **a resolution was amended on the House floor to include disapproval of President James K. Polk's waging of an "unnecessarily and unconstitutionally begun [Mexican-American] war**."[159] In 1834, the Senate censured President Andrew Jackson for dismissing a Treasury Secretary who disagreed with his economic policies and for attempting to install in his place a political crony.[160] It also has been found to be censurable for a President to allow political considerations to affect official government action.[161]

Congress has also censured a President for interfering with the authority of another branch of government. In 1842, the House adopted the conclusions of a committee report that concluded that President John Tyler had bestowed upon himself the authority of the Legislative Branch.[162] The report criticized the President for "gross abuse of constitutional power and bold assumption of powers never vested in him by any law," for "[assuming] . . . the whole Legislative power to himself;" and for the "abusive exercise of the constitutional power of the

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[156]CONG. RESEARCH SERV., CENSURE OF THE PRESIDENT BY CONG. (Dec. 8, 1998).

[157]SELECT COMM. ON ETHICS, U.S. SENATE, SENATE ETHICS MANUAL 6 (2003).

[158]In 1974, House resolution condemning maladministration and presidential negligence on the part of President Richard M. Nixon was introduced but did not receive floor consideration.

[159]CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848) (emphasis added). The amended resolution did not come before the full House.

[160]*See* REG. DEB., 23rd Cong., 1st Sess. 1317 (1834). The censure was expunged three years later, when the Democrats took control of the Senate.

[161]In 1860, the House reproofed President James Buchanan for allowing the Navy Secretary to permit campaign contributions to affect government contracts. CONG. GLOBE, 36th Cong., 1st Sess. 2951 (1860).

[162]*Journal of the House of Representatives*, 27th Cong., 2d Sess. 1343, 1346-52 (Aug. 17, 1842).

President."[163] In addition, the House debated a resolution that would have censured President John Adams for inserting himself into a deportation case pending before the Judicial Branch.[164]

Finally, Congress has considered censures of presidents for dishonest conduct. The Senate indefinitely postponed a resolution that would have censured President William Jefferson Clinton for misleading and deceiving the American people.[165] During full House debate of the Clinton impeachment articles, Democratic Members attempted to censure President Clinton but were denied the ability on procedural grounds.[166] During House Judiciary Committee consideration of the articles, however, the censure resolution was subject to a vote.[167] Other resolutions were introduced in the House with respect to the same allegations.[168]

Congress's power of censure is not limited, however, to the president. As a case in point, the House has censured a cabinet secretary. In the 1860's, Secretary of War Simon Cameron distributed government funds designated for purchasing military supplies to persons who were not in the business of providing military arms.[169] The Secretary ultimately resigned over an unrelated matter, but the House censured Secretary Cameron a few months later in April 1862.[170]

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[163] *Id.*

[164] 10 ANNALS OF CONG. 532-33, 542-78, 584-619 (1800), *discussed in* Neuman, *Habeas Corpus Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 995-96 (1998).

[165] 145 CONG. REC. S1462 (daily ed. Feb. 12, 1999). Consideration of the resolution was postponed by a vote of 56-43. *Id.*

[166] 144 CONG. REC. H12031 (daily ed. Dec. 19, 1998) (motion to recommit H. Res. 611 offered by Rep. Rick Boucher (D-VA)).

[167] H. REP. NO. 105-830, 105th Cong., 2d Sess. (1998).

[168] H.R.J. Res. 140, 105th Cong., 2d Sess. (1998); H.R.J. Res. 139, 105th Cong., 2d Sess. (1998).

[169] II HINDS § 1571.

[170] *Id.* The censure resolution passed by the House by a vote of 79-45 and stated:

> Resolved, That Simon Cameron, late Secretary of War, by investing Alexander Cummings with the control of large sums of the public money and authority to purchase military supplies without restriction, without requiring from him any guarantee for the faithful performance of his duties, when the services of competent public officers were available, and by involving the Government in a vast number of contracts with persons not legitimately engaged in the business

The Senate has used its power of expulsion and censure to discipline twenty-three of its own members.[171] The most famous example occurred in the 1950's when Sen. Joseph McCarthy (R-WI) used his chairmanship of the Committee on Government Operations to investigate alleged Communists in government, Hollywood, and other aspects of American life.[172] While Senate rules did not proscribe the Senator's actions, the full Senate found that censurable conduct was not limited to that which was specifically enumerated in law.[173] The Senate censured the Senator for misconduct and for abuse of his position.[174]

> pertaining to the subject-matter of such contracts, especially in the purchase of arms for future delivery, has adopted a policy, highly injurious to the public service, and deserves the censure of the House. *Id.*

[171]JACK MASKELL, CONG. RESEARCH SERV., EXPULSION AND CENSURE ACTIONS TAKEN BY THE FULL SENATE AGAINST MEMBERS 1-6 (Sept. 17, 1993). Fifteen senators were expelled for inciting violence against the government, attempting to withdraw certain states from the Union, and disloyalty to the Union. *Id.* Eight senators have been censured for violating the secrecy of documents, fighting, abuse of power, and financial irregularities related to political office. *Id.*

[172]SELECT COMM. ON ETHICS, U.S. SENATE, *supra*.

[173]*Id.*

[174]*Id.*