

MEMORANDUM

To: Members of the Maine Legislature

From: Maine Lawyers for Democracy

Date: April 5, 2007

Re: Call for Impeachment Proceedings Against the President & Vice President

Maine Lawyers for Democracy (hereinafter “MLD”) was founded in 2005 amidst growing concern about the deterioration in the health of our nation’s democracy. Our membership consists of 65 Maine attorneys committed to constructive action and debate to preserve and protect our nation’s democratic principles and ideals. As set forth in its bylaws, MLD’s basic mission is to “promote the democratic process and the free exercise of Constitutional rights and liberties; . . . to provide a forum in which to discuss issues related to democracy in America; to present and endorse proposals for the preservation and protection of democracy; to communicate with Maine’s legislature, its Congressional delegation and others with respect to such proposals; and to monitor the qualification of judicial nominees in order to ensure that the judicial branch remains independent and committed to defending democratic principles and the Constitutional rights and liberties of all.”

SUMMARY

The purpose of this memorandum is to address various actions of the current President and his administration that, in the opinion of MLD, have brought this country to the brink of a constitutional crisis. In addition to summarizing the problem, MLD proposes that the Maine Legislature carry out its unique role in our constitutional system by passing a resolution calling for the impeachment of the President and Vice President. This is not just a federal question; the rules of the U.S. House of Representatives provide for the consideration of impeachment resolutions brought to the House by a State Legislature. As a result, the Maine Legislature has a vital role to play in defending our constitutional system. This memorandum reviews the case for impeachment and the role that the Legislature should play in calling for impeachment. Impeachment resolutions have already been introduced in the legislatures of New Mexico, Vermont and Washington. Grassroots impeachment efforts are also underway in at least twenty other states across the country.

In Section I below, we summarize four areas of presidential and official misconduct that most directly threaten the health and integrity of our constitutional system of government, thereby justifying the immediate commencement of impeachment proceedings: (1) the knowing and willful deceit of Congress and the nation regarding the imminent threat posed by Iraq; (2) the conduct of an illegal war of aggression against the sovereign nation of Iraq; (3) the warrantless domestic wiretapping of Americans; and (4) the unlawful treatment of prisoners, including but not limited to torture, suspension of habeas corpus, military commissions and the denial of due process, and rendition.

In Section II below, we discuss the history and purposes of the impeachment remedy set forth in Article II, Section 4 of the Constitution, and its particular suitability as the appropriate mechanism for investigating and redressing the misconduct of the current President, Vice President and other high officials of this administration. In an effort to break from their monarchical past in which unelected tyrants wielded immense unchecked power, the enlightened framers of our Constitution included a provision for removing presidents and other high government officials who commit misconduct gravely injuring or threatening our constitutional system. In devising the impeachment remedy, the founders focused principally on conduct constituting an abuse or misuse of power, a neglect of duty, or an offense against the state. Because the raw abuse of power by the current President and his administration so clearly threatens the bedrock principles of checks and balances and separation of powers so carefully guarded by our nation's architects, removal through the remedy of impeachment is not only appropriate but necessary.

THE CASE FOR IMPEACHMENT PROCEEDINGS

I. THE MISCONDUCT OF THE PRESIDENT, VICE PRESIDENT & OTHER HIGH GOVERNMENT OFFICIALS

This memorandum will not endeavor to cover the full range of misconduct of the President and his administration that threatens our democratic system of government. Rather, it will attempt to summarize the principal areas of concern.

A. Knowing and Willful Deceit of Congress and the American Public about the "Imminent Threat" Posed by Iraq in 2003 for the Purpose of Taking the Nation to War Unnecessarily.

There is considerable evidence available indicating that the President, the Vice President, and other high-level officials of his administration had made a decision to invade Iraq and overthrow the government of Saddam Hussein in the summer of 2002, and possibly earlier. The Downing Street memorandum, prepared by the head of Britain's intelligence service which became public in early 2005, revealed that the "intelligence and the facts were being fixed around the policy" of invading Iraq. Over the course of the next several months, the American public and the Congress were the target of the most elaborate and high-stakes sales pitch in perhaps the entire history of the Republic. The President, the Vice President, and President's National Security Advisor, among others, spoke incessantly in public of the grave threat posed by Iraq's alleged links to Al-Qaeda and 9-11, and its possession of weapons of mass destruction, even evoking images of a mushroom cloud.

In his State of the Union speech in January of 2003, the President told the American public that Saddam Hussein had large stockpiles of chemical and biological weapons, and that he was on the verge of obtaining nuclear weapons. In the famous 16 words from that speech, the President referred to evidence of Saddam's efforts to procure an enriched form of uranium known as "yellow cake" from the Nigerian government. At the time he made this statement, the President knew or had reason to believe that the assertion was false or unsupportable, as it was based on weak and highly disputed intelligence. Around the same time, Vice President Cheney was making frequent public references about a meeting in

Germany before the 9-11 attacks between hijacker Muhammad Atta and an Iraqi government official, even though he knew the claim had already been thoroughly vetted and dismissed by European intelligence agencies. On February 5, 2003, Colin Powell was dispatched to the UN to prove to the world that Iraq possessed weapons of mass destruction. Virtually all of the claims made by Secretary Powell later turned out to be false. The public has also since learned that the intelligence upon which the claims were based was neither solid nor credible in the eyes of those professional intelligence analysts – including foreign analysts – who were sufficiently removed from the intense policy pressure imposed by the White House. As the administration knew at the time, much of the intelligence had been fed to the US by wealthy Iraqi exiles who had a direct interest in the overthrow of Saddam Hussein that a US invasion would bring.

These are just several examples of the misleading and high-pressure marketing campaign conducted by the President and his administration leading up to a rushed vote on a resolution in October of 2002, just weeks before the congressional mid-term elections. With shockingly little debate, Congress passed the resolution, delegating to the President the authority to determine when, if and how to wage war on the nation of Iraq. Although the resolution did express the hope that the President would work with the UN and seek the approval of our nation's allies, the evidence and subsequent history suggests that the President never intended to do so.

The United Nations had inspectors in Iraq which, the public learned later, were seen largely as an obstacle to the President's plans to invade Iraq before the intense heat of the Middle Eastern summer, and ostensibly, before the inspectors could fully document for the world the *absence* of WMD's in Iraq. On orders of the administration, Hans Blix and his team of U.N. inspectors were rushed out of the country in early March, as they continued to report a lack of any evidence that Saddam Hussein possessed weapons of mass destruction, and as Saddam was actively complying with demands that he destroy stockpiles of conventional weapons. The U.S. bombing campaign of "Shock and Awe" began shortly after the inspectors had all been removed.

Numerous former members of the CIA have come forward in the years since the Iraq invasion and admitted to the intense pressure placed upon them to overstate and spin intelligence to help make the administration's case for going to war against Iraq, particularly from the office of Vice President Dick Cheney. The Vice President made *twelve* separate trips to the CIA in the few months leading up to February 2003 to look over the shoulders of analysts who were assigned the job of "determining" the imminent national security threat posed by Iraq.

As the public now knows, there were no WMD's in Iraq, nor were there any credible links between Saddam Hussein – a secularist dictator unfriendly to radical Muslims – and Al Qaeda or the 9-11 attacks. Simply put, Iraq posed no imminent threat to America or the world in 2003. The fact is that Al-Qaeda was struggling for its life and on the run in Afghanistan when the current administration decided to shift valuable special operations forces and other military resources to the Persian Gulf and Iraqi theatre.

The President's actions in this regard constitute not simply lying to Congress (which is itself a crime), and, quite possibly, a conspiracy to defraud the United States (also a crime),

but abuse of power of the most extreme and serious kind, directly threatening the integrity of our constitutional system of government and the rule of law. The consequences have been profound and horrific on an unprecedented scale in terms of the loss of countless American and Iraqi lives, many tens of thousands wounded, the suffering of millions of Iraqi civilians dying of malnutrition and other health related problems, and the expenditure of over \$500 billion thus far of taxpayer money, mostly in the form of IOU's for our children and grandchildren. Then, of course, there is the loss of U.S. respect and credibility around the world, which cannot be quantified.

B. Conduct of Illegal War of Aggression.

There is substantial evidence, both circumstantial and direct, that the U.S. bombing and invasion of Iraq constituted a war of aggression, and crime against the peace, in violation of Article 6 of the Nuremberg Charter adopted by the United States and its allies after World War II, which provides as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

...

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

In the wake of World War II, Nazi Germany's crimes against the peace were deemed by the Allies to be the most serious crimes of that regime, which is remarkable given the horrific crimes of the Nazi holocaust. Considering the evidence set forth in Part I hereof strongly indicating that the President, Vice President, and other high level officials knew that Iraq posed no imminent threat to U.S. national security, and further considering the fact that the bombing and invasion of Iraq was conducted without provocation and without the support of the UN or the international community, a compelling case can be made that the U.S. invasion of the sovereign nation of Iraq and its overthrow of the Iraqi government violated Article 6 of the Nuremberg Charter. As a treaty ratified by the U.S. Senate, the Nuremberg Charter became the law of the United States pursuant to Article VI of the United States Constitution.

C. NSA Domestic Surveillance Program

In December of 2005, *The New York Times* revealed that the Bush administration had been secretly using the NSA to conduct a domestic wiretapping program without procuring any warrants. *Spy Agency Mined Vast Data Trove*, New York Times, December 24, 2005. The program did not comply with the requirements of the Foreign Intelligence Surveillance Act (“FISA”), and the President never claimed otherwise. FISA – which provides for special judges and “after-the-fact warrants” designed for gathering intelligence without sacrificing vital national security interests – was passed in the wake of the Nixon administration, after Congress and the nation learned about Nixon’s wholesale use and abuse of “national security” and “wartime” rationales to engage in warrantless wiretapping of his political opponents and members of the media. The basic public policy behind FISA is that, in keeping with the Constitution’s Fourth Amendment, Congress and the public should not be expected to simply “trust” an executive who insists that he or she will not engage in wiretapping for anything other than a vital national security purpose, without a paper trail and without a judge ensuring that constitutional and statutory safeguards are being respected. The other purpose of FISA is to ensure that minimum constitutional safeguards – including a judicial process for issuing warrants – are in place to help insulate intelligence collection activities from Fourth Amendment challenge.

When the story broke about the warrantless wiretapping program, President Bush insisted that the actions he has taken were necessary in a post-911 world, and he asked Congress and the American people to trust his representation that his administration was listening only to the conversations of those persons suspected of having direct ties to terrorist organizations like Al-Qaeda. “If Americans are talking to terrorists, I want to know about it,” the President famously declared.

The President’s NSA program was immediately and universally condemned by the nation’s foremost constitutional scholars, who signed letters expressing their unqualified opinion that President Bush had violated congressional law and the Fourth Amendment of the United States Constitution. The program is still currently in operation, and recent news stories have revealed that law-abiding citizens’ constitutional rights have been violated. Though the President, under intense pressure from the new Democratic Congress, has recently indicated for the first time that he is willing to agree to some FISA court involvement, in clear violation of law he conducted the program for nearly *five* years with no judicial or congressional oversight of any kind.

D. Treatment of Prisoners: Torture, Suspension of Habeas Corpus, Military Commissions and Rendition

The President’s treatment of prisoners raises serious legal and constitutional concerns in four separate contexts: the first is the President’s policy of sanctioning torture for prisoners in US custody at Guantanamo Bay and in Iraq, which policy was formally adopted by the Attorney General’s Office. The administration’s policy and practice of torture since 9-11 is a violation of both international and U.S. law, and again warrants concerns about whether the President considers himself bound by treaties that the United States has entered into, or laws passed by Congress.

The second issue involves the administration's holding of what it called "enemy combatants" for months and years on end without bringing any formal charges against them or affording them a right to counsel. In the July 2003 *Hamdi* decision, the Supreme Court held that this policy of the President and his Administration violated the constitutionally protected habeas corpus rights of the prisoners. Writing for the majority, Justice John Paul Stephens held as follows in *Hamdi*:

Executive imprisonment has been considered oppressive and lawless since [King] John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.

The third issue raising serious concern is the Administration's use of extra-constitutional military commissions to try prisoners in US custody. In the *Hamdan* case, the Supreme Court found in June 2006 that the President's actions were in violation of the US Constitution and the Geneva Convention, forcing the President to work with Congress to come up with a constitutional and legal system for trying prisoners of the "war on terror."

A fourth issue involves the President's policy of "rendering" suspected terrorists to foreign countries for more aggressive forms of interrogation, including torture. This policy – which, like the administration's formal torture policy – is arguably a violation of domestic and international law prohibiting US sanction and involvement in torture, and is currently being challenged in courts in Italy and Germany.

II. IMPEACHMENT IS THE RIGHT REMEDY FOR THIS MISCONDUCT.

A. The Impeachment Remedy: Legal & Historical Background

Under Article II, Section 4 of the U.S. Constitution, "[t]he President, the Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery and other high crimes and misdemeanors." In fashioning the impeachment remedy, the framers of our Constitution were chiefly concerned about misconduct that threatened the integrity of our constitutional system of government.¹ As the Staff of the Nixon Impeachment Inquiry noted, "impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment."

A close examination of the common law meaning of the phrase "high crimes and misdemeanors" in England and America in the late 18th century, and the comments of the framers concerning impeachment, illuminates this basic concern.² Specifically, the framers

¹ See Staff of the Impeachment Inquiry, House Comm. on the Judiciary, 93d Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* (Feb. 1974), as published in *High Crimes and Misdemeanors: Selected Materials on Impeachment* (New York: Funk & Wagnalls, 1974), p. 17.

intended to limit the scope of the impeachment remedy to conduct constituting an abuse or misuse of power, a neglect of duty, or an offense against the State.³ On the subject of forcible removal of a president by impeachment, the Founders were careful to focus only on the most serious official offenses.⁴ In Federalist No. 65, Alexander Hamilton asserted that impeachment was limited to “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 as POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”⁵ (emphasis original)

The presidential oath of office helps to further illustrate the boundaries of the impeachment remedy. Upon taking office in 2001 and 2005, President Bush and Vice President Cheney promised to “faithfully execute the Office of the President of the United States” and “preserve, protect and defend the Constitution of the United States.”⁶

The impeachment remedy set forth in our Constitution reflects a desire on the part of the Founders to protect our constitutional system of government by furnishing a way to remove those presidents and other officials whose conduct – whether or not technically criminal under statutory law – threatens the fabric of our democratic institutions and the delicate balance among those institutions so carefully guarded by the Constitution’s architects.⁷ One prominent scholar on the law of presidential impeachment put it this way:

² See Berger, *supra*, pp. 59-78. See also Staff of the Impeachment Inquiry, *Constitutional Grounds for Presidential Impeachment*, p. 18 (citing George Mason, who proposed the phrase “high Crimes and Misdemeanors” at the 1787 Constitutional Convention, and who expressed his intention that the phrase encompass “attempts to subvert the Constitution”).

³ See Tribe, Laurence H., *American Constitutional Law*, (2d ed. 1988), p. 291 (“offenses have been regarded as impeachable if and only if they involve serious abuse of official power”). See also Berger, *supra*, pp. 61, 70, 75 (citing Justice James Wilson, who stated that “impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments”); Berger, “The President, the Congress and the Courts,” 83 *Yale Law Journal* 1111, 1145-1146 (“the word ‘high’ modifies both ‘crimes and misdemeanors,’ and ‘refers to official conduct, conduct relating to one’s function with respect to the state’”) (citation omitted).

⁴ See Berger, *Impeachment: The Constitutional Problems*, pp. 86-91. It should be noted that the deliberations about impeachment at the 1787 Constitutional Convention focused almost exclusively on presidential impeachment, largely in light of the fact that judges and other government officials were included in the provision at the last minute.

⁵ The Federalist No. 65 (Gary Wills ed. 1982), p. 331.

⁶ Constitution of the United States, Article II, Section 1(8).

⁷ See Berger, *Impeachment: The Constitutional Problems*, p. 79 (citing Justice Joseph Story, who remarked that impeachment is “a proceeding purely of a political nature. It is not so much designed to punish the offender as to secure the state against gross official misdemeanors.”), pp. 75, 80 (citing James Wilson, who confirmed that “Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects.”). See also Staff of the Impeachment Inquiry, *Constitutional Grounds for Presidential Impeachment*, p. 19 (“The criminal law sets a general standard of conduct which all must follow. It does not address itself to

“In sum, ‘high crimes and misdemeanors’ appear to be words of art confined to impeachments, without roots in the ordinary criminal law, and which, so far as I could discover, had no relation to whether an indictment would lie in the particular circumstances.”⁸

The impeachment of President Nixon in 1974 is perhaps the most instructive historical example of this important remedy for grave official misconduct. President Nixon was accused, *inter alia*, of wielding the powers of his office to cover up White House involvement in a break-in at Democratic National Committee headquarters prior to the presidential election of 1972. Among other official actions, Nixon endorsed and helped organize efforts by his aides to conceal such White House involvement and used the FBI, the Department of Justice, the Internal Revenue Service and other federal agencies to combat his perceived political opponents and thwart prosecutorial and congressional investigation of the Watergate matter. Nixon’s abuse and misuse of executive power posed a direct threat to the twin constitutional doctrines of checks and balances and separation of powers, bringing the country into a constitutional crisis and leading to his impeachment.

One of Nixon’s chief defenses during the Watergate investigation was that he had not committed any criminal offense, and that he therefore could not be impeached. This argument forced the Committee on the Judiciary, majority and minority together, to squarely address the relevance of a president’s compliance or noncompliance with the criminal law in the context of a presidential impeachment inquiry. A memorandum prepared by the Staff of the Impeachment Inquiry concluded that the “criminal law sets a standard of conduct which all must follow. It does not address itself to the abuses of presidential power. In an impeachment proceeding a president is called to account for abusing powers *which only a president possesses.*”⁹ (emphasis added)

In rejecting Nixon’s criminality defense and approving articles of impeachment based fundamentally on Nixon’s misuse of presidential power, the Committee on the Judiciary established an important precedent for assessing future presidential misconduct and the appropriateness of the impeachment remedy. As the Rodino Committee found, the central issue in a presidential impeachment inquiry is not whether any positive law crime has been committed, but rather whether the alleged misconduct poses a threat to the integrity of our constitutional system of government: “The longing for precise criteria is understandable . . . However, where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is not the intrinsic quality of the behavior [*e.g.*, whether it is criminal or not] but the significance of its effects upon our constitutional system or the functioning of our government.”¹⁰

the abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers which only a President possesses.”)

⁸ Berger, “Impeachment for ‘High Crimes and Misdemeanors,’ ” as published in *Impeachment: Selected Materials*, p. 623.

⁹ Staff of the Impeachment Inquiry, *Constitutional Grounds for Presidential Impeachment*, p. 19.

¹⁰ Staff of the Impeachment Inquiry, *Constitutional Grounds for Presidential Impeachment*, p. 21. See also discussion of Nixon’s alleged income tax fraud in Part I(A)(2) of this memorandum.

B. Urgent Need for Impeachment Inquiry Concerning the Misconduct of President Bush and Vice President Cheney

When the historical and legal basis for impeachment is applied to the misconduct of the current President and Vice President generally summarized in Section I hereof, the conclusion is rather compelling: The impeachment remedy was designed and intended to address just the kind of abuses that Congress and the American public have witnessed from this President and his administration. Although numerous federal crimes have almost certainly been committed by the President and other high government officials, the most compelling basis for the commencement of impeachment proceedings is the recurring theme of abuse and misuse of presidential and executive power which has brought the nation to the brink of a constitutional crisis.

We, the members of Maine Lawyers for Democracy, believe that the United States House of Representatives should commence impeachment proceedings at once against the President and Vice President, which proceedings would properly begin with an investigation by the House Judiciary Committee. Pursuant to the Rules of the U.S. House of Representatives, which include Jefferson's Manual of Parliamentary Procedure, a congressional impeachment investigation may commence with a resolution duly passed by the legislature of one of the several states and directed to the Speaker of the House. *See* Jefferson's Manual, Section LIII, §603 at p. 303 (a copy of which is attached hereto). Once a resolution of impeachment reaches the attention of the House Speaker, the rules dictate that it be given immediate priority as an item of legislative business. *See* Jefferson's Manual, Section LIII, § 604 at p. 303.

As set forth above, this process is already underway in several other states, including Vermont, New Mexico and Washington. We strongly urge you to formally begin the process in Maine, through the introduction of appropriate legislation and the conduct of committee hearings leading to the passage of an impeachment resolution for submission to the U.S. House of Representatives.

Thank you for your consideration of this memorandum and the position set forth herein. Please understand that we do not undertake such a grave matter lightly. Rather, we submit this to you out of a deep and abiding concern for the integrity of our constitutional system of government.