

STATEMENT OF BRUCE FEIN

RE: H.R. 743: THE EXECUTIVE ACCOUNTABILITY ACT OF 2009

BEFORE THE HOUSE JUDICIARY COMMITTEE

JULY 27, 2009

Mr. Chairman and Members of the Committee:

I am pleased to share my thoughts on H.R. 743, The Executive Accountability Act of 2009. It would expressly and unequivocally criminalize intentional material misstatements of fact made by the President for the purpose of eliciting congressional authorization to initiate war. By making such deceit a crime, Congress would also be suggesting that the misconduct would constitute an impeachable offense, i.e., a high crime or misdemeanor within the meaning of Article II, section 4 of the Constitution. If the President knowingly lied about Iran's nuclear warheads, missile delivery vehicles, and intent to use them imminently to kill thousands of American to obtain authority for an Iranian war from Congress, the intentional and material deceit would be punishable under H.R. 743.

I believe the bill is urgent. If it is not enacted, the United States will be perpetually at war on every square inch of the planet; and, the executive branch will become the decisive branch of government and Members of Congress will be reduced to constitutional ink blots. The United States will come to resemble the government of King George III which provoked the American Revolution.

War and peace are the most important matters of any nation. As General William Tecumseh Sherman sermonized, war is hell. It makes murder legal. As Cicero taught, in time of war the laws are silent. Lives and limbs are lost. The proof in part is in the Civil War battlefields, Arlington Cemetery, the Vietnam War Memorial, and its World War II counterparts. Survivors suffer mental trauma. Habeas corpus may be suspended. Arbitrary detentions without accusation or trial flourish. The rule of law succumbs to national security fears. Government secrecy spreads. The people do not know what their government is doing—the

first principle of self-government. Dissent or oversight is equated with treason. Power migrates to the President. Government expenditures spiral. He awards military contracts. He makes military assignments and appointments. He is the beneficiary of secrecy, emergency powers, and patriotic sentiments of the people. And war gives the President an opportunity to achieve immortality by transforming the world.

In contrast to the President, neither Members of Congress nor Congress as an institution gain power or fame because of war. Members thus have no incentive to inflate foreign dangers to provoke or justify war.

Accordingly, *the Founding Fathers were unanimous in endowing Congress to the exclusion of the President with the sole power of authorizing the initiation of war.* James Madison, father of the Constitution, sermonized: “The Constitution expressly and exclusively vests in the Legislature the power of declaring a state of war [and] the power of raising armies. A delegation of such powers [to the president] would have struck, not only at the fabric of our Constitution, but at the foundation of all well organized and well checked governments. The separation of the power of declaring war from that of conducting it, is wisely contrived to exclude the danger of its being declared for the sake of its being conducted.” As President in 1812, Madison understood that only Congress could authorize war with Great Britain over impressments of U.S. seamen and neutrality. His message to Congress included the following: “Whether the United States shall continue passive under these progressive usurpations, and these accumulating **wrongs**, or, opposing force to force in defence of their national rights, shall commit a just cause into the hands of the Almighty Disposer of events, avoiding all connexions which might entangle it in the contest or views of other Powers, and preserving a constant readiness to concur in an honorable re-establishment of peace and friendship, is a solemn question, which the

Constitution wisely confides to the Legislative Department of the Government. In recommending it to their early deliberations, I am happy in the assurance, that the decision will be worthy of the enlightened and patriotic councils of a virtuous, a free, and a powerful nation.

Madison wrote to Thomas Jefferson: "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature."

At the Constitutional Convention, Pierce Butler "was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it." Not a single delegate would second Butler's motion.

James Wilson, a future Justice of the United States Supreme Court, lectured the Pennsylvania Ratifying Convention, "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war."

In Federalist 69, Alexander Hamilton, the strongest proponent for a muscular executive among the Founding Fathers, nevertheless understood and approved that the President's war powers "would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the

British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which by the constitution under consideration would appertain to the Legislature."

Abraham Lincoln, an opponent of the Mexican-American War, understood that there is no limiting principle to unending presidential wars if preemptive wars can be fought without initial authorization from Congress:

"Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose – and you allow him to make war at pleasure.... Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose. If, to-day, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us" but he will say to you "be silent; I see it, if you don't."

"The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood."

Lincoln was here echoing the views of John Jay, future Chief Justice of the United States, in *Federalist No. 4*: "[A]bsolute monarchs will often make war when their nations are to get

nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people. But, independent of these inducements to war, which are more prevalent in absolute monarchies, but which well deserve our attention, there are others which affect nations as often as kings.”

John Bassett Moore, a towering authority on international law, taught that, "There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace."

President George Washington conducted defensive measures against Indian attacks on his own authority (akin to repelling a sudden invasion), but recognized that offensive measures would require congressional authorization: "The Constitution vests the power of declaring war with Congress," he observed, "therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure."

The distinction Washington made between defensive war in response to an actual attack as opposed to preemptive or offensive war in anticipation of an alleged future danger was sound. A President has no ability to deceive Congress or the American people about defensive wars

because an attack by the enemy provides indisputable ocular evidence of the danger. Pearl Harbor is the classic example. In contrast, preemptive or offensive wars are suspect because they are prompted by conjectural fears of foreign aggression that can be awakened by false statements by the President about weapons of mass destruction or otherwise.

In sum, it would be preposterous to argue that the Constitution empowers the President to initiate preemptive or offensive war without the express authorization of Congress. It is no answer to say that Congress can curtail or end funding of a war after-the -fact. Funding measures can be vetoed by the President, and the veto can be overridden only by two-thirds majorities in both the House and Senate. The veto power enables one-third of Congress to get the country into war, contrary to the Founding Fathers' intent to create high, not low barriers to accept all the misery and horrors that war brings.

Until the Mexican-American War, the equilibrium of war powers between Congress and the President intended by the Constitution's makers was generally honored. The policy of the United States was brilliantly captured by then Secretary of State John Quincy Adams' July 4, 1821 address:

“America, in the assembly of nations, since her admission among them, has invariably, though often fruitlessly, held forth to them the hand of honest friendship, of equal freedom, of generous reciprocity.

She has uniformly spoken among them, though often to heedless and often to disdainful ears, the language of equal liberty, of equal justice, and of equal rights.

She has, in the lapse of nearly half a century, without a single exception, respected the independence of other nations while asserting and maintaining her own.

She has abstained from interference in the concerns of others, even when conflict has been for principles to which she clings, as to the last vital drop that visits the heart.

She has seen that probably for centuries to come, all the contests of that Aceldama the European world, will be contests of inveterate power, and emerging right.

Wherever the standard of freedom and Independence has been or shall be unfurled, there will her heart, her benedictions and her prayers be.

But she goes not abroad, in search of monsters to destroy.

She is the well-wisher to the freedom and independence of all.

She is the champion and vindicator only of her own.

She will commend the general cause by the countenance of her voice, and the benignant sympathy of her example.

She well knows that by once enlisting under other banners than her own, were they even the banners of foreign independence, she would involve herself beyond the power of extrication, in all the wars of interest and intrigue, of individual avarice, envy, and ambition, which assume the colors and usurp the standard of freedom.

The fundamental maxims of her policy would insensibly change from liberty to force....

She might become the dictatress of the world. She would be no longer the ruler of her own spirit....

[America's] glory is not dominion, but liberty. Her march is the march of the mind. She has a spear and a shield: but the motto upon her shield is, Freedom, Independence, Peace. This has been her Declaration: this has been, as far as her necessary intercourse with the rest of mankind would permit, her practice."

To borrow from Justice Oliver Wendell Holmes, the life of the law has not been logic, it has been experience. And experience teaches the urgency of the Executive Accountability Act. Since President James K. Polk and the Mexican-American War, Presidents have chronically deceived or misrepresented material facts to Congress or the American people to rush the nation into war. As a consequence, countless lives and staggering expenditures have been squandered in making the nation less safe and the American people less free and less captains of the nation's destiny.

President Polk falsely maintained that the Mexican army had killed American soldiers on American soil to justify the Mexican-American War. The war was opposed by then Congressman and former President John Quincy Adams. It provoked then Congressman Abraham Lincoln's spot resolution:

Whereas the President of the United States, in his message of May 11th, 1846, has declared that "The Mexican Government not only refused to receive him" (the envoy of the U.S.) "or listen to his propositions, but, after a long continued series of menaces, have at last invaded our territory and shed the blood of our fellow citizens on our own soil."

And again, in his message of December 8, 1846 that "We had ample cause of war against Mexico, long before the breaking out of hostilities. But even then we forbore to take redress into our own hands, until Mexico herself became the aggressor by invading our soil in hostile array, and shedding the blood of our citizens."

And yet again, in his message of December 7, 1847, that "The Mexican Government refused even to hear the terms of adjustment which he" (our minister of peace) "was authorized to propose; and finally, under wholly unjustifiable pretexts, involved the two countries in war, by invading the territory of the State of Texas, striking the first blow, and shedding the blood of our citizens on our own soil."

And whereas this House desires to obtain a full knowledge of all the facts which go to establish whether the particular spot of soil on which the blood of our citizens was so shed, was, or was not, our own soil, at that time; therefe

Resolved by the House of Representatives, that the President of the United States be respectfully requested to inform this House –

First: Whether the spot of soil on which the blood of our citizens was shed, as in his messages declared, was, or was not, within the territories of Spain, at least from the treaty of 1819 until the Mexican revolution.

Second: Whether the spot is, or is not, within the territory which was wrested from Spain, by the Mexican revolution.

Third: Whether that spot is, or is not, within a settlement of people, which settlement had existed ever since long before the Texas revolution, until it's inhabitants fled from the approach of the U.S. Army.

Fourth: Whether that settlement is, or is not, isolated from any and all other settlements, by the Gulf of Mexico, and the Rio Grande, on the South and West, and by wide uninhabited regions on the North and East.

Fifth: Whether the People of that settlement, or a majority of them, of any of them, had ever, previous to the bloodshed, mentioned in his messages, submitted themselves to the government or laws of Texas, or of the United States, by consent, or by compulsion, either by accepting office, or voting at elections, or paying taxes, or serving on juries, or having process served upon them, or in any other way.

Sixth: Whether the People of that settlement, did, or did not, flee from the approach of the United States Army, leaving unprotected their homes and their growing crops, before the blood was shed, as in his messages stated; and whether the first bloods so shed, was, or was not shed, within the inclosure of the People, or some of them, who had thus fled from it.

Seventh: Whether our citizens, whose blood was shed, as in his messages declared, were, or were not, at that time, armed officers, and soldiers, sent into that settlement, by the military order of the President through the Secretary of War – and

Eighth: Whether the military force of the United States, including those citizens, was, or was not, so sent into that settlement, after Genl. Taylor had, more than once, intimated to the War Department that, in his opinion, no such movement was necessary to the defence or protection of Texas”

-

The Spanish American War of 1898 was fueled by misleading or exaggerated statements or insinuations by President McKinley that the Spanish government was responsible for blowing up the USS Maine in Havana harbor with a death toll of 258.

In the run-up to the United States entry into World War I, President Woodrow Wilson deceived Congress and the American people by complaining that the *Lusitania* sunk by German submarines in 1915 was carrying only passengers when in fact it was also transporting munitions of war.

In an attempt to hurry the United States into World War II, President Franklin D. Roosevelt, on September 11, 1941, prevaricated to Congress and the American people that the USS Greer had been the subject of an unprovoked Nazi submarine attack. In fact, the USS Greer had been hunting the Nazi submarine, which responded in self-defense, according to Admiral Harold Stark, Chief of Naval Operations. President Roosevelt's cavalier attitude towards the truth in wartime was corroborated by the following confession: "You know I am a juggler, and I never let my right hand know what my left hand does...I may have one policy for Europe and one diametrically opposite for North and South America. I may be entirely inconsistent, and

furthermore I am perfectly willing to mislead and tell untruths if it will help win the war [May 15, 1942].”

President Harry Truman euphemistically characterized the Korean War as a “police action,” although more than 36,000 American soldiers perished over a three-year war that concluded with an armistice in 1953. President Eisenhower originated the idea of the “Domino Theory” in Southeast Asia, that was summoned by Presidents Kennedy and Johnson to enlarge a United States military presence in South Vietnam. President Eisenhower first coined this phrase on April 7, 1954 during a Presidential Press Conference. After being asked by Robert Richards of Copley Press to explain the strategic importance of Indochina, he exclaimed:

“You have, of course, both the specific and the general when you talk about such things...

Finally, you have broader considerations that might follow what you would call the “falling domino” principle. You have row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly. So, you could have a beginning of a disintegration that would have the most profound influences...Then with respect to more people passing under this domination. Asia, after all, has already lost some 450 million of its peoples to the Communist dictatorship, and we simply can’t afford greater losses.

But when we come to the possible sequence of events, the loss of Indochina, of Burma, of Thailand, of the Peninsula, and Indonesia following, now you begin to talk about areas that not only multiply the disadvantages that you would suffer through loss of materials, sources of materials, but now you are talking about millions and millions and millions of people

Finally, the geographical position achieved thereby does many things. It turns the so-called island defensive chain of Japan, Formosa, of the Philippines and to the southward; it moves in to threaten Australia and New Zealand.

It takes away, in its economic aspects, that region that Japan must have as a trading area or Japan, in turn, will have only one place in the world to go – that is, toward the Communist areas in order to live.

So, the possible consequences of the loss are just incalculable to the free world.”

Then came the false bomber and missile gap claims of Presidents Eisenhower and presidential candidate Kennedy in the 1950s and the 1960 presidential campaign.

The Gulf of Tonkin Resolution was built on false assertions, whether witting or unwitting, by President Lyndon Baines Johnson that North Vietnam's torpedo boats had fired missiles at the USS Mattox and the USS Turner Joy on August 2 and 4, 1964, without provocation. In fact, the United States had provoked the attack by using a navy ship to conduct espionage and to shell the North Vietnamese coast. Further, North Vietnam had not targeted the USS Turner Joy for a missile attack. The reports of the same were spurious. When the Vietnam War ended in a debacle with the phony Paris Peace Accords of 1973, more than 55,000 American soldiers had died without purpose.

In 1965, President Johnson invaded the Dominican Republic with 24, 000 thousand Americans troops. He justified the United States intervention with the false statement that rebels in the Dominican Republic were controlled by Cuban Communist revolutionaries.

In 1969, President Nixon deceived Congress with his secret bombing of Cambodia in the Vietnam War.

President William Jefferson Clinton justified war in Bosnia by dramatically inflating the danger of the Balkans in flame ala Sarajevo and World War I absent United States military intervention. In a televised address, the President maintained:

“Securing peace in Bosnia will also help to build a free and stable Europe. Bosnia lies at the very heart of Europe, next door to many of its fragile new democracies

and some of our closest allies. Generations of Americans have understood that Europe's freedom and Europe's stability is vital to our own national security. That's why we fought two wars in Europe;; that's why we launched the Marshall Plan to restore Europe; that's why we created NATO and waged the Cold War, and that's why we must help the nations of Europe to end their worst nightmare since World War II now...

If we're not there, NATO will not be there. The peace will collapse; the war will reignite; the slaughter of innocents will begin again. A conflict that already has claimed so many victims could spread like poison throughout the region, eat away at Europe's stability and erode our partnership with our European allies..."

In 2003, President George W. Bush withheld evidence from Congress and the American people undermining his emphatic claim that Saddam possessed weapons of mass destruction. According to Barton Gellman in *Angler*, then House Majority Leader Dick Armev was deceived by Cheney about Saddam's miniaturization of nuclear weapons that could be delivered with ground personnel—a deception that flipped the Majority Leader in favor of the Iraqi War Resolution. Congress then passed the bill, which unconstitutionally delegated to the President the choice whether to initiate war against Iraq. That decision has been responsible for in excess of 4,000 American deaths for a purpose yet to be articulated.

Long experience thus demonstrates the urgency of deterring the President from misleading Congress about foreign dangers and war by the enactment of the Executive Accountability Act. The problem it addresses is not with Republican or Democratic Presidents. It is a problem of the institution of the presidency and the craving for power and fame and remembrance. The bill is not targeted on former President Bush or Vice President Cheney. The law would have no retroactive effect, which in any event would be proscribed by the

Constitution's ex post facto law. It is arguable that the false statements prohibition, 18 U.S.C. 1001, might overlap with the Executive Accountability Act. But when the criminal law addresses presidential conduct, it should speak with absolute clarity. The demand of fair warning is at its zenith when the legality of presidential action is at stake.

It is a dreadful commentary on the state of the American political culture and the ascendancy of the psychology of Empire in the White House that the Executive Accountability Act is needed. In a healthy political culture, no president would dare dissimulate to rush the nation into war with all its grisly consequences. Sober experience, however, has taught that neither Congress nor the American people can trust the President to be honest about national security dangers. The temptation to exaggerate to gain power, secrecy, and patriotic support by compromising truth is irresistible. But the knowledge that the President may be impeached or prosecuted for deceiving Congress to embroil the nation in war will concentrate his mind wonderfully on telling the truth. Therein lies the remedy for perpetual and global war.