

Statement of

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“National Security Decisions, History, and the Rule of Law:
Improving Transparency, Deliberation, and Accountability”

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Thank you, Chairman Feingold and members of the Senate Judiciary Subcommittee on the Constitution, for this opportunity to present our views on the critical issue of national security and the rule of law.¹

Like most Americans, we are keenly aware of the need for decisive responses when our Nation's security is threatened. As students of history and of constitutional law, we are also aware of the dangers to civil liberties and the rule of law that can come during periods of crisis. This submission will review briefly some of that history and argue for changes in procedure that can help defuse these dangers without hurting national security. Briefly, we propose three key procedural requirements:

¹ We have attached short biographical statements at the end of this submission. The views expressed here are obviously those of ourselves as individuals and should not be attributed to our institution.

- Notice and an opportunity to comment about proposed national security policies—preferably by the public but at least by a spectrum across the Executive Branch and Congress.
- Except when a proposal is uncontroversial or exigent circumstances exist, this notice and opportunity for comment should precede the action.
- National security policies should be reviewable in court to the extent practical, but otherwise should receive formal review by the DNI, assisted by a nonpartisan legal advisory board, with notification to the President and key congressional overseers.

Procedures like these cannot guarantee good outcomes, but they can increase the likelihood that national security responses will be carefully tailored to security needs rather than unnecessarily harming civil liberties or undermining legal rules.

National Security and the Rule of Law: A Historical Perspective

History proves that threats to national security often prompt incursions on civil liberties. This scenario has existed since the presidency of John Adams and has continued through two World Wars, the Cold War, Vietnam, and to the present day. In the long run, if we are to cope with present and future crises, we must think deeply about how our historical experience bears on a changing world. We begin with a quick review of this history, which shows that conflicts between national security and civil liberties have been endemic in U.S. history.²

Clashes between civil liberties and national security go back to the very beginning of the Republic. Fears about the French Revolution prompted passage of the Alien and Sedition Acts. The Alien Acts authorized the President to deport any alien who was a native of an enemy country or whom he considered “dangerous to the peace and safety of the United States.” More notorious was the Sedition Act, which made it illegal to defame any branch of the federal government. The Federalists considered their Republican opponents to be enemies of the state, not legitimate political adversaries. When Thomas Jefferson became President, this episode was quickly put behind us, and attention switched to new issues in the coming decades, such as the growing dispute over slavery.

The greatest constitutional crisis in our history came with the Civil War, which tested the nature of the Union, the scope of presidential power, and the extent of liberty that can survive in war time. When the war came, the federal government could hardly have been less prepared. Compared to today, the federal government was tiny. The White House staff consisted of President Abraham Lincoln, two secretaries, and a doorman. The peacetime army was small and mostly assigned to frontier outposts. In the aftermath of Fort Sumter, Lincoln took unprecedented presidential action: calling up the militia, declaring a naval blockade, suspending habeas corpus, and ordering military trials.

² The historical information in our testimony is drawn from Daniel A. Farber, *Lincoln’s Constitution* (Chicago: University of Chicago Press 2003); and Daniel A. Farber (editor), *Security v. Liberty: Conflicts Between National Security and Civil Liberties in American History* (New York: Russell Sage Foundation 2008).

Today, we sometimes forget the scale of the war. In four years of war, six hundred thousand Americans died. This death toll exceeds having one 9/11 attack *per week* for four years. It is not surprising that there were unprecedented stresses on the rule of law. If anything, it is surprising that democracy and the rule of law survived this crisis intact.

Most of Lincoln's emergency actions involved suspension of the normal legal process in the actual vicinity of armed conflict or in conquered territory. Lincoln was often faced with difficulty in controlling his subordinates, and abuses were often due to headstrong generals operating without authority from Washington. For instance, he rapidly overturned Ulysses Grant's notorious order expelling all Jews from his area of command. When he could not reverse an underling's actions, he might temper it, as when he reduced the imprisonment of confederate-supporter Clement Vallandigham to expulsion beyond the Union lines.

Lincoln's most famous wartime action, the Emancipation Proclamation, fell within the recognized authority to confiscate property rights from civilians when warranted by military necessity. Where his legal authority was controversial, Lincoln generally sought congressional ratification of his actions. For instance, his suspension of habeas corpus was retroactively approved by Congress, which also provided a general grant of immunity covering actions taken early in the war. With the end of the Civil War and then of Reconstruction, Lincoln's actions faded into memory.

Fifty years after Lincoln's death, another national crisis ensued. World War I engendered a violent reaction to dissent—a somewhat ironic turn for a war that, after all, was supposed to make the world forever safe for democracy. The Espionage and Sedition Acts of World War I were reminiscent of the Alien and Sedition Acts over a century earlier. The Espionage Act of 1917 made it illegal to discourage enlistment in the military and banned from the mails materials thought to be seditious. The Postmaster General interpreted the term 'seditious' to include anything critical of the government's motives. Unhappy that its powers were not even broader, President Woodrow Wilson's Administration obtained the passage of the Sedition Act of 1918, which made it a crime to insult the government, the flag, or the military. The Sedition Act also banned any activities that interfered with war production or the prosecution of the war. Beyond these legal measures, the government also encouraged extralegal attacks on dissidents. The greatest burden fell on immigrants. After the war, demands for loyalty revived in the great "Red Scare." The Justice Department made six thousand arrests on a single day. Most people were eventually released, though some were deported and others remained in custody for weeks.

World War II brought new issues. President Franklin D. Roosevelt established a military commission for the trial of Nazi saboteurs. After strong urging from military advisors, Roosevelt also authorized the detention of three thousand Japanese citizens and then the confinement of over a hundred thousand Japanese-Americans. Congress soon gave its approval with a statute criminalizing violations of the evacuation order. Even prior to Pearl Harbor, Roosevelt issued a broad authorization of electronic surveillance of suspected subversives, but requested that these investigations be kept to a minimum and limited as much as possible to aliens.

After World War II, of course, Russia replaced Germany as America's greatest adversary, and internal security policies shifted accordingly. The McCarthy Era is too well-known to require a detailed description. President Dwight Eisenhower's Administration

toughened the security program, eager to distinguish itself from its predecessor. But by 1954 Eisenhower had decided that Senator Joseph McCarthy was out of control, and he put the brakes on the McCarthy Era.

The Vietnam era is still remembered by many Americans and helped shape our political culture today. As President, both Lyndon B. Johnson and Richard Nixon were appalled by the intensity of the opposition to the War. By the mid-1960s, however, it had become impossible to base prosecutions on mere dissenting speech. Instead, the government prosecuted individuals for conduct, such as burning draft cards; more importantly, it used domestic surveillance to disrupt the antiwar movement.

As the antiwar movement expanded in the mid-1960s, the Federal Bureau of Investigation expanded its domestic surveillance efforts beyond suspected communists. In 1965, the FBI began wire tapping the Students for a Democratic Society and the Student Non-Violent Coordinating Committee. The anticipated evidence of ties with the Communist Party did not materialize. President Johnson also requested FBI reports on antiwar members of Congress, journalists, and professors. In 1968, the FBI's activities turned from surveillance to disruption. FBI agents infiltrated antiwar groups in order to destabilize them.

Other government agencies undertook their own investigations. The Central Intelligence Agency began its own effort to infiltrate and monitor antiwar activities, opening international mail of individuals involved in the antiwar movement. At the urging of Johnson, the CIA began a massive effort to investigate antiwar activities. Even Army intelligence officers got into the act, assigning 1500 undercover agents and ultimately collecting evidence on more than 100,000 opponents of the war. In 1969, the National Security Administration began to intercept phone calls of antiwar advocates.

When Nixon took office, these activities expanded. For instance, the CIA gave the FBI more than 12,000 domestic intelligence reports annually (all quite illegal, given the CIA Charter's prohibition of agency involvement in domestic security). The Nixon Administration also used the Internal Revenue Service to identify supporters of antiwar organizations and then target them and their organizations with tax investigations. By 1970, the Nixon Administration began assembling an enemies list and moved to centralize domestic intelligence in the White House.

These programs remained secret until an antiwar group broke into an FBI office to steal and then release about a thousand sensitive documents. As more of the government's activities became public, congressional investigations began. A Senate committee found that the FBI alone had more than half a million domestic intelligence files.

During the 1970s, Congress and the President enacted restrictions to halt such activities. The Army terminated its program and destroyed its files. President Gerald Ford banned the CIA from conducting surveillance on domestic activities and prohibited the NSA from intercepting any communication beginning or ending on U.S. soil. Edward Levy, Ford's Attorney General, imposed stringent limits on FBI investigations. Federal legislation prohibited certain electronic surveillance without a warrant from a special court. Congress established special intelligence

oversight committees: the House Permanent Select Committee on Intelligence was created in 1977; the Senate Select Committee on Intelligence was formed in 1976.

Many of these post-Vietnam safeguards have now been dismantled or at least significantly weakened as part of the “war on terror.” In 2002, Attorney General John Ashcroft authorized the FBI to attend any event that is open to the public for surveillance purposes. The USA PATRIOT Act authorizes the government to demand medical records, financial records, and other documents from third parties without probable cause. Most importantly, under President George W. Bush, the NSA began a secret electronic surveillance program that disregarded the statutory restrictions enacted in the 1970s.

The Lessons of History

The current Administration may be unusual in the extent of its claims of unilateral presidential authority. In contrast, prior Presidents such as Lincoln generally sought congressional ratification of their legally debatable actions. Nevertheless, President George W. Bush’s Administration is not unique in emphasizing security concerns over civil liberties or strict compliance with legal requirements. Presidents of every political persuasion have focused heavily on national security in times of crisis, with considerably less thought of civil liberties.³ The character and ability of individual Presidents is undoubtedly important, but the deeper problem is structural. We therefore need to consider structural lessons from history to achieve more transparent, better considered, and more accountable policy decisions.

First, a more deliberative process could help curb the tendency toward overreaction even to genuine security threats. The Alien and Sedition Acts were the first but by no means the last example of this kind of overreaction. The great “Red Scare” after World War I is also notorious today, along with the McCarthy Era. Presidents too often make decisions in the heat of the moment and fail to consider long term consequences. Others, like Lincoln, had a keener sense of which measures were necessary and which departed from historical American values for no real reason. We cannot guarantee that future Presidents will have Lincoln’s stature. Nor can we guarantee that the necessity for future actions will be carefully and dispassionately scrutinized. What we can do, however, is to try to shift the playing field in order to make it more likely that decision makers will distinguish truly necessary actions from harmful overkill.

Second, transparency and accountability are important. The blatant flaws of the Alien and Sedition Acts led to Jefferson’s election in 1800. Once exposed, the secret practices of the pre-Watergate Era could not survive. In contrast, there can be little political check on actions that are known to only a handful of chosen insiders.⁴ Legal accountability is also important, as shown by the role of the Supreme Court in the Nixon Tapes Case decades ago and in recent cases like *Hamdi v. Rumsfeld*.

³ The largest exception is the Cold War, where the impetus for civil liberties incursions came from Congress, and Presidents were less enthusiastic—although generally acquiescent. The aftermath of Watergate, however, did lead to a serious correction of course under President Ford (with strong assistance from Attorney General Edward Levy), as well as significant congressional action.

⁴ The Subcommittee’s April 2008 hearing, “Secret Law and the Threat to Democratic and Accountable Government,” discussed some of the dangers from secret action.

Third, legal professionals and other members of the federal bureaucracy are often champions of the rule of law and civil liberties. Lincoln was ably assisted by the Army's Inspector General, who worked hard to preserve the fairness and integrity of military trials. The Japanese internment was opposed by key figures in the Justice Department. State department lawyers opposed violations of the Geneva Convention under George W. Bush, and military lawyers demanded greater fairness in military trials. It is important to ensure that the decision making process includes these professionals as well as political insiders.

With these lessons in mind, we present a proposal to increase the transparency, deliberativeness, and accountability of national security efforts. These proposals must balance safeguards for civil liberties and the rule of law with the need to allow prompt, effective action in crises. In the end, our society must depend in large part on the character and ability of our Nation's leaders who are charged with making these decisions. We believe, however, that our proposals can help reduce the likelihood that historical abuses will be repeated.

Improving Transparency, Deliberation, and Accountability

Our proposal for improving the rule of law in national security matters draws heavily from the administrative state, which existed in a much more reduced form in Lincoln's time. It is a simple idea: require "notice and comment" on national security policies that have implications for the rule of law values we hold dear. We sketch first how the proposal would operate in ideal circumstances. But because society has competing needs, modifications likely may be needed in particular contexts to make the proposal feasible in the face of national security and political pressures. We then suggest how to craft these modifications. Even with these modifications, which would often restrict notice and the opportunity to comment process to particular government actors, the proposal has promise to foster the rule of law and to improve national security by increasing accountability and broadening the range of viewpoints involved in decision making.

Our suggestion is straightforward but far reaching. *Absent a clear contrary need, every national security policy with consequences for civil liberties and other democratic values should go through notice and comment procedures.* These procedures would work much like those in the Administrative Procedure Act (APA) governing agency rulemaking, which do not currently apply to "military or foreign affairs function[s]" of the government and do not cover some executive officials such as the Office of the President.⁵

More specifically, an agency—whether the CIA or the Department of Homeland Security—desiring to implement a national security policy would provide prior notice of the proposed policy and relevant information on which to evaluate rule of law concerns, such as legal arguments as to its constitutionality. The agency then would provide a period for interested persons to comment on the proposed policy, whether in support or in opposition. Those comments would also be available to others to consider in forming their own reactions. Finally, the agency would evaluate the submitted information and decide whether to implement the policy (as announced or in modified form), to seek additional comments, or to withdraw the policy from consideration. If the agency decided to enact some version of the policy, it would

⁵ 5 U.S.C. § 553; *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

defend its decision by offering responses to materially relevant objections that were submitted. This process is commonplace in agencies such as the Environmental Protection Agency and the Federal Communications Commission, and we should strive for as transparent and deliberative a process as possible in the national security area where the stakes are often even higher.

In ideal circumstances, this notice and comment process would have the following three attributes. First, the process would be *public*. The notice of the proposed policy and relevant information on which to judge it would be provided to the general public. Members of the public (as well as the government) would then be able to submit reactions to the proposal. The media would report, if they so chose, on the proposal, which would generate additional reaction for the agency to consider. A public process permits transparency. Second, the process would occur *before* the implementation of policy. The agency would provide notice and opportunity for comment and then consider reactions to its proposal, all before finalizing it and putting it into practice. A prior process encourages deliberation. Third, the process would permit *review* by outside institutions, preferably the courts. Once an agency had announced and justified its final policy, interested and affected persons could challenge that policy above the agency itself. A review process allows accountability. In short, with a transparent, deliberative, and accountable process, rule of law values are protected.

To be certain, these attributes may be at odds, perhaps deeply so, with critical needs, such as to preserve confidential sources or to act quickly before an anticipated attack. National security matters in a representative democracy often create, at least in perception, inherent conflicts—between transparency and secrecy, deliberation and fast action, external accountability and presidential powers. We recognize that circumstances will often be far from ideal, and we lay out the three ideal attributes above as a starting point, not as a prescription. We now consider potential modifications to each of the three in order to address competing pressures if circumstances warrant.

The first ideal attribute involves the transparency of the policymaking process. At times, the nature of the national security policy, however, may prevent a truly public notice and comment process. Even if details of the proposal cannot be made public, at least some aspects might be subject to public notice and comment. This would allow at least public input about some aspects of the proposal or about the general topic. In some circumstances, even that might not be possible. But when public notice must be limited or absent, notice and comment could still occur within the national security community, including those tasked with protecting the rule of law in both the executive and legislative branches. Specifically, within the executive branch, the proposed policy could be announced to, and comments sought from, the executors of national security, primarily, the sixteen agencies that make up the intelligence community and the wider Departments of Defense and Homeland Security. Notice and comment could also be sought from protectors of the rule of law in the national security arena, primarily, the Privacy and Civil Liberties Oversight Board created by the Intelligence Reform and Terrorism Prevention Act of 2004 and civil liberties officers within the intelligence, defense, and homeland security agencies.

Similarly, within the legislative branch, key committee members and staff tasked with the execution of national security and protection of civil liberties could participate. This congressional “gang” should be larger than eight individuals. For instance, the Armed Services,

Intelligence, and Judiciary Committees have legitimate interests in preserving the rule of law in national security matters. Secrecy can still be protected with intra-government notice and comment, by making the consequences to public disclosure by either branch sufficiently severe.

Intra-government notice and comment makes national security policy more deliberative and transparent than no or extremely limited disclosure, yet preserves necessary secrecy. Although inter-branch discussion, with its inherent checks and balances, may better protect the rule of law, even intra-branch consideration of important policies may help prevent abuses by a single agency. The executive branch is not monolithic in its policy expertise or preferences. For example, as recent experience indicates, policymakers or legal counsel in the State Department or military lawyers might raise objections to a proposed policy by the Central Intelligence Agency.

Although we propose notice and comment procedures as a way to promote the rule of law, these procedures should also improve the effectiveness of national security policy. Putting rule of law concerns aside, crafting policy in isolation often leads to worse outcomes, as a matter of national security, than in deliberative settings, where complementary expertise can prevent “group think” and reduce the risk of failure. In many ways, intra-government notice and comment creates redundant policymakers. This redundancy likely improves the rule of law and national security.⁶

The second ideal attribute concerns the prior timing of the notice and comment process. The default should be that the process occurs before a policy is implemented. In particular circumstances, however, agencies may not be able to provide notice and opportunity for comment prior to implementing a policy because national security may require immediate action. Here, too, our proposed process need not be jettisoned entirely. In matters unrelated to national security, agencies sometimes issue regulations without prior notice and comment.

In recent years, agencies have increasingly used two categories of legally binding rulemaking without prior opportunity for comment, although the APA does not mention them directly. First, agencies promulgate “direct final rules,” which take effect a certain time after they are announced unless adverse comments are received. Direct final rules are intended to expedite the enactment of noncontroversial policies. Second, agencies promulgate “interim final rules,” which take effect immediately upon publication or soon thereafter, and then take comments on the policies after the fact before issuing a “final final rule.” Interim final rules are intended for use when the agency has good cause to enact rules immediately, such as in emergency situations.

Both categories could apply in the national security setting. To start, not all national security policies are controversial. For instance, an agency might want to modify the mechanics for how private companies apply for national security contracts. If that change is trivial or non-controversial, the agency could issue a “direct policy” that would take effect in 30 days unless it received adverse comments. Direct policymaking would be more efficient in such cases. In addition, national security policies may need to be developed and enacted under tight time constraints. For example, an agency might need to impose restrictions on certain actions to

⁶ Some of the policy benefits in our testimony are drawn from Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. 1655 (2006).

respond quickly to a newly identified threat to the Nation. If there were not sufficient time to provide notice and opportunity for comment, even within select government communities, the agency could enact an “interim policy” immediately and then seek feedback before issuing a final policy that addressed any ex post reaction.

Ex post commenting permits some deliberation, while also allowing agencies to act quickly to confront threats to national security. In harried times, agencies will formulate national security policies knowing that their policies will face examination once implemented. This shadow of oversight should discourage agencies from undermining the rule of law in the first place. But if the rule of law is undermined in the quick pace of national security policymaking, ex post commenting should help rebuild it. As with intra-government notice and comment, ex post opportunity for comment may improve national security, in addition to its benefits for the rule of law. The creation of feedback mechanisms, even if operating later in the policymaking process, promotes innovation and imagination—key characteristics the 9/11 Commission found missing in the national security community in the period before the tragic attacks.

The third ideal attribute deals with outside review of the notice and comment process. Such review, however, may not be feasible or desirable when the process is closed to the public. In traditional agency rulemaking, affected parties, presuming they meet particular jurisdictional requirements, can often challenge the procedure and substance of regulations in court. The timing of that review sometimes occurs before and sometimes after the regulations have been implemented; the court can also postpone implementation while it conducts its review. In national security matters, affected parties often are harder to identify, and, if identifiable, they may be unaware of the policy if it is classified. Who then would bring a challenge? In such cases, outside review by an Article III court may be impractical.

As an alternative, for significant national security policies with implications for the rule of law, the Director of National Intelligence (DNI) could assess the policy and provide his conclusions, in writing, to the originating agency, President, and relevant committees in Congress. We would also suggest that the Privacy and Civil Liberties Oversight Board be required to offer peer review of any opinion regarding the legality of a policy. As in traditional administrative law, the timing of this review could vary depending on the circumstances, but likely would occur after the policy’s implementation.

DNI review, with notification to Congress, of national security policies promotes accountability when more traditional judicial review is unavailable. Such review could encompass both procedural and substantive choices. For example, if an agency does not postpone implementation of a “direct policy” in the face of comments, the DNI could determine if those comments were sufficiently adverse to prevent the agency from forgoing more intensive notice and comment procedures. Or if an agency finalizes a policy after notice and comment that affects civil liberties, the DNI could evaluate whether such infringement is warranted. Presumably, as with judicial review of agency action, this review would not be de novo, but it could be structured to be less deferential to better protect the rule of law. Although judicial review fosters accountability in our separated but overlapping powers system, intra-branch review, with notification to another branch, functions in practice quite similarly, especially in periods of divided government, and makes the national security community more accountable.

Thus, each ideal attribute of our proposal—public scope, prior timing, and outside review—can be modified to balance other values at play in national security (and to make it more politically feasible) without abandoning the proposal’s benefits of transparency, deliberation, and accountability. The key is to permit these modifications only when truly necessary. Even in the absence of secrecy concerns, agencies will prefer intra-government notice and comment to public notice and comment, and DNI review to judicial review. In the absence of timing concerns, agencies will prefer ex post (or no) notice and comment to ex ante notice and comment.

In traditional administrative rulemaking, an agency may forego notice and comment procedures when it “for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁷ Similarly, to restrain agency preferences for more control over their decisions, agencies could have to justify their choices to use any of these modifications, and face potential review of those choices, at least by congressional committees and the DNI, if not also the courts. It is conceivable that under some circumstances the need for security might be so extreme that even a truncated form of notice and comment or DNI review might be precluded. In those circumstances, there should at least be presidential accountability in terms of a formal finding personally made by the President, to the effect that extraordinary circumstances preclude a more deliberative process.

With or without modifications, our proposal for notice and comment of national security policies has substantial potential to improve the rule of law. Just as “alternative analysis” and “red teams” are being used to improve the quality of intelligence decisions,⁸ such mechanisms can also protect democratic values. Indeed, one can imagine the potential of alternative analysis or peer review for Office of Legal Counsel opinions. Even in modified form, the notice and comment process would improve transparency, deliberation, and accountability because more government actors would participate in and oversee key decisions.

In sum, notice and comment procedures combine advantages of centralization and redundancy in national security. They do not create additional decision makers, which can lessen the pressure for any one policy maker to take responsibility, but do solicit input from multiple sources, which can help catch mistakes. And they create a record on which decisions can be reviewed, even if only internally. Most importantly, these procedures would not place the rule of law in conflict with national security. Rather, they would foster both through better transparency, deliberation, and accountability. The procedures could be mandated by Congress through an amendment to the APA or they could be implemented by executive order.

We would like to close by once again thanking the Committee for this opportunity to comment on this important issue. Our goal has not been to assign blame for previous actions, but

⁷ 5 U.S.C. § 553(b)(3)(B).

⁸ The Intelligence Reform and Terrorism Prevention Act of 2004 requires that the DNI “establish a process and assign an individual or entity the responsibility for ensuring that, as appropriate, elements of the intelligence community conduct alternative analysis (commonly referred to as ‘red-team analysis’) of the information and conclusions in intelligence products.” Pub. L. No. 108-408, § 1017(a), 118 Stat. 3638, 3670 (2004).

rather to suggest how as a society we can best maintain the rule of law in the future while fully acknowledging the special processes needed to protect national security.

Brief Biographies

Daniel Farber is the Sho Sato Professor of Law at the University of California, Berkeley. He is also the chair of the Energy and Resources Group at Berkeley. Professor Farber received a B.A. in philosophy with high honors in 1971 and M.A. in sociology in 1972, both from the University of Illinois. In 1975 he earned his J.D. from the University of Illinois, where he was editor in chief of the *University of Illinois Law Review*.

Professor Farber clerked for Judge Philip W. Tone of the U.S. Court of Appeals for the 7th Circuit and for Justice John Paul Stevens of the U.S. Supreme Court. He then practiced law with Sidley & Austin before joining the faculty of the University of Illinois Law School. In 1981 he became a member of the University of Minnesota Law School faculty. During his years in Minnesota he became the first Henry J. Fletcher Professor of Law in 1987, served as a visiting professor at Stanford Law School, Harvard Law School and the University of Chicago Law School, and was named McKnight Presidential Professor of Public Law in 2000. In 2001, he moved to Berkeley, where he teaches constitutional and environmental law.

Professor Farber is the author or coauthor of over ninety articles and a dozen books, including *Security v. Liberty* (2008); *“Retained by the People”* (2006); and *Lincoln’s Constitution* (2003), *Desperately Seeking Certainty* (2002), as well as leading casebooks on environmental and constitutional law. He is a fellow of the American Academy of Arts and Sciences.

Anne Joseph O’Connell is an Assistant Professor of Law at the University of California, Berkeley. She received a B.A. in Mathematics, with honors, from Williams College, an M.Phil. in the History and Philosophy of Science from Cambridge University, a J.D. from Yale Law School, and a Ph.D. in Political Economy and Government from Harvard University.

Before joining the University of California, Berkeley, faculty in July 2004, where she teaches Administrative Law and Civil Procedure, Professor O’Connell clerked for Justice Ruth Bader Ginsburg of the U.S. Supreme Court during the October 2003 term. From 2001 to 2003, she was a trial attorney for the Federal Programs Branch of the U.S. Department of Justice’s Civil Division, where she worked on terrorist financing cases and other matters. She clerked for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit from 2000 to 2001. She is a member of the New York bar.

Professor O’Connell’s primary areas of research are administrative law; agency design and reorganization; qualifications and tenure of agency officials; shifts in regulatory activities; and agency oversight (including congressional hearings and U.S. Government Accountability Office auditing of policy programs).