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[ERRATA]
RESTORING THE RULE OF LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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In the years since then, I've published articles criticizing Republican conservatives for misrepresenting the facts in attacking Harry Truman over the Korean War,[115] and I've criticized congressional liberals for misrepresenting the facts in attacking LBJ and Nixon in Vietnam. During the 1996 election I strongly criticized Senator Bob Dole for trying to usurp President Clinton's discretion over whether to move our embassy from Tel Aviv to Jerusalem.[116] One may disagree with my conclusions and interpretations, but I don't believe my scholarship has ever been tainted by political partisanship.

And, in closing, I would commend to each of you this excerpt from the February 10, 1949, remarks of the late Senator Arthur Vandenberg, who said during a "Lincoln Day" address in Detroit:

> It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.[117]

Mr. Chairman, this concludes my prepared remarks.

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[115] *See, e.g.,* Robert F. Turner, *Truman, Korea, and the Constitution. Debunking the "Imperial President" Myth.* 19 HARV. J. L. & PUB. POL. 533 (1996).
[116] Robert F. Turner, *Only President Can Move Embassy*, LEGAL TIMES, Jan. 22, 1996 at 46.
[117] *Quoted in* TURNER, THE WAR POWERS RESOLUTION 118.

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ADDITIONAL SUBMISSIONS FOR THE RECORD

Statement of Steven Aftergood
Federation of American Scientists

Before the Subcommittee on the Constitution
Of the
Committee on the Judiciary
United States Senate

Hearing on

Restoring the Rule of Law

September 16, 2008

Thank you for the opportunity to address the Subcommittee.

My name is Steven Aftergood. I direct the Project on Government Secrecy at the Federation of American Scientists, a non-governmental policy research and advocacy organization. The Project seeks to promote public oversight and government accountability in intelligence and national security policy.

Summary

Perhaps the single most important action that is needed to invigorate the rule of law today is to reverse the growth of official secrecy, which has shielded misconduct and impeded oversight. The next Administration could initiate a transformation of government secrecy policy by tasking each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security secrecy to the essential minimum. Patterned after the Fundamental Classification Policy Review that was performed by the Department of Energy in 1995, such reexaminations have the potential to dramatically reduce unnecessary secrecy while enhancing external oversight and bolstering public confidence.

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Introduction: "We Overclassify Very Badly"

There are many steps that will need to be taken to strengthen the rule of law in the months and years to come. The next Administration and the next Congress will have to reexamine policies on domestic surveillance, prisoner detention and interrogation, and other important aspects of national security policy to make them constitutionally compliant and legally sound. Terms like "waterboarding" and "extraordinary rendition" will need to be relegated to the history books as quickly as possible, to be preserved for posterity as a reminder and a warning, along with others like Manzanar, the World War II internment camp for Japanese Americans.

But the most important systemic change that is needed is to sharply reduce the secrecy that has enveloped the executive branch.

Secrecy is problematic for several distinct reasons. First, it creates the possibility for agencies or officials to depart from legal norms or sound policies without detection or correction. Second, it tends to cripple the oversight process by diverting limited energy and resources into futile disputes over access for information, including even rudimentary and non-controversial factual information.[1] Third, it impoverishes the public domain. Ideally, an open political process helps to educate members of the public. If nothing else, it forces them to formulate and refine their arguments and to engage with those of their opponents. But a closed, secret process makes that impossible.

Secrecy is often criticized by those whose access to information has been barred, but what is more remarkable is that even the agencies themselves and officials who retain access acknowledge that classification authority has been exercised arbitrarily and that secrecy has now grown far beyond what any legitimate justification would allow.

"We overclassify very badly," Rep. Porter Goss, then the chair of the House Intelligence Committee, told the 9/11 Commission in 2003. "There's a lot of gratuitous

[1] "After more than five years of requests, we have only recently received access to redacted versions of OLC [Office of Legal Counsel] legal opinions related to the CIA's interrogation program," wrote Senator Patrick Leahy and Senator Arlen Specter on behalf of the Senate Judiciary Committee in an August 19, 2008 letter to the White House Counsel. "The failure to provide other documents that we have sought repeatedly, however, leaves us without basic facts that are essential to this Committee's ability to conduct its oversight responsibilities."

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classification going on."[2] Unfortunately, neither that forthright statement nor Mr. Goss's subsequent tenure as Director of Central Intelligence did anything to reduce classification levels, which remain as high or higher today than they did in 2003.[3]

"The definitions of 'national security' and what constitutes 'intelligence' -- and thus what must be classified -- are unclear," according to a January 2008 report from the Office of the Director of National Intelligence. This is an admission that classification policy in U.S. intelligence agencies lacks a coherent foundation. Ironically, that ODNI report itself was withheld from public disclosure, tending to confirm the report's diagnosis.[4]

Asked to estimate how much defense information is overclassified, Under Secretary of Defense for Intelligence Carol A. Haave told a House subcommittee in 2004 that it could be as much as fifty percent, an astonishingly high figure. Information Security Oversight Office director J. William Leonard added: "I would put it almost even beyond 50/50.... [T]here's over 50 percent of the information that, while it may meet the criteria for classification, really should not be classified."[5]

"It may very well be that a lot of information is classified that shouldn't be," agreed Defense Secretary Donald Rumsfeld in 2004, "or it's classified for a period longer

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[2] Public hearing before the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission), May 22, 2003. *Secrecy News*, January 14, 2005. transcript available at http://www.fas.org/irp/congress/2003_hr/911Com20030522.html#dys .

[3] According to the latest report of the Information Security Oversight Office, original classification activity in 2007 was approximately the same as in 2003 and "The number of reported combined classification decisions has risen each year." 2007 Report to the President, Information Security Oversight Office, available at: http://www.fas.org/sgp/isoo/2007rpt.pdf .

[4] "Intelligence Community Classification Guidance Findings and Recommendations Report," Office of the Director of National Intelligence, January 2008. I obtained an unauthorized copy, which is available at: http://www.fas.org/sgp/othergov/intel/class.pdf . "I'm not going to be able to comment on an internal document that has not been publicly released," an ODNI spokesman told the Washington Post in response to a question about the report. See "Agencies Use Contradictory Rules for Classifying Information" by Walter Pincus, April 11, 2008, page A4.

[5] "Too Many Secrets: Overclassification as a Barrier to Information Sharing," hearing before the House Committee on Government Reform, August 24, 2004, at pp. 82-83; copy available at http://www.fas.org/sgp/congress/2004/082404transcript.pdf.

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than it should be. And maybe we've got to find a better way to manage that as well."[6] But at the Defense Department and elsewhere in government, that "better way" remains elusive and uncharted.

"I think secrecy is one of the hard issues," said Michael Chertoff, the Secretary of Homeland Security, last month. "We will have to figure out how to be open to the extent we can while recognizing you live in a world where openness can be a problem too. It is my fervent hope that more and more [...] will be public and only things that really have to be kept secret will be kept secret."[7]

In the interests of a decent, effective and accountable government, the next Administration should finally move beyond fervent hope and should start to figure out how to limit official secrecy. One way to do that would be to undertake a systematic review of agency classification policy and practice.

Recalling the 1995 DOE Fundamental Classification Policy Review

If secrecy was always inappropriate, then it would be a simple problem with an easy solution-- get rid of all secrecy. But we know that there is a place for secrecy in protecting various types of genuine national security information, from advanced military technologies to sensitive intelligence sources and confidential diplomatic initiatives. When properly employed, secrecy serves the public interest. Therefore what is needed is some way to distinguish and disentangle legitimate secrecy from illegitimate secrecy.

The successful experience of the U.S. Department of Energy in updating its classification policies a decade ago may provide a helpful exemplar for confronting overclassification today.

In 1995, facing the new realities of the post-Cold War world, the Department of Energy initiated a systematic review of its information classification policies as part of

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[6] News briefing, August 26, 2004. *Secrecy News*, September 7, 2004; excerpts posted at http://www.fas.org/sgp/news/2004/08/dod082604.html .

[7] "Chertoff: I'm Listening to the Internet (Not in a Bad Way)" by Ryan Singel, *Threat Level*, August 6, 2008; http://blog.wired.com/27bstroke6/2008/08/chertoff.html . The Secretary's remarks were focused specifically on the national cybersecurity initiative.

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Secretary Hazel O'Leary's Openness Initiative. Formally known as the Fundamental Classification Policy Review, the declared objective of the process was "to determine which information must continue to be protected and which no longer requires protection and should be made available to the public."[8]

The Review was staffed by 50 technical and policy experts from the Department, the national laboratories, and other agencies, divided into seven topical working groups. The groups deliberated for one year, reviewing thousands of topics in hundreds of DOE classification guides, evaluating their continued relevance, and formulating recommendations for change.

Significantly, public input was welcomed and actively solicited at every stage of the process, from identification of the issues to review of the draft recommendations. Public participation was specifically mandated by the Secretary in order to support a Department objective of increasing public confidence in Department activities and operations.

Following their year-long deliberations, the reviewers concluded that hundreds of categories of then-classified DOE information should be declassified. In large part, their recommendations were adopted in practice. Broad categories like the production history of plutonium and highly enriched uranium as well as various narrow technical details were approved for declassification and public disclosure. At the same time, the Review also called for increased protection of certain other categories of classified information, as part of a classification strategy known as "high fences around narrow areas."

The review team's guiding principle was that "classification must be based on explainable judgments of identifiable risk to national security and no other reason." This sensible principle could usefully be applied to classification policy today as well.

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[8] Congress endorsed the review in the FY 1994 Energy and Water Appropriations Bill. For detailed history and recommendations, see the final "Report of the Fundamental Classification Policy Review Group," Dr. Albert Narath, chair, issued by the Department of Energy, December 1997, available at: http://www.fas.org/sgp/library/repfcprg.html . A brief narrative account of the process is available here: https://www.osti.gov/opennet/forms.jsp?formurl=od/fcprsum.html .

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The Proposal: Assign Each Agency to Perform a Classification Policy Review

With the fruitful example of the 1995 DOE Classification Review in mind, the next President could apply its lessons government-wide. The President could initiate a systematic reduction in overclassification by tasking each agency that classifies information to perform a "top to bottom" review of its secrecy policies and practices.[9]

The agencies should be specifically directed to seek out and identify classified information that no longer requires protection and that can be publicly disclosed. The primary objective of the review should be to reduce classification to its minimum required scope. Every classification policy and every classification guide should be subjected to scrutiny and reconsideration -- resulting in affirmation, modification, or revocation. Each agency's review should be completed in a year or less.

As far as possible, the review process itself should be transparent and publicly accessible. At a minimum, agencies should solicit public input, suggestions and recommendations for policy changes, and should provide an opportunity for public comment prior to finalization of draft recommendations.

The Logic of the Proposal

Why would the executive branch voluntarily undertake such a review of its classification policies? One answer is that classification is enormously costly to the government, both operationally and financially.[10] Therefore reducing classification to its necessary minimum would be good management policy and a wise use of finite security

[9] The process could be initiated by executive order, national security directive, or other presidential instrument. Most of the agencies that have been granted authority to classify information were designated in an October 17, 1995 presidential order, available here: http://www.fas.org/sgp/clinton/oca.html . In the Bush Administration, classification authority was also extended to the Secretary of Agriculture, the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency, the Director of the Office of Science and Technology Policy, and the Director of National Intelligence.

[10] The Information Security Oversight Office reported that classification costs within Government reached a record high $8.65 billion in FY 2007, not including the significant costs of the CIA, NGA, NSA, DIA and NRO (which are classified). An additional $1.26 billion was spent to protect classified information in industry. ISOO Annual Report to the President for FY 2007, p. 27; copy available at http://www.fas.org/sgp/isoo/2007rpt.pdf .

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resources even if other considerations were lacking. As noted above, this fact has already been recognized by various executive branch agencies and officials. So it would be a matter of enlightened self-interest for agencies to undertake the proposed review.

The proposal has some other noteworthy features.

Significantly, the proposal would enlist the agencies themselves as agents of the classification reform process, and not simply its objects. Without agency cooperation, classification reform efforts will be piecemeal at best and may be futile. External pressure on an agency typically elicits internal opposition. By contrast, directing the agencies to lead classification reform, in cooperation with interested members of the public, stands a good chance of modifying the rules of these rule-based organizations, as it did for a while at the Department of Energy. It offers a way to alter their bureaucratic DNA.

Another important feature is that the proposed classification policy reviews would be conducted independently by each agency. This approach is based on the premise that far-reaching classification reform can best be accomplished at the individual agency level. In other words, a government-wide statement on classification policy (as important as that might be) will not suffice, because the classification issues that arise in each major national security agency are distinct. For example, intelligence agencies are concerned above all with protection of sources and methods. Military agencies are concerned with the security of military technology and operational planning. Foreign policy agencies must weigh the international impacts of classification and declassification. And so on. Although there may be a role for interagency consultation at some stage of the process, most agencies will need to conduct the bulk of their assessment independently.

Dividing the task among individual agencies in this way may even produce some constructive tension among the agencies. They may find themselves in competition to see which of them can implement the President's directive most effectively, and which one can generate the most significant reforms.

Finally, the role of public participation is essential. Public input will provide agencies with important perspectives on public interests and expectations. It will help to motivate and "incentivize" the process. And it may even nurture a wholesome public engagement with agencies on security policy that has been lacking for years. While

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agency officials may be best qualified to make the final classification decisions in many cases, members of the public are best qualified to articulate their own information needs.[11] Agency responsiveness to public concerns would also serve to increase the legitimacy of the review process.

On the Other Hand: A Few Caveats

Even if the proposal were adopted, it would not constitute a complete solution to the problem of government secrecy. There are several reasons for this.

For one thing, not all government secrecy abuses are rooted in classification policy. Unwarranted restrictions on information that have the same debilitating effects as overclassification can also arise from indiscriminate use of executive privilege, deliberative process claims, and assertions of the state secrets privilege. An expansive new category of "controlled unclassified information" could be applied to something as innocuous as an embargoed press release, according to an official background paper.[12] And a federal court noted last month that the present Administration was withholding unclassified information from disclosure without any justification at all.[13] The current proposal would not fix such problems.

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[11] The feasibility of soliciting public input on security policy has been demonstrated most recently by the Nuclear Regulatory Commission, which asked members of the public to suggest categories of security-related information that should be publicly disclosed. See "NRC Solicits Public Input Into How It Can Increase Public Access to Security Information," Nuclear Regulatory Commission, July 29, 2008; copy available at http://www.fas.org/sgp/news/2008/07/nrc072908.html .

[12] See "Background on the Controlled Unclassified Information Framework," May 20, 2008, copy available at http://www.fas.org/sgp/cui/background.pdf ; and "Press Releases Could Become 'Controlled Unclassified Info'," *Secrecy News*, May 28, 2008.

[13] In a pending lawsuit over the refusal of former White House Counsel Harriet Miers to testify before the House Judiciary Committee, DC District Judge John D. Bates wrote that "the Executive has supplied no justification, and the Court cannot fathom one, for its failure to produce non-privileged documents to the Committee." Memorandum Opinion, Committee on the Judiciary v. Harriet Miers, et al, DC District Court, August 26, 2008, p.8 (emphasis added); copy available at http://www.fas.org/sgp/jud/miers082608.pdf .

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A future Administration could conceivably undertake a broad-based review of all restrictions on public disclosure that encompassed controls on classified, privileged, and unclassified information, which would be a commendable thing to do. But my sense is that the classification system, with its uniquely articulated guidelines and procedures, can best be tackled separately from other information policy issues, and that classification reform would complement and facilitate other needed reforms.

A second caveat is that a sound classification policy depends on the good faith of its practitioners. Our leaders and public servants need not be "angels," but if they are demons, or if they are simply determined to violate classification policy for whatever reason, they will likely find a way to do so. Good faith cannot be mandated or made compulsory through any kind of reform process. All we can do is to elect leaders who act in good faith and seek to replace those who do not.

Lastly, continuing disputes over classification policy are inevitable due to the inherently subjective character of the classification process. It would never be possible to program a computer to decide what should information be classified, since there is no precise, objective definition of what constitutes unacceptable "damage to national security" that would justify such decisions. Instead, classification decisions must be based on judgment and experience. On matters of judgment, there are always likely to be disagreements.

(On the other hand, a hypothetical computer program would discover such objectively clear contradictions in current classification practices that it would be able to flag them as "system errors." For example, the Director of National Intelligence formally declassified the Fiscal Year 2007 budget for the National Intelligence Program on October 30, 2007. But in response to a Freedom of Information Act request, the Office of the Director of National Intelligence said earlier this year that the Fiscal Year 2006 budget for the National Intelligence Program is properly classified.[14] It seems unlikely that both of these judgments are correct.)

While such caveats represent limits to the probable impact of the proposed classification review, none of them negates its inherent utility. Even under the imperfect conditions we face, the proposed steps to eliminate unnecessary classification would be

[14] See the June 4, 2008 denial letter at http://www.fas.org/sgp/news/2008/06/odni060408.pdf .

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worth taking. Moreover, by "draining the swamp" of overclassification, it will become easier to identify pockets of resistance and to focus more closely on classification issues that remain in dispute.

Conclusion

There are numerous other useful steps that can and should be taken to eliminate and prevent inappropriate secrecy, and to promote robust public access to government information. For example:

* Agency inspectors general should be tasked to perform routine periodic audits of agency classification activities to ensure that they are consistent with declared policy.
* In confirmation hearings, presidential nominees should be closely questioned as to their attitudes on transparency and accountability, and should be asked to make specific commitments on secrecy reform.
* Oversight of intelligence agencies should be augmented through the use of cleared auditors from the Government Accountability Office, which has faced resistance from the present DNI and other intelligence agency officials.
* Just as OMB has required all agencies to designate a senior official responsible for privacy matters, agencies should designate another such senior official to be responsible for optimizing public access to agency information. And so on.

But if I were to select one idea out of the many possibilities, I would urge the next Administration and the next Congress to require each classifying agency to perform a fundamental classification policy review of the kind described above.

While the proposed reviews will not resolve all disputed classification issues, there is reason to believe that the review process will serve to discipline classification policy and that it will pay meaningful dividends to the public and the agencies themselves.

Thank you for your consideration of these views.

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Testimony of Mark D. Agrast
Senior Fellow, Center for American Progress Action Fund

Before the Judiciary Subcommittee on the Constitution
United States Senate

Restoring the Rule of Law

September 16, 2008

Mr. Chairman, thank you for the opportunity to testify today. My name is Mark Agrast. I am a Senior Fellow at the Center for American Progress Action Fund, where I work on issues related to the Constitution, separation of powers, terrorism and civil liberties, and the rule of law. Before joining the Center, I was an attorney in private practice and spent over a decade on Capitol Hill, most recently as Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts. A biographical statement is attached to my testimony.

I commend you for convening this hearing. The many ways in which the outgoing administration has turned its back on our nation's long commitment to the rule of law have been exhaustively recounted. But as the presidential transition approaches, it is time to consider how Congress and the next administration can begin to turn the page on this appalling chapter in our history. This will be a major challenge. But it also offers an unprecedented opportunity to rededicate our nation to the advancement of the rule of law.

As we witness the political turmoil in Pakistan, Thailand and Zimbabwe, the repression from Iran to Myanmar, the return of "telephone justice" in Russia, it is a source of solace to know that such things, at least, are unthinkable in the United States.

This is first and foremost because of the rule of law—by which I mean not merely a system of rules, but the culture of lawfulness that is deeply embedded in our national consciousness and reinforced by the Constitution and our civil institutions.

Yet if this is cause for congratulation, it does not justify complacency. The culture of lawfulness in the United States has taken a beating over the past seven years. Many things that were unthinkable *have* taken place. If 9/11 shattered the myth of U.S. invulnerability, the response of our government has laid to rest another myth—that the rule of law was so firmly established in America that we were immune from the lawless exercise of power that afflicts so many other nations. We are not immune. It *can* happen here.

Every four years, we celebrate the peaceful transfer of power that is the envy of the world. Yet our electoral system is a shambles and the integrity of the vote is open to question in a way it had not been before.

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We glory in the finely calibrated system of separated powers bequeathed us by the Framers. Yet the Bush administration has subverted that system by advancing radical and extravagant theories of presidential power. And for the most part, Congress has acquiesced.

We revere the Constitution, which requires the President to faithfully execute the laws of the land. Yet this President has carried out that duty selectively at best, reserving the right to ignore the law, and secretly authorizing government officials to violate laws that limit his authority.

We pride ourselves on a federal judiciary that is widely respected as above politics. Yet its impartiality has come into question, and the system of advice and consent by which that impartiality was to be assured is not functioning as it should. At the state level, where many judges are elected, matters are far worse.

We profess our adherence to the human rights conventions which this nation did so much to put in place. Yet the policies and practices of our government have flouted and undermined some of the most basic of those core protections.

While in fundamental ways, ours is still "a government of laws, not of men," our recent failings have made a mockery of our efforts to lecture the rest of the world about the rule of law. But this situation presents Congress and the next administration with an unusual opportunity. If we can no longer preach to other nations, perhaps we can join with them at last in the common endeavor of advancing the rule of law in every country, including our own.

This hearing is focused on the rule of law in the context of national security claims after 9/11. The witnesses will discuss such issues as the detention and abuse of suspected terrorists and their "rendition" to countries in which they will be subjected to torture; the surveillance of the international communications of U.S. citizens without probable cause; the withholding of government information from Congress, the courts, and the citizenry; and perhaps most egregious of all, the perversion of the law itself to mask and justify lawless conduct by the government.

You will hear testimony today on all of these issues. But I hope you also will look at the larger picture. The assault on the rule of law did not begin with 9/11, nor will it end there. Beyond the specific matters requiring redress, the next administration and Congress need to join together to make the restoration of the rule of law (at home and abroad) an overarching priority.

What does the rule of law require of us? The phrase has been given many meanings. Indeed, it has meant so many different things that it is in danger of meaning nothing at all.

The most recent and comprehensive effort to develop a robust and serviceable definition of the rule of law is that undertaken by the World Justice Project, a

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multinational, multidisciplinary initiative to strengthen the rule of law launched by the American Bar Association and its partners around the world.[1] Its definition comprises four universal principles:

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

These four principles—accountable government; just laws; fair and efficient processes for enacting, administering and enforcing the laws; and equal access to justice—seem to me to capture the essence of what the rule of law should mean.[2] Taken together, they describe a social and political order in which all can enjoy their rights and freedoms under the Universal Declaration of Human Rights, commerce can flourish, and just and equitable communities can thrive.

Unfortunately, these principles have been systematically undermined by the actions of the Bush administration. It has:

- circumvented the constitutional checks that limit its power;
- flouted its obligations under international law;
- employed excessive secrecy and spurious claims of privilege to avoid public scrutiny of its actions and evade accountability for its misdeeds;
- exempted itself from the application of the laws;
- destroyed public confidence in the administration of justice by politicizing the hiring and firing of United States attorneys and career Justice Department officials;
- subverted the laws and the Constitution by issuing secret orders and legal opinions, and secretly revoking them;

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[1] I am a member of the steering committee of the World Justice Project, www.worldjusticeproject.org. However, my views do not necessarily represent those of the Project or its sponsoring organizations.

[2] These principles are further elaborated in the World Justice Project's Rule of Law Index, the first comprehensive effort to assess the extent to which a given country adheres to the rule of law in all of its dimensions. http://www.abanet.org/wjp/rolindex.html

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- misused presidential signing statements to claim the authority to disregard or decline to enforce over 1,100 provisions signed into law by the president, or to interpret the laws in a manner inconsistent with the clear intent of Congress;

- impeded public access to government information through policies that encourage excessive secrecy and non-disclosure;

- detained individuals designated by the president as "enemy combatants" for years without minimal due process, denying them access to counsel and independent tribunals, and arraigning them instead before special tribunals which fail to meet basic standards of fairness;

- authorized the use of torture and cruel, inhuman and degrading treatment and punishment, and the abduction and secret rendition of terrorist suspects to countries where they would be tortured; and

- ordered the interception of the international communications of millions of U.S. citizens in violation of federal statute, without a warrant and without any showing of probable cause.

The reversal of these lawless acts will require specific, targeted action, in some cases through legislation, and in others, through executive branch orders and directives. Such efforts will be immeasurably aided if Congress and the next president pledge to give concerted and systematic attention to the overall task of restoring public confidence in the rule of law.

Recommendations

The next president should:

- Make the restoration and advancement of the rule of law an overarching theme of his administration, highlighting its importance in the inaugural address and on other public occasions.
- Pledge to work with Congress to give priority to measures to restore public confidence in the rule of law, and call upon Congress to work with him in developing initiatives to advance the rule of law.
- Announce that it is the policy of his administration to refrain from actions that weaken public confidence in the rule of law, and that he will enforce a "zero tolerance" policy for official misconduct.
- Establish a national security law committee within the National Security Council to serve as the decision-making body for legal issues related to national security. The committee would be chaired by, and report to the president through, the attorney general. The establishment of such an entity would help ensure that future national security policies are consistent with the rule of law.

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- Establish an interagency working group, headed by a senior official within the Executive Office of the President, to undertake a policy review and initiate, oversee and coordinate efforts to advance the rule of law.
- Direct the Attorney General, the Secretary of State, the Secretary of Homeland Security, and the heads of other key departments, to designate a senior official to participate in the working group and oversee departmental efforts to advance the rule of law.
- Convene a White House conference on the rule of law in America and the world, to include federal, state and local officials and civic leaders, including business, labor, education, scientific, religious, and human rights leaders.
- Work with other world leaders to place the rule of law on the international agenda.

The next Congress should:

- Conduct a bipartisan inquiry into the causes of the breakdown of the rule of law and develop a blueprint for legislative solutions.
- Develop legislative initiatives to promote the rule of law, including civic education initiatives that foster an appreciation of its importance to all segments of society.
- Incorporate into committee oversight plans hearings on progress made by the administration in advancing the rule of law.

Such steps as these will go a long way toward restoring respect for the rule of law as the foundation for communities of equity and opportunity, both at home and abroad.

Thank you.

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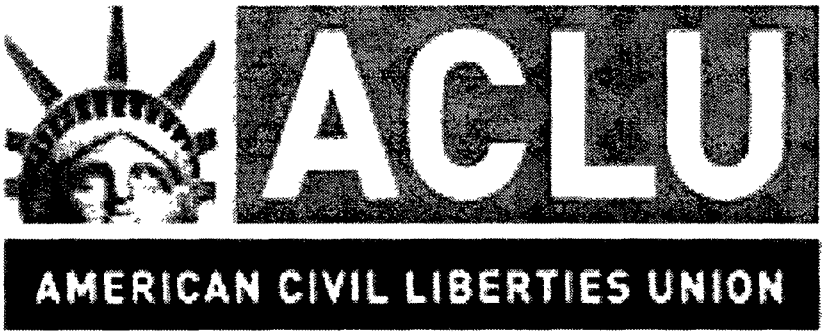

Statement of Caroline Fredrickson
Director, Washington Legislative Office

American Civil Liberties Union

On

"Restoring the Rule of Law"

Before the Subcommittee on the Constitution

Senate Judiciary Committee

September 16, 2008

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We are pleased to submit this statement on behalf of the American Civil Liberties Union, a non-partisan organization with more than half a million members and fifty-three affiliates nationwide, regarding our views on how Congress and the next President can begin to restore the rule of law. The ACLU is well suited to provide this advice as we were founded in 1920 to defend the constitutional rights of political dissidents targeted in an illegal campaign of harassment led by U.S. Attorney General A. Mitchell Palmer during a period of perceived national emergency similar to the one we face today. As new crises emerged over the decades, the ACLU has remained a vigilant defender of the American values enshrined in our Constitution and Bill of Rights, and we have been at the forefront since the terrorist attacks of September 11, 2001, in challenging illegal and unconstitutional government programs undertaken in the name of national security.

The ACLU believes that preserving our commitment to the rule of law, human rights, and individual liberties at home and around the world is essential to developing effective and sustainable policies to protect our national security. As its primary goal, this Subcommittee should put to rest the dangerously false assumption that new threats to our security justify a deviation from these fundamental values. In his first inaugural address, Thomas Jefferson acknowledged the honest fear some held that our republican form of government would not be strong enough to protect itself in troubled times, yet he argued it was our nation's commitment to individual liberty and "the standard of the law" that made it the strongest on earth.[1] Jefferson counseled that if we ever found, in a moment of "error or alarm," that our government had abandoned its essential principles we should retrace our steps in haste "to regain the road which alone leads to peace, liberty, and safety." The ACLU applauds the Subcommittee for holding this hearing and for exploring, after an extended period of error and alarm, the quickest path to restoring that greatest protector of our national security: the rule of law.

THE NEED FOR ACCOUNTABILITY

An effort by Congress and the next President to account fully for government abuses of the recent past is absolutely necessary for several reasons. First, only by holding those who engaged in intentional violations of law accountable can we re-establish the primacy of the law, deter future abuses, and reclaim our reputation in the international community. Second, only by creating an accurate historical record of recent failures and the reasons for them can government officials, historians, and other chroniclers properly understand the failure of internal and external oversight mechanisms and how to reform our national security programs and policies. Finally, only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

In January 1776, Thomas Paine declared "in America, the law is king."[2] With this simple statement, Paine sparked a revolution and altered forever the way people would evaluate the legitimacy of not only our government, but all governments. Around the world, wherever the law is king, freedom, equality, and legitimacy naturally follow. Unfortunately, after the devastating terrorist attacks of September 11, 2001, the Bush administration deliberately chose to

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abandon the law in favor of working "on the dark side," in secret, in violation of our own core principles and universally recognized standards of international behavior.

Relying on an aggrandized theory of executive power that is diametrically opposed to the fundamental concept of checks and balances enshrined in the Constitution, the administration secretly initiated extra-judicial detention programs and cruel, inhuman and degrading interrogation methods that violated international treaties and domestic law. It engaged in extraordinary renditions – international kidnappings – in violation of international law and the domestic laws of our allied nations. It conducted warrantless wiretapping within the United States in violation of the Foreign Intelligence Surveillance Act and the Fourth Amendment. And these are only the abuses that have come to light at this time. The administration intentionally weakened internal oversight mechanisms by politicizing the Department of Justice in an unprecedented fashion and by promulgating secret legal opinions deliberately crafted to provide a veneer of legitimacy over these illegal programs, but which could not withstand scrutiny under any generally accepted standard for legal analysis. It intentionally hindered external oversight by obscuring its activities behind a cloak of secrecy designed not to protect our national interests but to hide abuse and illegality and to thwart constitutional checks and balances. Rather than improve our security these misguided policies have provided propaganda victories for our enemies, alienated our allies, and sown distrust of the government here inside the United States. Meanwhile, at least according to recent testimony from the leaders of our intelligence agencies, the threats to our national security are increasing rather than diminishing.[3]

Yet an honest assessment of our predicament cannot lay the blame entirely at the feet of this administration, or even the cumulative usurpations of power of Presidents past. For while a forceful desire to expand executive power beyond its constitutional limits was necessary to achieve such an unchecked concentration of power within one branch, it could not have been achieved without the willful abdication of responsibility by the other branches. James Madison explained in Federalist 51 that "the great security against the gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." In short, "[a]mbition must be made to counteract ambition."

The Constitution provides ample tools for Congress and the courts to check executive abuses of authority, such as those described above. The failure to use those tools leaves the members of both other branches equally to blame for the consequences of the administration's misguided policies. The courts have too often and too easily acquiesced to government state secrets privilege claims in dismissing lawsuits challenging illegal programs like extraordinary rendition and NSA warrantless wiretapping.[4] Congress is perhaps more at fault, however, because the Constitution gives it the more robust tools. As Madison said, "[i]n republican government, the legislative authority necessarily predominates," yet Congress did not fulfill its responsibility.

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THE ROAD BACK TO RESTORING THE RULE OF LAW

I. ENFORCE THE LAW

The rule of law is meaningless if left unenforced. Some of the programs that have been exposed through internal investigations, government whistleblowers, or press reports appear to involve violations of U.S. criminal statutes. American CIA officers allegedly involved in extraordinary renditions in Europe have found themselves prosecuted for kidnapping by Italian authorities, and under criminal investigation elsewhere.[5] Our government's failure to address these matters in our own courts of law and failure to defend these charges publicly diminishes our moral standing on the international stage.

Any effort to restore the rule of law in the United States requires that serious allegations of illegal behavior by government agents be investigated thoroughly by a competent authority and, if sufficient evidence of criminal violations is established, prosecuted in criminal courts. In the best of all possible worlds, career prosecutors at the U.S. Department of Justice would carry out this responsibility. Unfortunately political litmus tests used in the hiring and firing of Justice Department employees and the promulgation of specious legal opinions regarding post-9/11 national security programs now cast doubt on the political independence of Department prosecutors. When Justice Department officials cannot pursue investigations due to real or perceived conflicts of interest, the Attorney General should appoint an outside special counsel to conduct an independent investigation.

Justice Department regulations require the appointment of an outside special counsel when a three-prong test is met.[6] First, a "criminal investigation of a person or matter [must be] warranted." Second, the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department." And, third, "under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." When this three-prong test is met a special counsel must be selected from outside the government and given full investigatory and prosecutorial powers and the authority to secure the necessary resources.

The ACLU has previously called for the Attorney General to appoint outside special counsel to investigate the torture and abuse of detainees held in U.S. custody overseas; to investigate the National Security Agency's warrantless wiretapping program; and to investigate the destruction of Central Intelligence Agency interrogation videotapes.[7] Attorney General Mukasey did recently assign an Assistant United States Attorney from Connecticut to investigate the CIA's destruction of interrogation tapes, but this is not the type of independent investigation required under the regulation.[8] Moreover, the investigation is improperly limited to illegal activity surrounding the destruction of the tapes, rather than the illegal interrogation methods they depict. The three-prong test for appointing an outside special counsel is met in each of these matters, and we urge Congress to join us in renewing the call for the Attorney General to appoint special counsel to investigate these potential violations of law. Should a new President take office before an outside special counsel is appointed, that President should order his

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Attorney General to appoint outside special counsel regarding all of these matters, to ensure independence from any possible political influence.

II. RESTORE CONSTITUTIONAL CHECKS AND BALANCES

A program to restore the rule of law must focus on restoring the constitutional checks and balances that ensure the three branches of government are accountable to one another, and to the American public they serve. Excessive secrecy is the most significant menace to accountability in government today and Congress and the next President must address this problem in all its forms.

A. STATE SECRETS PRIVILEGE

First, Congress must pass legislation to reform the state secrets privilege so private lawsuits challenging illegal and unconstitutional government practices can proceed in a manner that allows injured plaintiffs their day in court while protecting legitimate government secrets. The ACLU supports the State Secrets Protection Act, S. 2533, sponsored by Senator Kennedy and similar legislation in the House, H.R. 5607, sponsored by Representative Nadler. Both bills would require courts to review evidence and make independent judgments regarding disclosure and use of information claimed to be subject to the privilege, and would allow the legal process to move forward to a just conclusion with substitute information or other unprivileged evidence when possible. Such reforms would re-arm the courts as an effective check on executive power and provide a forum for holding the government accountable for abusive national security programs that cause real harm to innocent people.

B. CONGRESSIONAL OVERSIGHT

Second, Congress should begin vigorous and comprehensive oversight hearings to examine all post-9/11 national security programs to evaluate their effectiveness and their impact on civil liberties, human rights, and international relations, and it should hold these hearings in public to the greatest extent possible. Congress has several options in how it could pursue such oversight, whether through standing committees with jurisdiction, or select committees or special committees established for specific purposes (or both). However, it is critically important for Congress to do this work itself rather than to appoint an outside commission. Only by routinely exercising congressional oversight powers will Congress be able to restore its authority to compel the timely production of documents and witnesses from the executive branch, thereby empowering Congress to perform more effective oversight going forward.

Passing oversight responsibility to an outside commission would only reinforce the perception that Congress has neither the authority, capability nor political will necessary to conduct proper oversight on its own. Moreover, outside commissions can often limit Congress's options in addressing a particular problem by issuing recommendations. Because the public views these commissions as politically independent, deservedly or not, it often becomes politically expedient for Congress to adopt their recommendations wholesale, regardless of whether its own review would come to the same conclusions. If such a commission's recommendations fail, Congress could avoid responsibility and simply blame the commission.

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The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government.

As the "predominant" branch of our republican government, to use Madison's expression, the Constitution provides Congress with robust powers to exert its will over the executive. The Congressional Research Service Congressional Oversight Manual lists six constitutional provisions authorizing Congress to investigate, organize, and manage executive branch activities.[9] The most direct and forceful tools are the power of the purse, the confirmation power, and the impeachment power. Congress can use these powers to leverage cooperation from the executive branch, but Congress can also directly compel compliance with congressional inquiries when necessary. The Supreme Court explained the constitutional basis for Congress's power to investigate, and to compel compliance, in *McGrain v. Daugherty*:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed... Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[10]

Yet despite the unquestioned legitimacy of this authority, Congress has not used its inherent contempt power since 1935. While we respect Congress's self-restraint in its use of its power to deny people their personal liberty, the failure to compel compliance has allowed recalcitrant executive branch officials to thwart congressional oversight by using unjustifiable delaying tactics, incomplete compliance, or outright refusal to cooperate based on specious claims of privilege and litigation. Once the threat of inherent contempt proceedings becomes real, however, Congress would likely find future Presidents and executive officials more responsive to congressional requests for information.

And despite administration claims to the contrary, Congress retains these robust powers even in matters of national security and foreign affairs. Not only does the Constitution require a role for Congress in the decision-making process over national security matters, but sound government policy demands it. The Constitution gives Congress the power to declare war and to make rules regulating land and naval forces. Congress, and Congress alone, has the power to levy and collect taxes for the common defense and to appropriate funds as it sees fit. These powers were given to the legislative branch intentionally so that the legislature, as the representatives of the people and the more deliberative branch of government, would have direct control over the critical decisions regarding war and peace. The framers realized our democracy would be strongest when congressional action, supported by the will of the people, guides our use of military activities abroad.

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Congress has the power to demand access to national security information and Congress must use this authority to oversee intelligence activities.[11] The National Security Act of 1947 and the Intelligence Oversight Act of 1980 codify Congress's right to national security information, but access to this information is inherent in the constitutional power to legislate. Under the current statutory structure, congressional oversight of intelligence matters is primarily conducted in classified sessions, so Members of Congress who become aware of abusive security programs are prohibited from sharing this information with the public. This secrecy thwarts public oversight, a key aspect of accountability for both the executive branch and Congress. Recent revelations that certain Members of Congress were advised of the NSA's domestic wiretapping activities and the CIA's interrogation practices long before they were revealed to the public illuminate this problem, as their ability to curb these activities was limited to filing secret letters of concern.[12] This problem is only exacerbated when the executive limits notification regarding covert activities to the "Gang of Eight" -- congressional leaders of both houses and both parties and the chairmen and ranking members of the intelligence committees.[13] Notice regarding particular intelligence activities is meaningless if congressional leaders cannot share the information with colleagues as necessary to pursue legislative measures curb executive abuse.

Congress has the power under its own rules to declassify national security information, though it has never exercised this authority.[14] Congress should use its power to demand access to national security programs and should immediately declassify any information that reveals illegal government activities or abuses of rights guaranteed under the Constitution or international treaties, in a manner that does not disclose technical military information that could harm national security. Congress should also exercise the power of the purse to de-fund illegal or abusive programs, or any program the President refuses to let Congress examine. Congress can also improve its ability to receive information about national security programs by passing effective whistleblower protection for national security, intelligence, and law enforcement agency employees, such as those incorporated in H.R. 985, the Whistleblower Protection Amendments Act of 2007.

The President has no right to deny Members of Congress access to national security matters, or to limit access to classified information to certain Members. One of the issues Congress should examine, perhaps through a select or special committee investigation, is why the intelligence committees and current congressional oversight procedures failed to check executive abuses in national security programs. Learning the reasons for these procedural failures is a necessary first step to establishing a more effective system for the future.

C. OVER-CLASSIFICATION

In addition to thwarting congressional, judicial and public oversight, excessive secrecy is also damaging national security by impeding effective information sharing among federal agencies and with state and local governments and private stakeholders. The classification system is a cold war relic poorly suited to address the diffused threat environment we face today. Secrecy is making us less secure, not more. Congress has held many hearings exploring the problem of over-classification but few concrete steps have been taken to institute reforms. Congress should make a priority of identifying and quickly implementing reform measures that

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will ensure that our security programs respect the rule of law, human rights and individual liberties. A reformed information classification system that incorporates effective oversight mechanisms will better serve our national interests by compelling efficiency and accountability in all government security programs.

III. RESTORE EFFECTIVE LEADERSHIP

While congressional and judicial oversight of national security programs will help restore the accountability systems that are built into our constitutional framework, it will also be incumbent on the next president to perform an extensive evaluation of every national security program and immediately halt any program that is illegal, abusive or ineffective. The next president should establish policies of public transparency in our national security programs to regain public trust and support.

The next president should recognize that ineffective or abusive security programs are counterproductive to long-term government interests, so both internal and external oversight mechanisms should be nurtured and strengthened. Establishing a culture of constant re-evaluation and reform within executive branch agencies will allow for more self-correction in advance of congressional investigations or litigation. The president should foster a cooperative relationship with Congress, limiting claims of privilege strictly to those absolutely necessary to protect the integrity of executive branch operations. While the friction between the branches is a necessary part of our constitutional system, the next president should learn from the past and recognize that Congress and the courts play essential roles in ensuring that we remain a nation where the law is king.

CONCLUSION

It is now widely known around the world that since 9/11 the United States government authorized its agents and employees to conduct international kidnappings, indefinitely detain people without judicial process, often in secret prisons, and engage in cruel, inhuman and degrading treatment of those detainees – including the use of techniques most reasonable people recognize as torture. It is difficult to understand how a nation founded on the ideals articulated by Thomas Paine and Thomas Jefferson could have allowed such things to happen, but understand we must. We are at a crossroads. Unless we render a full accounting and create an accurate record of how top officials discarded our core principles, we will never be able to find our way back to that high road that made America a symbol of liberty, equality, and justice around the world. The ACLU remains confident, as we have since our founding in 1920, that the rule of law will ultimately prevail. But it is up to you, as the elected representatives of the American people to provide this full accounting; to hold individuals accountable where appropriate; to reform the checks and balances that were designed to keep our government in check; and to restore the rule of law over the government of the United States.

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[1] Thomas Jefferson, First Inaugural Address, Washington, DC, (Mar. 4, 1801), *available at* http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm.
[2] Thomas Paine, Common Sense, (1776).

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[3] *See, Current and Projected National Security Threats: Hearing before the Senate Select Comm. on Intelligence*, 110th Cong. (Feb. 5, 2008); *Annual World-wide Threat Assessment: Hearing before the House Permanent Select Comm. on Intelligence*, 110th Cong. (Feb. 7, 2008).

[4] *See,* El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. 2006); Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9thCir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*
507 F.3d 1190 (9th Cir. 2007); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007), *cert. denied,* 128 S.Ct. 1334 (2008); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).

[5] *See, Trial on CIA Rendition Resumes in Italy,* ASSOCIATED PRESS, (Mar. 19, 2008); *and* Don Van Natta, Jr. and Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link,* N. Y. TIMES, (Jan. 9, 2005).

[6] 28 C.F.R. part 600.1 et seq.

[7] *See,* American Civil Liberties Union, Letter to Attorney General Alberto Gonzales, Requesting Appointment of Outside Special Counsel for Investigation and Prosecution of Civilian Violation, or Conspiracy to Violate, Criminal Laws Against Torture or Abuse of Detainees (Feb. 15, 2005), *available at* http://www.aclu.org/safefree/general/17582leg20050215.html; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting Investigation of Possible Perjury by General Ricardo A. Sanchez; Renewal of Request for an Outside Special Counsel to Investigate and Prosecute Violations or Conspiracies to Violate Criminal Laws Against Torture or Abuse of Detainees (Mar. 30, 2005), *available at* http://www.aclu.org/safefree/general/17554leg20050330.html; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting the Appointment of Outside Special Counsel for the Investigation and Prosecution of Violations, or Conspiracy to Violate, Criminal Laws Against Warrantless Wiretapping of American Persons (Dec. 21, 2005), *available at* http://www.aclu.org/safefree/general/23184leg20051221.html; *and* American Civil Liberties Union, Letter to Attorney General Michael Mukasey, Requesting the Appointment of Outside Special Counsel for the Investigation into the Destruction of CIA Interrogation Tapes, (Jan 7, 2008) *available at* http://www.aclu.org/images/general/asset_upload_file88_33530.pdf.

[8] Congressman John Conyers, Jr., *Conyers Demands that DOJ Appoint Real Special Counsel,* Statement (Jan. 2, 2008), http://judiciary.house.gov/news/010208.html.

[9] Frederick M. Kaiser and Walter J. Oleszek, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS,5 (Jan. 3, 2007).

[10] 273 U.S. 135, 174-175 (1927).

[11] *See,* Kate Martin, CENTER FOR NATIONAL SECURITY STUDIES, CONGRESSIONAL ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION, (March 2007), *available at* http://www.openthegovernment.org/documents/congressional_paper.pdf.

[12] *See,* Senator Jay Rockefeller, Letter to Vice President Cheney Concerning NSA Wiretapping Program (Jul. 17, 2003), *available at* http://www.talkingpointsmemo.com/docs/rockefeller-letter/; *and,* Greg Miller and Rick Schmitt, *Letter Said CIA Image to Suffer if Tapes Trashed,* LOS ANGELES TIMES, (Jan. 4, 2008), *available at* http://articles.latimes.com/2008/jan/04/nation/na-ciatapes4.

[13] *See,* Alfred Cumming, CONGRESSIONAL RESEARCH SERVICE, STATUTORY PROVISIONS UNDER WHICH CONGRESS IS TO BE INFORMED OF INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTION, (Jan. 18, 2006), *available at* http://epic.org/privacy/terrorism/fisa/crs11806.pdf.

[14] *See,* Project on Government Oversight, Congressional Tip Sheet on Access to Classified Information, (Oct. 2007), http://pogoarchives.org/m/cots/cots-october2007a.pdf.: "The House rule allowing declassification by the House Permanent Select Committee on Intelligence can be found in Rules of the 109th Congress, U.S. House of Representatives, Rule X. Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to declassify."

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ASSOCIATION OF
RESEARCH LIBRARIES

Statement for the Record
U.S. Senate Committee on the Judiciary,
Subcommittee on the Constitution

for the hearing:

"Restoring the Rule of Law"

Submitted by
the American Library Association and the Association of Research Libraries

The American Library Association (ALA) and the Association of Research Libraries (ARL) (hereafter known as "the Libraries"), submit this statement for the record to the Senate Judiciary Committee's Subcommittee on the Constitution hearing titled, "Restoring the Rule of Law" held on September 16, 2008.

Founded in 1876, the ALA is the oldest and largest library association in the world with more than 66,000 individual members and 4,000 library and corporate members dedicated to improving library services and promoting the public interest in a free and open information society.

The ARL is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

Looking to the future, the next President and Congress must work vigorously to ensure the privacy rights of our citizenry while enforcing the law. Protecting library patron privacy and the confidentiality of library records are deep and longstanding principles of librarianship, and guide the daily work of all types of libraries. Based on these principles, the Libraries have worked to reform legislation related to privacy, National Security Letters (NSLs), and the Foreign Intelligence Surveillance Act (FISA). Recommendations to the next President and Congress by Libraries related to these policies are included below. In addition, a number of related issues not addressed in this statement, which are extremely important to libraries include: the accountability and transparency of government, especially via the Freedom of Information Act (FOIA); improving access to e-government information; and ensuring public access to Presidential records.

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Privacy

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." -- Fourth Amendment of the U.S. Constitution*

Libraries have deep and longstanding principles concerning the protection of patron privacy. Privacy is essential to exercise free speech, free thought, and free association. In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others. Forty-eight states and the District of Columbia have patron confidentiality laws; the attorneys general in the remaining two states (Hawaii and Kentucky), have issued opinions recognizing the privacy of library users' records; and ten state constitutions guarantee a right of privacy or bar unreasonable intrusions into patrons' privacy. The courts have established a First Amendment right to receive information in a publicly funded library. Further, the courts have upheld the right of privacy based on the Bill of Rights of the U.S. Constitution.

Libraries remain pillars of democracy, institutions where citizens come to explore their concerns, assured that they can find information on all sides of controversial issues, and confident that their explorations remain personal and private. For example, a woman looking for information on divorce or breast cancer does not want those concerns known to anyone else; a student who wants to study about the Qur'an should not have to wonder if the government is inquiring about why he is interested in this topic; a business owner curious about markets for his products or services in the Middle East should not have to worry that by researching these markets at the public library he will arouse FBI suspicions. In a recent and very public case in which a library was served an NSL, a person affected by the gag order simply and yet so eloquently stated, "Spying on people in the library is like spying on them in the voting booth."

In looking to the future, the next President and Congress must work to restore privacy rights that have eroded in recent years with the expanded use of National Security Letters, while at the same time, balancing the enforcement of the law. For libraries to flourish as centers for unencumbered access to information, librarians must stand behind their patrons' right to privacy and freedom of inquiry. Patrons should feel comfortable using library materials and services knowing that their use of the library is not monitored. The Libraries have consistently stated that while librarians fully support the efforts of law enforcement in legitimate investigations, those efforts must be balanced with an individual's fundamental and constitutional right to privacy.

National Security Letter (NSL) Reform and the USA PATRIOT Act

In recent years, the USA PATRIOT Act, coupled with the Intelligence Authorization Act of FY 2004, drastically expanded the Federal Bureau of Investigation's (FBI's) authority to obtain business and personal records of Americans by issuing National Security Letters (NSLs). This expansion directly impacts library patrons' rights and expectations of privacy when using library services – as NSLs do not require prior judicial approval and can be used to obtain a wide range of documents based on claims that the information is merely "relevant" to a terrorism investigation. In addition, the FBI can keep records acquired via an NSL indefinitely, even after the subject of the records has been deemed innocent of a crime and is no longer of intelligence interest. Arguably, while the FBI needs prompt access to some types of information acquired

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under NSLs, civil liberties are nonetheless being sorely tested by law enforcement abuses of national security letters. The questions raised vindicate the concerns that the library community and others have had for the last several years about the broad powers expanded under the USA PATRIOT Act. The Libraries believe changes can be made that conform to the rule of law, do not sacrifice law enforcement's abilities to pursue terrorists, yet maintain civil liberties guaranteed by the U.S. Constitution.

We are driven by a key principle of librarianship -- the deep-rooted commitment to patron confidentiality. To function as such, the public must trust that libraries are committed to such confidentiality. When the USA PATRIOT Act was signed into law, our Libraries, and booksellers, authors and others, were concerned about the lack of judicial oversight as well as the secrecy associated with a number of the Act's provisions and the NSLs, in particular. Adding to heightened concern is the inherent nature of the NSL gag orders themselves -- librarians receiving these letters are not able to inform patrons about specific or broad inquiries. Nor can libraries report the use of NSLs to local or Congressional officials, impeding both oversight responsibilities to insure that abuses are not occurring and the ability to assess the use of such legal tools. The Libraries call on the next President and Congress to demand greater accountability on these important issues.

The Libraries would also like to highlight that the misconception still exists that some civil liberties were restored in the revised PATRIOT Act. Language in the revised law appears to protect the privacy of library records; however, a loophole inserted into the wording allows the FBI to use an NSL to obtain library records nonetheless. The revision states that a library functioning in a "traditional role" is not subject to an NSL *unless* it is providing "electronic communication services," which the law defines as "any service that provides to users thereof the ability to send or receive wire or electronic communications." Thus, any library providing Internet service can still be served with an NSL – which is essentially every library in the United States today. Robert Mueller, FBI Director, in a written response to a Senate Judiciary Committee inquiry, even stated that new language "did not actually change the law."

While the re-authorized USA PATRIOT Act appears to provide a way to challenge the lifetime gag order imposed on anyone who is required to turn over records to the FBI via an NSL, a loophole in the wording makes it virtually impossible for anyone to successfully challenge the gag order. According to the revised PATRIOT Act, if the government declares that lifting the gag order would "harm national security"; the court must accept that assertion as "conclusive" and dismiss the challenge. Hence, there is no prior judicial review to approve an NSL and, with rare exception, no legal way to challenge an NSL after the fact.

Like so many others, the library community believes that secrecy is a threat to open government and a free society. It is the secrecy surrounding the issuance of NSLs that permits their misuse. Because all recipients of NSLs were gagged, no one knew exactly how many the FBI had issued; there was no public examination of the practice; and finally, there was no inquiry into whether such action was the best use of FBI resources. These questions cannot be asked if gag orders and other forms of secrecy prevent Congress from knowing the power the FBI exerts. Secrecy that prevents oversight and public debate is a danger to a free and open society.

Therefore, the Libraries urge the next President and Congress to re-consider the PATRIOT Act. Restore basic civil liberties. Restore constitutional checks and balances by requiring judicial

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reviews of NSL requests for information, especially in libraries and bookstores where a higher standard of review should be considered. National security letters are very powerful investigative tools that can be used to obtain very sensitive records. The FBI should not be allowed to issue them in an unrestrained and unrestricted manner. NSLs should not be issued unless a court has approved the action and found that the records being sought are truly relevant to identifying a suspected terrorist. We believe that terrorists win when fear of them induces us to destroy the rights that make our country free. However, because of the gag order imbedded within NSLs, the next President, our elected Senators and representatives, and the American public, are denied access to the stories and information about these abuses. This is information that is needed to conduct oversight, work for appropriate changes to current law, and seek to protect our constitutional rights.

FISA Reform and Looking to the Future

Related to the privacy concerns raised by the unrestricted and unmonitored use of NSLs, the Libraries seek language in future reform and modernization of the Foreign Intelligence Surveillance Act (FISA) that ensures judicial review of law enforcement requests for library patron records or surveillance of library users through library networks. The Libraries strongly believe that when the government seeks foreign intelligence information from libraries in the United States, it should do so only on an order authorized by the Foreign Intelligence Surveillance Court (FISC), regardless of whether the person using the library services is a U.S. citizen or not, or located with the United States or abroad. Libraries are gateways to freedom abroad – as they offer expanded services globally, provide distance learning opportunities, and serve American and foreign students abroad, as part of their essential mission.

Libraries are, of course, subject to law enforcement. Librarians respect the law and most certainly want to abide by the law when it comes to pursuing terrorists and protecting our country. We recognize and accept that, with appropriate judicial review, law enforcement can obtain certain patron information with subpoenas and appropriate court orders. What has disturbed the library community in recent years has been the idea that the government could use the USA PATRIOT Act, FISA, NSLs and other laws, to learn what our patrons were researching in our libraries with no prior judicial oversight or after-the-fact review.

A 2005 report released by the ALA documents the *chilling effect* of law enforcement activity in libraries. The *Impact and Analysis of Law Enforcement Activity in Academic and Public Libraries* found that library patrons are intimidated by intrusive measures such as the USA PATRIOT Act and NSLs. This so-called chilling effect can take on many forms – for example, a library patron concerned about the privacy (or lack thereof) of their library records may be hesitant, or even decide not to, checkout or view certain materials.

We ask the next President and Congress to help us with our ongoing efforts to rebalance our patrons' civil liberties with the need for protecting our national security.

Submitted for the record September 23, 2008

American Library Association – Lynne Bradley, 202-628-8410
Association of Research Libraries – Prue Adler, 202-296-2296

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Testimony of Nancy Talanian
Executive Director
Bill of Rights Defense Committee

"Restoring the Rule of Law"

Prepared for the Constitution Subcommittee of the Committee on the Judiciary
United States Senate
September 16, 2008

On behalf of the Bill of Rights Defense Committee, I thank Chairman Feingold for the invitation to submit written testimony to support the efforts of the next Congress and the next administration to restore the rule of law.

What Is the Bill of Rights Defense Committee (BORDC)? BORDC was established in 2002 as a community-based response to post-9/11 assaults on civil liberties, including the passage of the USA PATRIOT Act and the roundups and detention of approximately 5,000 immigrant men who had no connection to the terrorist attacks or Al Qaeda. The mission of the Bill of Rights Defense Committee is to promote, organize, and support a diverse, effective, national grassroots movement to restore and protect the civil rights and liberties guaranteed to all U.S. residents by the Bill of Rights. BORDC provides educational resources, strategies, and technical support to local coalitions that are concerned about laws and policies that threaten civil liberties and damage human rights.

Grassroots Response to Government Curbs on Civil Liberties and Violations of Human Rights. The new laws and policies, including unprecedented government secrecy and, increasingly, government abuses of individual rights have generated renewed interest nationwide in the Bill of Rights, the Constitution, and the Geneva Conventions and other international treaties the U.S. has signed. Hundreds of nonpartisan local and statewide coalitions across the United States have acted on their concerns and have used BORDC's educational resources to work for the passage of eight statewide resolutions and more than 400 local resolutions and ordinances opposing provisions of the PATRIOT Act or other civil liberties erosions, reaffirming constitutional rights and setting standards for local police conduct. The state and local jurisdictions that have enacted these resolutions have a combined population of 85 million. The City Council of the City of New York is among them. *(See attached list.)*

Failure to Prevent Terrorist Attacks Versus Government's Responses. There is no evidence that laws and policies promoting openness in government or protecting civil liberties were responsible for pre-9/11 intelligence failures. To the contrary, reports from several investigations have concluded that human failures and agency culture – notably turf wars and a failure to lawfully share information – contributed to the attacks. Nevertheless, the government's reaction has been to change the laws and policies to give increased discretion to the executive branch and to limit oversight by the other coequal branches. No proof has been offered that these new laws and policies were necessary or are likely to be effective in preventing terrorism. Policies that permitted the kidnapping and torture of detainees, for example, may have had the opposite effect. The low numbers of convictions and the high numbers of innocent

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victims say otherwise: that government resources are being squandered prying into the lives of innocent Americans, especially those who choose to exercise their First Amendment right to dissent or to practice the Muslim religion. Journalists gathering information on government actions have also been under attack.

BORDC applauds Congress's steps taken so far to increase its oversight of the executive branch. Internal audit reports you have demanded have uncovered abuses and misuses of new powers such as the FBI's powers to issue national security letters. This is an excellent time to reconsider the need for and effectiveness of antiterrorism laws and policies and to work in a bipartisan manner to investigate government abuses and to restore constitutional checks.

This testimony outlines some of the more troubling laws and policies adopted since 9/11 and recommends that they be repealed or revised in order to ensure that they conform with the Constitution and Bill of Rights. Congress will have an opportunity next year to revisit a few of the laws that sunset on December 31, 2009, but it should not wait until then to restore the American people's rights and freedoms, nor should it limit its review and amendments to those few provisions that sunset. We have organized our recommendations according to the provisions of the U.S. Constitution.

ARTICLE I, SECTION 9: HABEAS CORPUS

Recommendations to Congress:

Restore Habeas Corpus for All Persons Detained by the U.S. Government. The majority of detainees designated "enemy combatants" have been released without any charges. The Guantánamo Bay detention center has become a symbol of shame and outrage for the U.S., exacerbated by Congress's support of the President's position that he can designate any person in the world an "unlawful enemy combatant" without court review or the right to bring a habeas corpus action in civilian court. The U.S. sets a poor example for other countries and helps recruit new terrorists by preventing alleged victims of U.S. violations of the Geneva Conventions from filing habeas corpus claims in U.S. courts.

Recommendation: Congress should repeal the Military Commissions Act to help restore the United States' reputation for respecting the rule of law, and by so doing, raising the international standard for the human rights and dignity of detainees to its previous level.

Recommendation to the President

End the CIA Extraordinary Rendition Program and CIA Ghost Detainees Program. The CIA's practice of turning over terrorism suspects to foreign countries that practice torture and of violating international laws regarding the holding and interrogation of detainees, including ghost detainees, has brought shame to our country and has made it more likely that other countries will follow the U.S.'s example of violating international laws established to protect detainees.

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Recommendation: The new president should rescind all legal memos and orders that justify these programs and reassert the United States' adherence to U.S. laws and international treaties to which the U.S. is a signatory.

ARTICLE I: SEPARATION OF POWERS

Recommendation to the President

End Practice of Using Executive Signing Statements to Circumvent Laws Properly Enacted by Congress. The majority of President George W. Bush's signing statements have raised constitutional objections and indicated his intention to ignore legislation properly enacted by Congress. The American people have the right to rely on laws enacted by Congress for the people's benefit.

Recommendation: The new president should strictly adhere to the Constitution's provision that he faithfully execute the laws passed by Congress. The president has the power to veto bills of which he disapproves, but once he signs a bill into law, he should follow all of the provisions of that law.

FIRST AMENDMENT: FREEDOM OF RELIGION, SPEECH, PRESS, ASSEMBLY, AND DISSENT

Recommendation to Congress

Amend "gag orders" related to Section 215 and FBI national security letters. In 2006, when Congress reauthorized the USA PATRIOT Act, it set processes for appealing permanent gag orders that are heavily weighted toward the executive branch. Even after a national security letter recipient waits for a year to challenge the gag order within the letter, the government's assertion that there is a national security basis for the gag is conclusive, making the right to challenge the gag order theoretical rather than real. Given the steep obstacles, only three recipients have challenged their gag orders, and only two have succeeded.

Recommendation: Congress should change the law to give judges discretion to determine, case by case, whether the government's claims of national security requiring permanent gag orders are justified. Gag orders preventing third-parties from ever telling their customers that their records were given to the FBI should be lifted if no evidence is found linking the records with any wrongdoing.

Recommendations to the President

Call on the New Attorney General to Rescind Attorney General's May 30, 2002, guidelines. These guidelines replaced anti-COINTELPRO regulations by authorizing the FBI to monitor and conduct surveillance of religious and political groups without evidence of wrongdoing.

These guidelines have had a chilling effect on free speech, the practice of religion, and the right to dissent. They also permit agents and informants to attend meetings and gatherings of peaceful

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groups as *agents provocateur*. Through these tactics, impressionable members of a group may be swayed towards talk of violence and peaceful individuals may be driven out or discouraged from joining a group.

Recommendation: In order to establish that his administration respects the First Amendment, the new president should call on the new Attorney General to rescind the guidelines.

Call on the Attorney General to rescind Freedom of Information Act (FOIA) Memorandum of October 12, 2001. Congress recognized the public's right to know what its government is doing and supported that right with the passage of FOIA. The Attorney General's memorandum now in place has allowed the government to cover up information the public requests, such as the identities of approximately 5,000 immigrant men who were detained without charges after the September 11th attacks, not one of whom was found to have any involvement in the attacks or with Al Qaeda.

Recommendation: The new president should direct that the Ashcroft FOIA memorandum be rescinded and replaced with new guidelines that emphasize openness, in the true spirit of the FOIA. Agencies should be directed to not assert exemptions for information requested through the FOIA unless the agency foresees disclosure would cause harm to a protected interest under that exemption.

End FBI use of Joint Terrorism Task Forces (JTTFs) to interfere with activities protected by the First Amendment. Several JTTFs have engaged in activities more likely to discourage First Amendment-protected dissent and free speech than to prevent terrorist attacks. The FBI spy files on peaceful protestors in Denver, the JTTF's subpoenas and gag orders related to a Drake University campus antiwar protest in 2003, and the case against art professor Steven Kurtz in Buffalo, New York, are a few examples.

Recommendation: The president should ensure that law enforcement officers engaged in JTTFs fulfill their obligations to uphold the Constitution. Therefore, the president should prevent the JTTF's resources from being used to spy on or interfere with First Amendment-protected activities.

Amend USA PATRIOT Act Section 805: Material Support for Terrorism. Currently the material support laws make it a crime to give anything of value, including voluntary humanitarian assistance, to an organization that the government names a terrorist organization. That, combined with the government's ability to use secret evidence presented behind closed doors to designate such an organization *(see Section 411 in "Fourth Amendment: Right to Privacy" below)*, makes the harmless association with organizations punishable by fines and imprisonment.

Recommendation. Congress should tighten the material support laws to prevent their continued interference with free speech, free exercise of religion, and association.

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FOURTH AMENDMENT: RIGHT TO PRIVACY

Recommendations to Congress

Roll back the FBI's powers to issue national security letters (NSLs). The PATRIOT Act greatly expanded the FBI's ability to issue national security letters by eliminating the need for the FBI to show a connection between the records sought and a suspected terrorist. Congress also greatly expanded the types of private financial records that the FBI could obtain through NSLs. It also placed the bar for businesses challenging NSLs they receive too high. In order to win the challenge, the third-party holder of records must prove that the government acted in bad faith, and must do so without the advantage of knowing whether the government is using secret evidence.

Audits by the Department of Justice's Inspector General completed in 2007 and 2008 have revealed numerous abuses and misuses of this power, which Congress has thus far failed to address.

Recommendation: Congress should restore the previous standard for NSLs and require the FBI to show a connection between the records sought and a terrorist or foreign spy. In all other cases, NSLs should require the approval of either the FISA court or a magistrate judge. Congress should remove criminal penalties on businesses that do not comply with NSLs and should ensure that the right to challenge NSLs in court be made meaningful.

Restore court oversight for:

- **wiretapping calls, e-mails, and Internet activity involving U.S. residents (FISA Amendments Act of 2008)**
- **sharing criminal investigative information with the CIA (PATRIOT Act Section 203)**

The passage of the FISA Amendments Act eliminated the need for the government to obtain warrants to wiretap calls and e-mails to or from the U.S., provided there is some reason to believe that the person at the other end is outside the U.S. The Act violates the Fourth Amendment prohibition of unreasonable searches and the requirement for court-approved warrants. Moreover, Congress's support for retroactive immunity for companies that supported the warrantless program before it became law has prevented the courts from determining whether the government or the companies broke the law or whose rights were violated.

Court approval is no longer needed for the CIA to receive sensitive information gathered in criminal investigations, including wiretaps and information obtained by grand juries. Such information, which has traditionally been treated as extremely sensitive and may not be true, can now be freely shared with secret intelligence agencies and even with foreign governments with no safeguards against abuse.

Recommendation: Congress should restore meaningful court oversight in both cases.

Amend PATRIOT Act Section 206 to protect innocent bystanders from roving "John Doe" wiretaps. Under current FISA law, which sunsets on December 31, 2009, the FBI's roving

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surveillance authority does not require the FBI, before it can tap a line, to ensure that the intended target is present at the location. That means the FBI may wiretap conversations of innocent bystanders who may be using the device.

Recommendation: In 2009, Congress should use the opportunity of the sunset to eliminate that loophole.

Amend PATRIOT Act Section 215 to restore standard for obtaining FISA court orders for seeking records and other items. Prior to the PATRIOT Act, the FBI could seek a court order for records on a suspected terrorist or foreign spy. The PATRIOT Act greatly expanded that authority so that the FBI need only show "reasonable grounds" that information sought is relevant to an ongoing investigation...to protect against international terrorism or clandestine intelligence activities." By radically weakening the standard, Congress places the privacy of innocent Americans in jeopardy and has made it nearly impossible for third-parties to whom the requests are made to challenge orders they believe to be inappropriate or unjust.

Recommendation. To prevent abuse of this power, Congress should restore the standard that the FBI seek warrants from magistrate judges unless the records sought belong to a suspected terrorist or foreign spy.

Amend PATRIOT Act Section 218 to restore the requirement that the government meet Fourth Amendment standards when conducting searches to obtain evidence of a crime. Under the PATRIOT Act, FBI agents may now conduct secret searches of homes and offices in order to investigate an individual for a crime. Secret searches are constitutionally suspect at a minimum, and the searches of the home and office of Portland, Oregon, attorney Brandon Mayfield shows why this authority is rife for abuse.

Recommendation. Congress should restore meaningful requirements to limit or prohibit secret searches of Americans' homes or offices to those few extraordinary circumstances where they are truly necessary.

Amend USA PATRIOT Act Section 411: Definitions relating to terrorism. Currently the Secretary of State is able to designate any foreign or domestic group a "terrorist organization" without prior notification and an opportunity to defend itself from the designation. The government's use of secret evidence, which is impossible to refute, has prevented groups thus named from prevailing in their appeals.

Recommendation. Congress should amend PATRIOT Act Section 411 to provide warning and a fair appeals process to foreign or domestic groups that the Secretary of State plans to designate as "terrorist organizations."

Pass a law limiting the executive branch's use of "data-mining." News reports on the executive branch's lists and databases indicate they are riddled with errors and that any American can be added to a list such as the DHS's Terrorist Watch List, often called the "no-fly list," now estimated to contain more than a million names, or to a database such as the FBI's Investigative Data Warehouse, which contains more than 700 million records, including personal

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financial records. A person's inclusion in such a list or database can be detrimental and seemingly permanent, as there is no way to be taken off the list even after a person has been cleared of any involvement in wrongdoing. The usefulness of lists and databases in which false positives vastly outweigh the true suspects is doubtful, but they appear to be growing faster than individuals who do not belong in them are being removed.

Recommendation: Congress must set standards for counter-terrorism lists and databases to ensure that innocent individuals do not suffer undue consequences from being on the lists or in the databases. Congress should get complete information about each of these lists, assess their accuracy and usefulness, and exercise strict oversight over the collection, use, retention, and removal of names and other personal data in the lists and databases.

Recommendations to the President

Ensure strict standards for U.S. Customs and Border Protection (CBP) searches and retention of travelers' papers and electronic equipment. Without any judicial check or reason to suspect wrongdoing, travelers' computers and other electronic devices may be searched and phone records, business records, or possessions may be downloaded when they cross a U.S. border. Every traveler expects the government to search for and seize contraband. However, the government's assumed right to seize papers and data from cell phones or laptops violates a person's Fourth Amendment right to be free from unreasonable searches and seizures and from government abuses of First Amendment-protected free speech and association.

Recommendation: To prevent abuse of travelers' rights, the new president should ensure that the seizing or downloading of travelers' personal effects such as papers, private records, and possessions are subject to strict standards.

FIFTH AMENDMENT: DUE PROCESS, UNLAWFUL IMPRISONMENT, AND SELF-INCRIMINATION

Recommendations to Congress and the President

Prevent abuses of the state secrets privilege. The Bush administration has claimed state secrets, meant to protect national security, to prevent lawsuits brought by detainees, victims of extraordinary rendition, and others. Examples are German citizen Khaled el Masri, Canadian citizen Maher Arar, and several national security whistleblowers.

Recommendations:

- Congress should strengthen the law to guard against misuse of the state secrets doctrine by the government.
- The new president should reject the previous administration's invocation of state secrets and allow certain high-profile lawsuits to come to trial to signal the administration's commitment to Fifth Amendment guarantees.

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SIXTH AMENDMENT: RIGHTS OF THE ACCUSED

Recommendations to the President

Close Guantánamo. The interrogation methods and treatment of detainees at Guantánamo have earned severe criticism from the International Committee of the Red Cross, the United Nations Special Rapporteur for (Human Rights), foreign governments, and U.S. residents.

Recommendations: Guantánamo has become such a symbol of injustice and human rights abuses that the new president should close the prison immediately and try the remaining detainees in U.S. federal courts. Such a move would signal the administration's commitment to U.S. and international law regarding the accused, including the ancient writ of habeas corpus.

End practice of closing immigration hearings on a blanket basis. Chief Immigration Judge Michael Creppy issued an order known as the "Creppy Memo," which bars the public and the press from all immigration hearings for "special interest" persons. Such secrecy makes it impossible for the public or an immigrant's family members to know whether an immigration hearing to decide the immigrant's fate was fair. In *Haddad v. Ashcroft,* the Sixth Circuit Court of Appeals ruled the Creppy Memo barring the public and the press from all immigration hearings for "special interest" persons to be unconstitutional. Senior Judge Damon Keith wrote, "Democracies die behind closed doors."

Recommendation: To help restore fairness, the president should rescind the Creppy Memo and restore the previous practice of leaving the decision as to whether an individual hearing must be closed in whole or in part to the judge hearing the case.

Conclusion

These recommendations are not comprehensive, but they represent an array of needed corrections to U.S. laws and policies that would signal to the American people and the world that the 111th Congress and the next president intend to protect both our nation's security and the rights, liberties and principles in which the American people take pride.

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414 Resolutions (8 States and 406 Cities and Counties), 85 million people, as of December 2007

Alaska
Anchorage
Bethel
Denali Borough
Fairbanks
Fairbanks N. Star Borough
Gustavus
Haines Borough
Homer
Juneau
Kenai
North Pole
Sitka
Skagway
Soldotna
Valdez

Arizona
Bisbee
Flagstaff
Jerome
Pima Cty
Tucson

Arkansas
Eureka Springs

California
Alameda Cty
Albany
Alhambra
Arcata
Berkeley
Calistoga
Claremont
Contra Costa Cty
Cotati
Davis
Dorris
Duarte
Dublin
El Cerrito
Emeryville
Fairfax
Glendale
Hayward
Humboldt Cty
Lake Cty
Livermore
Los Angeles
Los Gatos
Marin Cty
Mendocino Cty
Mill Valley
Monte Sereno
Mountain View
Nevada City
Oakland
Pacific Grove
Palo Alto
Pasadena
Pinole
Placer Cty
Pleasanton
Point Arena
Porterville
Richmond
Sacramento
Salinas
San Anselmo
San Francisco
San Jose
San Mateo Cty
San Rafael
San Ramon
Santa Barbara
Santa Clara
Santa Clara Cty
Santa Cruz
Santa Cruz Cty
Santa Monica
Saratoga
Sausalito
Sebastopol
Siskiyou Cty
Soledad
Sonoma
S Pasadena
Tehama Cty
Ukiah
Union City
Watsonville
W. Hollywood
Yolo Cty

Colorado
Aspen
Boulder
Carbondale
Crestone
Dacono
Denver
Durango
Fort Collins
Oak Creek
Paonia
Pitkin Cty
Ridgway
San Miguel Cty
Telluride
Ward
Woody Creek

Connecticut
Bethany
Coventry
Hampton
Hartford
Lyme
Mansfield
New Haven
Norwalk
Windham

Delaware
Arden
Odessa
Newark
Wilmington

Florida
Alachua Cty
Broward Cty
St Petersburg
Sarasota
Tampa

Georgia
Atlanta
Savannah

Hawaii
Honolulu

Idaho
Boise
Idaho Cty
Moscow

Illinois
Carbondale
Chicago
Evanston
Glencoe
Oak Park

Indiana
Bloomington

Iowa
Ames
Des Moines

Kansas
Kansas City/ Wyandotte Cty
Lawrence

Kentucky
Lexington-Fayette Cty

Maine
Bangor
Mount Vernon
Orono
Portland
Waterville

Maryland
Baltimore
Greenbelt
Montgomery Cty
Prince George's Cty
Takoma Park

Massachusetts
Acton
Amherst
Aquinnah
Arlington
Ashfield
Brewster
Bridgewater
Brookline
Buckland
Cambridge
Carlisle
Charlemont
Chatham
Chilmark
Colrain
Concord
Conway
Dennis
Duxbury
Eastham
Edgartown
Greenfield
Groton
Heath
Lenox
Leverett
Lexington
Lincoln
Littleton
Lowell
Manchester-by-the-Sea
Marblehead
Milton
Newton
North Adams
Northampton
Oak Bluffs
Orleans
Peabody
Pittsfield
Provincetown
Rockport
Shutesbury
Somerville
Sudbury
Swampscott
Tisbury
Truro
Wellfleet
Wendell
West Tisbury
Westford
Weston
Williamstown

Michigan
Ann Arbor
Auburn Hills
Detroit
East Lansing
Ferndale
Grand Rapids
Ingham Cty
Kalamazoo
Lake Cty
Lansing
Lathrup Village
Meridian Tsp.
Muskegon Cty
Pontiac
Southfield
Troy

Minnesota
Duluth
Minneapolis
Robbinsdale
St. Paul

Mississippi
Jackson

Missouri
Kansas City
St. Louis
University City

Montana
Beaverhead Cty
Bozeman
Butte-Silver Bow
Dillon
Eureka
Helena
Lewis & Clark Cty
Missoula
Whitefish

Nebraska
Lincoln

Nevada
Elko
Elko Cty
Las Vegas
Silver City
Sparks

New Hampshire
Exeter
Farmington
Marlborough
Peterborough
Portsmouth

New Jersey
Englewood
Ewing
Franklin Twp
Highland Park
Keansburg
Lawrence Twp
Mercer Cty
Montclair Twp
Mullica
New Brunswick
Passaic Cty
Paterson
Phillipsburg
Plainfield
Princeton
South Brunswick
West Windsor
Willingboro

New Mexico
Albuquerque
Aztec
Bayard
Farmington
Grant Cty
Las Vegas
Los Alamos Cty
Rio Arriba Cty
Santa Fe
Silver City
Socorro
Taos
Valencia Cty

New York
Albany
Albany Cty
Bethlehem Twp
Brighton
Canton
Danby
Elmira
Greenburgh
Huntington
Ithaca
Mamaroneck
Mount Vernon
Town of New Paltz
Vill. of New Paltz
New York
N Hempstead
Nyack
Plattsburgh
Rosendale
Rochester
St Lawrence Cty
Schenectady
Schuyler Cty
Syracuse
Tompkins Cty
Urbana
Westchester Cty
Woodstock

North Carolina
Boone
Carrboro
Chapel Hill
Davidson
Durham
Durham Cty
Greensboro
Orange Cty
Raleigh

Ohio
Cleveland Heights
Oberlin
Oxford
Toledo
Yellow Springs

Oregon
Ashland
Astoria
Benton Cty
Coos Cty
Corvallis
Douglas Cty
Eugene
Gaston
Lane Cty
Multnomah Cty
Port Orford
Portland
Talent
Wheeler

Pennsylvania
Berks County
Erie
Lansdowne
Philadelphia
Pittsburgh
Reading
State College
Wilkinsburg
Yeadon
York

Rhode Island
Bristol
Charlestown
Middletown
New Shoreham
N. Providence
Providence
S Kingstown

South Carolina
Columbia

South Dakota
Rapid City

Tennessee
Blount Cty

Texas
Austin
Dallas
El Paso
Sunset Valley
Wichita Falls

Utah
Castle Valley

Vermont
Athens
Brattleboro
Burlington
Dummerston
Guilford
Jamaica
Marlboro
Montpelier
Newfane
Putney
Rockingham
Waitsfield
Warren
Westminster
Windham

Virginia
Alexandria
Arlington Cty
Charlottesville
Falls Church
Richmond

Washington
Bainbridge Island
Bellingham
Clallam Cty
Coupeville
Jefferson Cty
King Cty
Olympia
Oroville
Port Townsend
Riverside
San Juan Cty
Seattle
Snoqualmie
Tacoma
Tonasket
Tumwater
Twisp
Vashon-Maury Island
Whatcom Cty

Washington, D.C.

West Virginia
Huntington

Wisconsin
Douglas Cty
Eau Claire
Madison
Milwaukee

Wyoming
Fremont Cty

Source: Bill of Rights Defense Committee

Shading indicates statewide resolution

Statement of

Gregory T. Nojeim
Director, Project on Freedom, Security & Technology
Center for Democracy & Technology

On

"Restoring the Rule of Law"

Hearings Before the Senate Judiciary Committee, Subcommittee on the Constitution

September 16, 2008*

Chairman Feingold, Ranking member Brownback, Members of Subcommittee:

Thank you for the opportunity to submit this written statement for the record on behalf of the Center for Democracy & Technology in these important hearings on Restoring the Rule of Law. CDT is a non-partisan, non-profit organization devoted to keeping the Internet open, innovative and free. We advocate for democratic values in the digital age. Since the horrible attacks of September 11, those values have been severely tested, and in some cases, compromised in the search for security. We compliment Chairman Feingold and the entire Subcommittee for conducting this hearing now so that recommendations to the new President and Congress about measures to restore the rule of law can be assembled and analyzed this year and be acted on early next year.

Privacy, one of our most fundamental rights, recently has been dramatically eroded as a result not only of policy failures stemming from the response to September 11, but also because our privacy laws and policies have not kept pace with advances in technology. Increasingly, Americans use the Internet and other digital services to access, transfer and store vast amounts of private data. Financial statements, medical records, travel itineraries, and photos of our families – once kept on paper and secure in a home or office – are now stored on networks. Electronic mail, online reading habits, business transactions, Web surfing and cell phone location data can reveal our activities, preferences and associations. Information generated by digital services is accessible to the government under weak standards based on outdated Supreme Court decisions and laws. Indeed, the major federal law on electronic communications was written in 1986, before the World Wide Web even existed.

In the wake of the 9/11 attacks, laws and policies have been adopted that unnecessarily weaken privacy rights and other constitutional liberties. The government has adopted data mining techniques, expanded electronic surveillance, and launched new identification programs without adequate safeguards for the rights of Americans. These

* This statement for the record was submitted on October 1, 2008.

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and other programs have often been adopted before careful assessment of whether they are even likely to be effective. But bad policy choices are only half of the story.

Any effort to restore the rule of law must account both for poor policy choices and for advances in technology that require new policies. In other words, reversing course on policies chosen in order to restore the rule of law insufficient because the old course is outdated. Return to prior status quo is not an option. Instead, more must be done to impose checks and balances. Such checks and balances not only preserve liberty, but also help enhance security by ensuring that the government is focusing its limited resources on real threats and effective measures.

In short, the next President and Congress should --

- **Update electronic communications laws to account for the way that Americans communicate today;**
- **Restore checks and balances on government surveillance, including vigorous judicial and congressional oversight of surveillance programs;**
- **Review information sharing policies and practices to ensure that the government can "connect the dots" while preserving privacy; and**
- **Revisit the REAL ID Act and ensure that governmental identification programs include proper privacy and security protections.**

Updating Electronic Communications Privacy Laws

The Electronic Communications Privacy Act (ECPA) sets the standards for government surveillance of email and other communications in criminal cases. Adopted in 1986, ECPA has been outpaced by technology developments. For example, though cell phones can be used to track a person's location, ECPA does not specify a standard for law enforcement access to location information. In this instance, the rule of law cannot merely be "restored" because the law specifies no rule. It should.

E-mail, personal calendars, photos, and address books, which used to reside on personal computers under strong legal protections, now are stored on communications networks where privacy rules are weak or unclear. Instead of the law being technology neutral to put technologies that operate "in the cloud" on the same privacy footing as technologies that operate on a desktop computer, the law discriminates against Web-based technologies in terms of the privacy afforded to users.[1] A patchwork of confusing standards and conflicting judicial decisions has arisen, and it has confounded service providers and created uncertainty for law enforcement officials.

ECPA should be updated to tighten and clarify the standards for government access to data that is that is communicated and stored. Updating ECPA will require the next President to work with Congress, industry, and NGOs to strengthen protections against

[1] See http://blog.cdt.org/2008/09/29/liberty-technology-and-the-next-president/.

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unwarranted government access to personal information.[2] CDT has been working for over six months with industry and NGO stakeholders to develop policy recommendations that could become a blueprint for updating ECPA. We look forward to providing those policy recommendations to the new President and Congress in the coming months.

Ensuring that Intelligence Collection Complies with FISA and Is Subject To Judicial Oversight

While ECPA governs electronic surveillance for criminal purposes, surveillance to gather sound and timely intelligence is also needed to head off terrorist attacks and otherwise to protect the national security. Recent history shows that intelligence gathering powers can be abused. For example, the Administration for over five years after September 11, 2001 conducted an unlawful, unconstitutional warrantless surveillance program aimed at the international communications of individuals who were themselves al Qaeda members, or who were suspected of being in communication with such persons. Strong statutory standards, judicial checks and balances, and congressional oversight are critical to protect the rights of Americans and ensure that the intelligence agencies are acting effectively and within the law. Both Congress and the President can play crucial, complimentary roles in restoring checks and balanced on intelligence surveillance.

The President should announce that it is the policy of his administration to refrain from engaging in warrantless surveillance in the United States, to comply with the Foreign Intelligence Surveillance Act, and to cooperate fully with any investigation of post 9-11 warrantless surveillance. But compliance with FISA is not enough because the law itself has been changed in ways that erode the checks and balances originally built into it.[3] An Inspector General's report on implementation of the 2008 FISA Amendments Act, due out next summer, should be reviewed carefully with an eye toward making the changes in the law that are to address any abuses or misuses of FISA authorities that it identifies.

Congressional leaders should also commence a joint congressional investigation of domestic intelligence activities that is designed to uncover illegal or inappropriate surveillance and prevent it from recurring. Necessary legislation resulting from this review should be attached to the legislation Congress considers in connection with the expiration of key provisions of the USA PATRIOT Act on December 31, 2009.[4] Such legislation should, at a minimum, include the checks and balances on issuance of national security letters and orders under Section 215 of the USA PATRIOT Act.

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[2] More information about what needs to be done can be found in this CDT Report on "Digital Search and Seizure" http://www.cdt.org/publications/digital-search-and-seizure.pdf and in this CDT Policy Post on how digital technology requires stronger privacy laws: http://www.cdt.org/publications/policyposts/2006/4.

[3] See CDT's testimony on changes to FISA proposed earlier this year, many of which were enacted in the FISA Amendments Act: http://www.cdt.org/security/20070925dempsey-testimony.pdf and http://www.cdt.org/security/20070918dempsey-testimony.pdf.

[4] On December 31, 2009, both Section 215 of the PATRIOT Act (the "library records provision") and the PATRIOT Act provision authorizing roving intelligence wiretaps, will expire unless renewed by Congress. In addition, a related provision of FISA permitting electronic surveillance for intelligence purposes of non-U.S. Persons who are not associated with foreign powers (the "lone wolf" provision) will also expire.

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A National Security Letter is a demand by the FBI or by other elements of the intelligence community, issued without prior judicial approval, for sensitive bank, credit and communications records from financial institutions, credit reporting agencies, telephone companies, Internet Service Providers, and others. These records are important to national security investigations, but the PATRIOT Act dramatically expanded the scope of these demands while reducing the standards for their issuance. The Inspector General of the Department of Justice found widespread errors and violations in the FBI's use of NSLs.[5] A Section 215 order is an order issued by a judge requiring any person to turn over records or objects when the judge finds that the material sought is relevant to an authorized intelligence investigation. To protect Americans' privacy and focus investigative resources more effectively, the next President should curtail the use of NSLs and should propose, and the next Congress should enact, legislation such as S. 2088, the NSL Reform Act, introduced in the 110th Congress. It would require a court order for access to sensitive personal records.[6] The President should also cooperate with congressional and Inspectors General oversight of intelligence surveillance and the next Congress should conduct vigorous, non-partisan oversight of the full range of intelligence surveillance programs affecting the rights of Americans.

Connecting the Dots Without Short Circuiting Privacy Protections

Reforming the way intelligence is collected is only one part of the equation. In addition, the sharing of intelligence information is in need of an overhaul as well. Government watch lists, fusion centers, databases, and data mining programs[7] are growing at an alarming pace without adequate safeguards. Connecting the dots is crucial to preventing the next attack, but inaccurate information and flawed analytic techniques can result in a person being wrongfully treated as a terrorist, with devastating consequences such as arrest, deportation, job loss, discrimination, damage to reputation, and more intrusive investigation.

The next President and Congress should adopt a balanced framework for information sharing and analysis for counterterrorism purposes. The next President should review all information sharing and analysis programs for effectiveness. The next President and Congress should bring all information sharing and analysis programs under a framework of privacy protection, due process and accountability. A Markle Foundation Task Force has issued a report[8] on implementing a trusted information sharing environment that should be a valuable resource for the next President as he seeks to implement information sharing while protecting civil liberties.

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[5] DOJ Inspector General Report on NSL abuses: http://www.usdoj.gov/oig/special/s0703b/final.pdf.

[6] See CDT's testimony on national security letters, http://judiciary.senate.gov/hearings/testimony.cfm?id=3255&wit_id=7127 and our policy post on NSLs: http://cdt.org/publications/policyposts/2007/5

[7] See CDT's testimony on government data mining programs http://www.cdt.org/testimony/20070109harris.pdf and CDT's memorandum on government mining of commercial data: http://www.cdt.org/security/usapatriot/030528cdt.pdf.

[8] http://www.markle.org/markle_programs/policy_for_a_networked_society/national_security/projects/taskforce_national_security.php#report1

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Information sharing for counter terrorism purposes often results in the government using information collected for one purpose for an entirely different purpose – thus implicating the Privacy Act, which was adopted to control such practices. Designed for the mainframe world of 1974, the Privacy Act needs to be updated to reflect the distributed nature of government information systems and the ease with which data maintained by the government or obtained from the commercial sector can be shared and mined. The next Congress should adopt legislation to update and strengthen the Privacy Act, including by adopting standards for government use of commercial data.[9]

The E-Government Act of 2002 provides additional protections. It requires agencies of the federal government to issue privacy impact assessments (PIAs) before they launch a new system or program that collects or processes personal information in identifiable form. These PIAs can act as an effective check on the abuse of personal information maintained by the government, and can spur agencies to consider means of carrying out necessary programs while limiting the privacy risks associated with them. However, the quality of PIAs issued varies widely from agency to agency,[10] and sometimes within the same agency. The President should appoint a senior White House official as Chief Privacy Officer to issue a guide to best practices for the PIAs required by the E-Government Act of 2002 and to ensure that agencies increase the quality of their PIAs. The Chief Privacy Officer would also advocate for privacy within the Executive Branch and chair a Chief Privacy Officer Council consisting of the Chief Privacy Officers of each agency united in a structure similar to that of the Chief Information Officer Council.

Making Identification Programs Effective and Safe

In recent years, the federal government has launched a variety of ID card programs, including, most notably, REAL ID. Some of these programs would incorporate biometric and Radio Frequency Identification (RFID) technology without safeguarding the privacy and security of information on the cards or limiting how they can be used by government or commercial entities to track the movements of ordinary Americans. Poorly designed programs could actually contribute to ID theft. The REAL ID program is already showing signs of "mission creep."

The next President and Congress should revisit the REAL ID Act and ensure that all governmental identification programs are necessary and effective and subject to adequate privacy and security protections. In particular, the REAL ID program should be given a top to bottom review to determine whether it will be effective and whether the costs of the program to the federal government and to state governments – in terms of dollars and risks to security and privacy – outweigh the benefits. If such review justifies continuation of the program, the next President should direct the Secretary of Homeland Security to recommend improvements in the REAL ID Act and to withdraw the

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[9] For information about the new policies and laws that should be adopted to protect personally identifiable information in government data bases, see CDT's June 2008 testimony: http://cdt.org/testimony/20080618schwartz.pdf.

[10] For example, the State Department's PIAs have been woefully inadequate and the PIAs issued by the Department of Homeland Security have generally been of high quality. See CDT's testimony on the privacy of passport files, p. 4. http://www.cdt.org/testimony/20080710schwartz.pdf.

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regulations that have been issued under it or make substantial improvements in the existing regulations to enhance privacy protections.[11]

Congress should conduct its own review of the REAL ID Act and make improvements where necessary. It should also amend the Driver's Privacy Protection Act to further protect privacy against both governmental and commercial abuse.

Conclusion

Thank you for the opportunity to outline some of the policies and legislation that should be adopted by the next President and the new Congress to restore the rule of law. We look forward to working in the coming years with the Subcommittee, and with the new Administration, to implement as many of these proposals as possible.

[11] CDT's analysis of REAL ID and of the REAL ID regulations can be found here: http://www.cdt.org/testimony/20070321dhstestimony.pdf, and its testimony on implementation of REAL ID and the Western Hemisphere Travel Initiative can be found here: http://www.cdt.org/testimony/20080429scope-written.pdf.

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Testimony of the
Center for National Security Studies by
Kate Martin, Director, and Lisa Graves, Deputy Director.

Before the Judiciary Subcommittee on the Constitution
United States Senate

Restoring the Rule of Law

September 2008

We appreciate the opportunity to participate in such a critically important effort by Senator Feingold and this Committee.

The Center is the only non-profit organization whose core mission is to prevent claims of national security from being used to erode civil liberties, human rights, or constitutional procedures. The Center works to preserve basic due process rights, protect the right of political dissent, prevent illegal government surveillance, strengthen the public's right of access to government information, combat excessive government secrecy, and assure effective oversight of intelligence agencies. It works to develop a consensus on policies that fulfill national security responsibilities in ways that do not interfere with civil liberties and constitutional government.

Introduction. The story of this administration's disrespect for the rule of law and separation of powers, as well as the abuses visited on individuals, is well-known and well told by others who have submitted statements to this Committee. We will outline some recommendations for actions the next administration must take to remedy these problems. While these recommendations are focused on actions by the Executive Branch, some solutions will require joint congressional and executive action, including legislation.

The Center for National Security Studies has challenged unconstitutional government surveillance for the past thirty years. Since September 11th, we have worked on many surveillance and detention issues and, in particular, their effect on minority and immigrant communities. The following recommendations are based on the principles and experience of the past few decades. We have developed them after close consultation with Suzanne Spaulding (who has separately submitted testimony) and many civil liberties and civil rights groups engaged on these issues. Ultimately, however, the views and conclusions laid out in this testimony are those of the Center for National Security Studies.

Recommendations concerning Domestic Surveillance, *i.e.*, government collection of information on Americans for counter-terrorism and other national security purposes:

Since immediately following the terrible attacks of 9/11, there has been an expansion of secret government surveillance powers through secret presidential

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directives, changes in laws and regulations and investment in new technologies with much greater capabilities to acquire, store and analyze information on Americans. There has also been a large-scale reshuffling of domestic intelligence responsibilities, including the establishment of the Office of the Director of National Intelligence and the Department of Homeland Security, which has resulted in many more agencies and government officials having access to sensitive information about individuals.

Much of the debate about these powers has focused on whether they were a violation of the law, as in the case of NSA warrantless spying, or whether there were sufficient safeguards in place to prevent violations of the law, as with the discussions concerning internal FBI oversight. There has been considerably less attention focused on what should be the standards and criteria that must be met according to law before the government can collect information on Americans–usually in secret and to be kept virtually indefinitely–which will be available for any "authorized" use by numerous government agencies.

At the same time, the standards for such collection, retention and use have been substantially weakened. In general, the new framework adopted by this administration has authorized surveillance so long as the government's "purpose" is to collect information on Americans for a legitimate reason, e.g., to gather foreign intelligence or address national security threats and its techniques comply with the administration's crabbed interpretation of the Fourth Amendment's protections. But substituting this requirement of a legitimate purpose for a framework that required factual predication before conducting surveillance allows virtually unfettered collection of information about Americans. The only remaining prohibition is that the government may not gather information for an illegitimate purpose, which of course no government agency would ever own up to in any event.

There is no doubt that such an approach poses grave risks to privacy and civil liberties, and it is not clear that adequate safeguards can ever be devised for such broad powers. At the same time, there is virtually no evidence that such an approach is, in fact, effective counterterrorism, much less the only or most effective means of preventing terrorism.

The next administration needs to ensure that the government's domestic surveillance and intelligence activities target terrorists, not minorities or political dissenters.

To assist with this effort, we are attaching a Statement of Principles for Constitutional Law Enforcement the Center helped develop and that was signed in 2002 by more than 70 public interest organizations. This statement expresses deep concerns about domestic law enforcement and intelligence activities, and enumerates important principles of non-discrimination, due process and respect for privacy required by the Constitution of the government in its dealings with Americans.

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Goals for restoring the rule of law to domestic surveillance. The next administration needs to:

- Restore the trust of the American people that their government abides by the rule of law and is not engaged in illegal spying on them;
- Provide accountability for illegal surveillance in the past eight years; and
- Adopt domestic surveillance policies that are effective in identifying, locating and prosecuting those who are planning terrorist attacks and are also consistent with constitutional protections for individual privacy and liberty and the law.

In her testimony, Ms. Spaulding has spelled out the essential connections between effective counter-terrorism and respect for individual rights and the rule of law, which we will not repeat here. (Domestic surveillance, of course, is undertaken for a variety of "foreign intelligence" purposes, not just counter-terrorism, but these comments will focus on counter-terrorism as illustrative of the broader range of surveillance activities.)

Presidential announcement or directive. The next President needs to set a new framework by making a public commitment that his administration will comply with the following principles when collecting information on Americans and conducting domestic surveillance activities. The government will:

- Abide by the law;
- Operate with the greatest degree of transparency consistent with the necessities of legitimate surveillance activities;
- Respect the constitutional roles of Congress and the judiciary, recognizing that all branches have responsibilities to conduct oversight of government surveillance of Americans, and specifically pledging to cooperate with the other two branches by providing the information needed for them to carry out their legislative, oversight and judicial roles; and
- Respect the Fourth amendment and privacy rights of Americans and carry out necessary surveillance activities in the most focused and effective way possible.

In particular, domestic surveillance and intelligence activities should to the greatest extent possible collect and retain information on individuals only when there is some degree of predication, *i.e.*, some reason to believe that the individual is involved in some way with criminal activities, including plotting terrorist attacks.

Accountability for the current administration's domestic spying. Providing accountability for what has happened to date is not only essential for determining how to frame the most effective policies moving forward, but also essential for preserving constitutional government and the rule of law. Given the existing roadblocks to judicial review of past programs, *e.g.*, the recent congressional amnesty for the companies involved in the warrantless NSA spying, the next administration has a critical responsibility to ensure accountability. To do so, it should:

- Immediately provide to Congress the information requested concerning domestic surveillance and intelligence activities in the U.S. without attempting to impose restrictions regarding access by Members of Congress;
- Immediately review whether the administration's responsibility to keep the Congress "fully and currently informed" of all intelligence activities, including any illegal intelligence activity, through disclosures to the congressional

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intelligence committees has been fulfilled with regard to domestic intelligence activities (*see, e.g.*, 50 U.S.C. 413(a)(1), 413(b));

- Direct all agencies to provide full and prompt cooperation with Inspector General inquiries concerning domestic surveillance activities, including the congressionally mandated inquiry in the Foreign Intelligence Surveillance Amendments Act; and
- Conduct a declassification review of those documents that the American people have a right and a need to see, starting with the Justice Department legal opinions and other directives and policies concerning domestic intelligence activities as well as the legal opinions of the FISA court that were cited by this administration in seeking changes to FISA, but withheld from the public and much of Congress. Such materials can be reviewed in order to redact any sensitive and secret intelligence information, whose disclosure would cause more harm than good. [1]

Executive Branch Review. As detailed in Ms. Spaulding's testimony, the administration should also initiate a comprehensive review of domestic intelligence policies and activities to determine their effectiveness and their consistency with constitutional principles. Such review should be led by the next Attorney General with full cooperation from all other agencies. We refer you to Ms. Spaulding's testimony for an explication of the need for such a review and how it should proceed.

Cooperation with congressional inquiry. We also believe that Congress needs to undertake a bicameral inquiry concerning domestic surveillance and other domestic intelligence activities to determine what legislative changes are needed. The next administration should pledge to cooperate with such an inquiry by providing needed information in a timely manner.

Policy Changes. It is rare that a new administration undertakes the construction of an entirely new legal and policy architecture instead of making incremental changes where needed. Yet that is precisely what the current administration did regarding the rules and policies governing domestic surveillance of Americans. In response to the 9/11 attacks and long held ideological views—and enabled by an explosion in technological surveillance capabilities and the failure of congressional oversight encouraged by political fear-mongering—the Bush administration fundamentally changed the principles and practices limiting government information collection and surveillance of Americans.

They did so without any acknowledgment of the enormity of the changes. As Ms. Spaulding points out, the legal framework for surveillance is now a "Rube Goldberg"-like structure, and this patchwork of laws makes it difficult to understand the full impact of the changes. Moreover, the issues that have been the focus of public debate have been largely technical and frequently subjected to less scrutiny than they deserved because of

[1] The Center has long urged that the standard for declassification should be whether the public interest in knowing the information outweighs the national security harm anticipated from disclosure; see Professor Stone's testimony and cf. E.O. 13292, sec. 3.1 (b), "in some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified."

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the political pressures surrounding the debate. (For example, while there have been many abstruse and technical debates around such issues as the pre-9/11 "wall" between law enforcement and intelligence, that shorthand was used to obscure rather than illuminate the pre-9/11 failures and how the administration's proposals would address those failures. The shorthand has also stunted consideration of the adverse consequences of these proposals.)

There is no doubt that the government made many mistakes before 9/11, that globalization has changed the vulnerabilities of the United States, that technology has outpaced the law in some areas, and that changes were needed to ensure the most effective possible counterterrorism effort consistent with our Constitution. However, a comprehensive review is needed as to whether the changes made in the past eight years are in fact necessary and effective or whether other approaches would be more effective and less threatening to the balance of power between the government and the people. As Senator Sam Ervin explained in 1974:

> [D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.
>
> Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom: the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.[2]

Renunciation of the unsupportable and extreme views by this administration concerning constitutional requirements, statutory interpretations, and policy needs. This administration justified these unprecedented and extraordinary changes in government power in part by adopting extreme views of executive power and constitutional protections. The next administration should renounce those views. In particular, it should renounce:

> The claim that the President has Article II powers to conduct secret domestic surveillance of Americans for national security purposes, including in cases where such action has not been specifically prohibited by congressional enactment;
>
> The claim that the government's authority to conduct searches and seizures is limited by only the most narrow interpretations of Fourth Amendment

[2] Senator Ervin, June 11, 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976)

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requirements—even when such interpretations are in dispute; and, most specifically,

The claim that the government has authority to search or wiretap an American without obtaining a court order pursuant to statutory authority should be renounced.

The next administration should also recognize that compliance with the current administration's interpretations of existing privacy statutes, including the Privacy Act and the Electronic Communications Protection Act, is not adequate to ensure that Americans' privacy is being respected. It should commit to cooperate with Congress to enact statutory protections for seizures of information held by third parties about individuals, affording Fourth Amendment protections to sensitive personal information.

New legal and policy framework for surveillance policies. The next administration should adopt a framework that considers the broader question of how the legitimate needs of the government to collect information and conduct surveillance can be best reconciled with the equally important mandate to respect individual rights. The framework should explicitly require that surveillance policies operate in the least intrusive manner possible consistent with legitimate law enforcement and national security needs.

Specifically, the administration should insist that policies comply with the following principles: the government should collect no more information on Americans than is necessary; it should use the least intrusive means to do so; it must have explicit protections against racial or religious profiling and protections for First-Amendment protected activities; and it should operate with the greatest possible degree of transparency. *Compare* E.O. 12333 sec. 2.4 (requiring the use of "least intrusive collection techniques feasible").

While the results of the comprehensive reviews by the Attorney General and the Congress will be needed in order to determine how best to resolve many of the details of many existing authorities and practices, the necessity for some reforms is already clear.

Electronic surveillance and physical searches under FISA.

The administration should direct that electronic surveillance and physical searches of Americans' homes and offices be conducted in accordance with these principles of least intrusive means and greatest transparency consistent with national security and law enforcement requirements.

Surveillance under FISA is less transparent than surveillance conducted under the criminal rules in several key respects: the target of the surveillance is never notified of the wiretapping or search unless he or she is indicted; an innocent target of such surveillance can never learn what is included in government files on himself or herself as a result of the surveillance; even if notified of the surveillance because indicted, there is never any opportunity for meaningful judicial review of the government's warrant application because the application is always withheld from the target. There is no

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necessity for such automatic complete secrecy in every case. The Attorney General should direct that:

where feasible electronic surveillance and physical searches should be conducted under the criminal authorities rather than FISA authorities;

where surveillance is conducted under the FISA authorities, as much information as possible should be disclosed to the target when the surveillance/investigation is closed or charges are brought; and

amendments to FISA to provide for greater transparency and accountability should be considered.

Surveillance authorized under FISA including electronic surveillance under this summer's amendments and pen register/trap and trace surveillance is also much broader with less oversight than that conducted under law enforcement authorities. The Attorney General should direct a review of the constitutional objections made to the breadth of these authorities and in the meantime direct that these authorities be used only when absolutely necessary.

Collection of sensitive personal information held by third parties, such as financial records and call records.

Current legal authorities have allowed the secret collection of literally hundreds of millions of records on Americans who have never been and will never be charged with any wrongdoing. The Attorney General should undertake to revise and re-focus such collection authorities and limit their use. This could be done by modifying Patriot Act provisions permitting the clandestine collection of private personal information about people who are not suspected of terrorist acts or plots; including reforming the National Security Letter (NSL) powers that permit the FBI to obtain sensitive personal information.

Limit the creation of massive data-bases and data-mining on Americans.

The administration should work with Congress to impose meaningful restrictions and oversight on the collection and data-mining of personal information about individuals in the U.S. throughout intelligence agencies.

The Attorney General should also undertake to review the existence of masses of personal data already accumulated in the FBI's Investigative Data Warehouse with an eye toward ensuring that such databases are properly focused.

FBI investigations of Americans suspected of no wrong-doing.

The Attorney General should strengthen the Guidelines for FBI investigations to restore the protections that have been eliminated or weakened in the past several years.

Use of undercover informants in places of worship or other First Amendment-protected gatherings.

The Attorney General should require that the Department of Justice make a determination of probable cause before the FBI uses a confidential informant to infiltrate mosques or other houses of worship or places where people are exercising First

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Amendment rights. The Attorney General should also work with Congress to provide for judicial warrants in such cases.

Protection against religious and racial profiling in surveillance and against political spying.

The Attorney General should convene a task force to make recommendations to ensure the elimination of religious and racial profiling in domestic surveillance and intelligence activities by all agencies of the government and to ensure that First Amendment-protected activities do not trigger surveillance by the government.

Impose limits on domestic intelligence activities by the Defense Department.

The new administration should review and limit domestic intelligence activities by the Defense Department, *e.g.*:

ensure that new Defense Counterintelligence and Human Intelligence Center that has replaced the Counterintelligence Field Activity (CIFA) office does not restart domestic surveillance of Americans who disagree with U.S. policies; and

Impose meaningful checks on Defense Department collection and data-mining of private information on individuals in the U.S.

Protect against the unfair use of information to penalize individuals. The administration should work with Congress to end unwarranted watch lists, to ensure that individuals are not unfairly denied security clearances or employment or otherwise penalized.

Border searches: The administration should end the policy of seizing the laptops and private information of Americans returning to the United States without probable cause and without a warrant, and work with Congress to pass legislation protecting the rights of American travelers.

Department of Homeland Security. The administration should require the Department of Homeland Security to respect civil liberties and human rights in its surveillance and intelligence activities.

Military satellites should not be used to conduct domestic spying on people in the U.S.

The role of the Department of Homeland Security in collecting information on individuals other than in furtherance of its law enforcement duties should be revisited.

In all events, the protections and limits outlined above regarding domestic surveillance and intelligence activities should explicitly apply to DHS collection of personal information.

The Department of Homeland Security should eliminate discriminatory profiling and refocus its immigration and law enforcement efforts on those who pose a genuine threat of terrorist acts;

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Remedies for unlawful surveillance.

The administration should work with Congress to ensure that individuals have a meaningful opportunity to obtain judicial redress for violations of their First and Fourth Amendment rights as well as violations of statutory protections.

Recommendations concerning Detention Policies.

As this Committee is also well aware, this administration has also adopted detention policies, which violate basic principles of due process and have served only to make the United States less, not more powerful in the world. These policies should also be changed.

Detention of non-citizens in the United States.

The next administration should restore due process protections for non-citizens facing detention or deportation.

Secret arrests:

The next administration should renounce the claim of authority to detain individuals in secret and should work with the Congress to outlaw such practices.

Abuse of material witness authority.

The next administration should renounce the claim of authority to imprison individuals using the material witness authority, when the government's interest is not in securing trial testimony from such individuals, but in investigating them.

Detention and trial of alleged "Enemy Combatants" in the United States and elsewhere. The Center with the assistance of the Brennan Center for Justice has also prepared a set of recommendations for a new Detention Policy to replace this administration's "war on terror" framework. We have previously presented these to this Committee in our July 16, 2008 testimony but repeat them below for ease of reference.

A. Application of the Law of War or Criminal Law:

- When military force is used consistent with constitutional authorization and international obligations the United States should follow the traditional understanding of the law of war, including the Geneva Conventions. Individuals seized in a theater of active hostilities are subject to military detention and trial pursuant to the law of war.
- When suspected terrorists are apprehended and seized outside a theater of active hostilities, the criminal law should be used for detention and trial.

A new detention policy based on these principles would result in a stronger and more effective counterterrorism effort. It would ensure the detention and trial of fighters and terrorists in accordance with recognized bodies of law and fundamental notions of fairness and justice. It would ensure cooperation by key allies in Europe and elsewhere

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who have insisted that military detention be limited. It would begin to restore the reputation of the U.S. military, damaged by the international condemnation of the abuses of this administration. And it would deprive al Qaeda of the propaganda and recruiting opportunities created by current policies.

The Supreme Court has reaffirmed that under the law of war, when the U.S. military is engaged in active combat, it has the authority to seize fighters on the battlefield and detain them as combatants under the law of war.[3] The traditional law of war, including the Geneva Conventions and Army Regulation 190-8,[4] should be followed when capturing and detaining individuals seized on a battlefield/in a theater of armed conflict/during active hostilities, such as Afghanistan or Iraq. Of course, following the traditional rules for detaining battlefield captives would in no way require "Miranda" warnings or other "Crime Scene Investigation" techniques. Nevertheless, the Bush administration deliberately ignored these military rules – including the requirement for a hearing under Article 5 of the Geneva Conventions -- when it seized individuals in Afghanistan who are now held at Guantanamo.[5]

(While some have claimed that the "battlefield" in the "war against terror" is the entire world, that claim is inconsistent with traditional understandings in the law. For example, one characteristic of a battlefield is the existence of Rules of Engagement, which permit the military to use force offensively against an enemy.[6] Military Rules of Engagement for the armed forces stationed in Germany or the United States for example, are quite different from those applicable to troops in Afghanistan or Iraq. Troops in the United States or Germany are not entitled to use deadly force offensively.)

Outside these battlefields, in countries where there is a functioning domestic judiciary and criminal justice system, criminal laws should be used to arrest, detain and try individuals accused of plotting with al Qaeda or associated terrorist organizations. Outside the war theater, criminal law has proved to be successful at preventing and punishing would-be terrorists, protecting national security interests and ensuring due process.[7]

B. The government must distinguish between the different categories of detainees, who are subject to different rules.

One of the key sources of confusion in the debates to date about detention policy has been to speak about "terrorism detainees" in general as if they are all subject to the same legal regime. Recognizing that the law of war must be followed when seizing individuals on the battlefield and that criminal law must be followed when arresting suspects in Chicago or Italy, makes it clear that there are different categories of detainees.

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[3] *See Hamdi v. Rumsfeld*, 542 U. S. 507 (2004).
[4] Enemy Prisoners of War, Retained Persons, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).
[5] Article 5 requires that captives be given a hearing to determine whether they are prisoners of war.
[6] Corn and Jensen, *supra* note 1.
[7] *See* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice*, Human Rights First, May 2008, available at: http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

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- The first category includes fighters in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future); the second category is Osama bin Laden and the other self-proclaimed planners and organizers of the 9/11 attacks. Pursuant to the congressional authorization, individuals in the first or second categories may be targeted, captured and tried under the law of war.
- The third category includes suspected al Qaeda terrorists seized in the United States or elsewhere, other than Afghanistan or Iraq, who must be treated as suspects under criminal law.
- The last category is current detainees at Guantanamo, which includes individuals alleged to fall within all three categories listed above. The detainees in Guantanamo are *sui generis* for a number of reasons, including that their treatment has violated military law and traditions and that it has become an international symbol of injustice.

Fighters captured in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future) subject to military detention and/or trial:

Pursuant to the Supreme Court's ruling in *Hamdi*, individuals fighting in the Afghanistan or Iraq hostilities may be captured and detained pursuant to the law of war and may be held until the end of hostilities in the country in which they were captured.

All such individuals, immediately upon capture, should be provided a hearing pursuant to Article 5 of the Geneva Conventions and military regulations to determine whether they are entitled to be treated as prisoners of war, should be released as innocent civilians, or may be held as combatants pursuant to the Supreme Court's decision in *Hamdi*.

Any such individuals who are accused of violations of the law of war are subject to trial by a regularly constituted military tribunal following the rules of the Uniform Code of Military Justice as outlined below.

Osama bin Laden and the other planners and organizers of the 9/11 attacks:

In the September 2001 Authorization for the Use of Military Force, Congress specifically authorized the use of military force as "necessary and appropriate" against those individuals who "planned, authorized, committed or aided" the 9/11 attacks. The administration has identified approximately six individuals detained at Guantanamo as planners of the attacks and a limited number of others, including bin Laden, remain at large.

If such individuals are captured rather than killed, they should be treated humanely and protected from torture and cruel, inhumane or degrading treatment.

They may be held by the military until they are tried by a military tribunal or the end of the conflict with al Qaeda.

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They may be tried by a regularly constituted military tribunal as outlined below.

Such individuals may also be tried in the federal district courts on criminal charges.

The best course from the standpoint of discrediting and opposing al Qaeda may be to conduct a fair public trial of these individuals, rather than detain them without trial.

Suspected al Qaeda terrorists seized in the United States or elsewhere other than Afghanistan or Iraq:

Individuals found in the United States or in other countries with a functioning judicial system (other than Afghanistan and Iraq) who are suspected of terrorist plans or activities, must be detained and charged pursuant to the criminal justice system and/or deported in accordance with due process.

Any such individuals may be transferred to other countries only in accordance with the rules outlined below. They must be protected against the danger of torture and may only be transferred in accordance with due process and to stand trial on criminal charges.

Individuals suspected of terrorist plotting may be subject to surveillance in accordance with domestic laws.

Individuals currently held at Guantanamo:

The United States should begin a process to close the Guantanamo detention facility. There are many difficult questions about how to accomplish this arising in part from the administration's failure to follow the law in detaining and seizing these individuals. The Center for American Progress has recently issued a report detailing an approach in line with these recommendations.[8]

The government should expeditiously transfer all those detainees it has determined are eligible for release to their home country or to some other country where they will not be subjected to abuse or torture.

Those individuals in Guantanamo who are not alleged to have been captured on the battlefields of Afghanistan or Iraq or fleeing therefrom may not be held by the military as combatants, but must be either charged with a crime, transferred to another country for prosecution on criminal charges, or released.

As recognized in *Boumediene*, all detainees at Guantanamo are also entitled to habeas corpus.

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[8] *See* Ken Gude, *How to Close Guantanamo*, Center for American Progress, June 2008, available at: http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf.

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Those Guantanamo detainees who are alleged to have been captured in Afghanistan or Iraq and been part of al Qaeda or Taliban forces may be detained until the end of hostilities in those countries if the habeas court finds that they are such.[9] Such detentions without charge for the duration of hostilities were approved by the Supreme Court under *Hamdi* as having been authorized by the AUMF. At the same time, there are likely to be counterterrorism benefits to choosing to bring charges against such individuals and providing them with a fair trial.

Those detainees who are alleged to be planners or organizers of the 9/11 attacks may be detained until the end of the conflict with al Qaeda if the habeas court finds that they personally participated in the planning of the attacks.

Those detainees who are subject to military detention as described above and who are also charged with violations of the law of war may be tried by a regularly constituted military tribunal as outlined below.

C. Military tribunals for individuals who are properly held as combatants, either having been captured on the battlefield or having planned or organized the 9/11 attacks:

As recognized by the Supreme Court in *Hamdan*, combatants may be tried by military tribunals for offenses properly triable by such tribunals. Such tribunals must accord due process and be "regularly constituted courts." In addition, such tribunals must be seen by the world as fair and be consistent with the proud history of U.S. military justice in the past 50 years. The military commission system created for Guantanamo will never be seen as legitimate and thus should no longer be used to try detainees.

If military trials are sought for combatant detainees at Guantanamo, they should be conducted pursuant to the United States Uniform Code of Military Justice courts martial rules to the greatest extent possible.

D. End torture and cruel, inhumane and degrading treatment.

As the Supreme Court has made clear, all of these detainees are protected by Common Article 3 of the Geneva Convention and must be treated humanely. In particular:

All detainees should be treated humanely and be protected from torture and cruel, inhumane or degrading treatment.[10]

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[9] Whether al Qaeda fighters may be detained beyond the end of hostilities in Afghanistan need not be addressed, because peace in Afghanistan does not appear likely in the near future.

[10] For more specific recommendations about insuring humane treatment and ending torture, *see*, e.g., *Declaration of Principles for a Presidential Executive Order On Prisoner Treatment, Torture and Cruelty, National Religious Campaign Against Torture, Evangelicals for Human Rights, and the Center for Victims of Torture*, released June 25,

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No individual may be detained in secret.

The government must institute new mechanisms to ensure that no person is transferred to a country where it is reasonably likely that he would be in danger of torture.

Individuals may only be seized and transferred to other countries in order to stand trial on criminal charges in accordance with due process and the domestic laws of the country they are transferred to.

The CIA program of secret detention and interrogation of suspected terrorists should be ended.

The administration should consider whether any overriding national security reason exists for CIA involvement in terrorism detentions and interrogations, which outweighs the demonstrated harm these activities have caused to the national security. Before determining that the CIA should again participate in any detention or interrogation activity, the administration should report to the Congress concerning the national security interests at stake and specifically outline how, if such participation is authorized, it would be conducted with adequate checks to ensure that its operation conforms to law and is fully consistent with the United States' commitment to human rights.

Conclusion

Disrespect for the law has harmed, not enhanced, our national security. The next administration has a crucially important opportunity to restore U.S. standing in the world and respect for individual rights and constitutional separation of powers at home. We appreciate this opportunity to outline our recommendations for doing so.
Thank you.

September, 2008

2008, available at:
http://www.evangelicalsforhumanrights.org/storage/mhead/documents/declaration_of_principles_final.pdf, among others.

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Testimony before the U.S. Senate,
Committee on the Judiciary,
Subcommittee on the Constitution

"RESTORING THE RULE OF LAW"

A Statement by

Dr. Sarah E. Mendelson
Director, Human Rights and Security Initiative
Center for Strategic and International Studies (CSIS)

September 16, 2008

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Chairman Feingold and Members of the Subcommittee:

Thank you for inviting me to submit this written testimony for this session devoted to restoring the rule of law. My name is Sarah Mendelson. I direct the Human Rights and Security Initiative at the Center for Strategic and International Studies (CSIS), where I am also a senior fellow in the Russia and Eurasia Program.

The president of the United States and the two presidential candidates agree that the United States ought to close Guantánamo. But how can we expand a position that has been little more than a bumper sticker—"Close Guantánamo!"—and turn it into a blueprint for real policy change? My comments here outline an answer to this specific question and draw on the report that CSIS is releasing today entitled "Closing Guantánamo: From Bumper Sticker to Blueprint." In addition to this testimony, I wish to submit the entire report for the record.

I. Background

If I may, I'd like to begin on a personal note. I have spent the better part of nearly 15 years working along side many colleagues to support the development of democracy and human rights in Russia. Over the last several years, this work became increasingly difficult and indeed freighted by not only the actions of the Putin government but by specific policies adopted by the Bush administration concerning detention and torture. The work I was doing, for example trying to draw international attention to detention and torture in Chechnya, was increasingly overtaken by the reality that U.S. policies concerning detention, and in particular the detention facility at Guantánamo Bay, were condemned world wide. For that reason, I have spent much of the last year, together with a dedicated team, working on this issue. I look forward to the next administration restoring the rule of law concerning detention and interrogation issues. Then I might once again focus on the human rights abuses that occur elsewhere.

I want also to recognize the lengthy and collaborative process by which we came to the recommendations made in the report. CSIS first convened the Guantánamo and Detention Policy Working Group in late November 2007 in order to develop thoughtful policy recommendations concerning what ought to be done with those currently detained at Guantánamo. We did not begin with either the idea that it ought to be closed or left open. Our nonpartisan working group combined executive branch, intelligence, military, human rights, and international law experience. We planned and executed a careful process, meeting 18 times over seven months. Early sessions were devoted to defining what questions needed to be asked and what sorts of experts were best suited to answer them. Later sessions were spent with 15 additional experts

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exploring specific issues. Then we engaged in a lengthy debate within the group concerning specific recommendations and policy positions.[1]

At the end of the seven months, we came to general agreement on an outline of the policy recommendations. Not every working group member or observer agreed with every point in the outline or the final report—we did not aim to produce a "consensus document." Rather, our goal was to produce actionable policy recommendations that CSIS would issue for either this administration or, more likely, the next, on how best to deal with Guantánamo. We did this in two stages. We first released a draft report in mid-July 2008 for public comment and followed up with media appearances and briefings for those that requested them. After gathering comments and suggestions, we now issue this final version of the report.

At this stage, it will likely fall to the next administration to carry out this new policy. The challenges are considerable. There is no "silver bullet." In fact, there are only imperfect options. That said, we have concluded that the costs of keeping Guantánamo open far outweigh the costs of closing it. Our review of these issues concluded that the record of the criminal justice system concerning the prosecution of international terrorism cases far outshines that of the Guantánamo military commissions: since 2001, 145 convictions versus 2 convictions.[2] Overall, we found that a rather straightforward policy—review, release/transfer and try—can help restore our reputation as a country that is built on and embraces the rule of law.

The working group concluded that the United States has been damaged by Guantánamo beyond any immediate security benefits. Our enemies have achieved a propaganda windfall that enables recruitment to violence, while our friends have found it more difficult to cooperate with us. Symbols of alienation such as Guantánamo have served as a recruitment tool for individuals and groups who seek to harm the United States, increasing—not decreasing—danger. In fact, researchers at West Point's Combating Terrorism Center have found scores of references by top al Qaeda leaders referencing Guantánamo (some in the same breath that they mention Chechnya) going back to 2002 and as recently as January 2008.[3] Restoring the U.S. reputation will also have national security benefits.

II. How to Close Guantánamo

During the first week in office, the next president of the United States should announce the date for closure of Guantánamo as a detention facility in conjunction with announcing the establish-

[1] For a full list of working group participants, advisers and additional experts with whom we met, see Sarah E. Mendelson, "Closing Guantánamo: From Bumper Sticker to Blueprint," CSIS, September 2008, pp. 19-22.
[2] Richard Zabel and James Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court* (New York: Human Rights First, May 2008), p. 26.
[3] Author's e-mail correspondence, Natasha Cohen and Reid L. Sawyer, Combating Terrorism Center, West Point, N.Y. August 15, 2008.

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ment of a new policy. Implementation of this new policy would be charged to a blue-ribbon panel of eminent Americans named at the same time the president announces the date for closure. The panel would be tasked to review the files on all remaining Guantánamo detainees and to categorize all detainees to be transferred to the custody of another government, released, or, alternatively, held for prosecution. Once that sorting of the detainees is done, then the detainees would be either moved to the destination of release or transfer or to the United States for prosecution. The final element of the new policy would be to prosecute them through the U.S. criminal justice system.

In recommending that the president appoint a nonpartisan, blue-ribbon panel of eminent persons to review all available information on those held at Guantánamo and to assess who should be released/transferred or prosecuted, we are advocating essentially the policy equivalent of "rebooting" the system.[4] A team composed jointly of Department of Justice and Department of Defense prosecutors and support personnel would serve as staff to the panel and help evaluate the government's ability to prosecute detainees—on the basis of available evidence or evidence that reasonably could be developed—in U.S. district courts.[5] Representatives from the intelligence community would also be present on the team. The panel should provide as much transparency regarding its decisionmaking process as practicable, while remaining sensitive to prosecutorial considerations and to the need to protect sources and methods of intelligence collection. The panel would then make recommendations to the president on a rolling basis as files are reviewed. The administration will need to set a date by which the work of the panel ought to conclude. Without having seen the files, it is impossible to determine if that date might be met by December 31, 2009, or sooner.[6]

The process for release and transfer depends in substantial part on the willingness of allies to help the United States. With a comprehensive plan to close Guantánamo and end problematic policies and practices, allies are expected to prove more likely to help, and the next administration ought to explore immediately after inauguration the possibility of a "grand bargain." This process would involve negotiations conducted by senior administration officials concerning return arrangements consistent with non-refoulement obligations and principles. It would also likely involve, as a signal to the world that there is real change in policy, the United States accepting some detainees whom the Bush administration has slated for release but (with the exception of a few) has been unable to move to other countries.

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[4] The blue-ribbon panel and their staff would most likely have existing security clearances, but if not, they should be part of the expedited clearance process during transition recommended by Richard Armitage and Michèle A. Flournoy, "No Time for 'Nobody Home,'" *Washington Post*, June 9, 2008.

[5] The working group agreed that in certain cases UCMJ and courts martial might be the appropriate venue for prosecution.

[6] Some members of the working group strongly urged that the target date for reviewing all files ought to be within six months of inauguration.

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As the review process begins, staff for the blue-ribbon panel ought to consider current re-education and "counseling" programs, such as the one established by Saudi Arabia in 2004. The staff will need to assess strengths and weaknesses of the current programs and possibly work with governments receiving detainees to consider what programs might be developed for those specifically released from Guantánamo.

There are a host of post-release issues that must be carefully monitored by the next administration. These will include the possible abuse of detainees by the host or home government, as well as concern relating to possible acts of violence by those released. The administration ought to invest in diplomatic, technical, and possibly strategic communications strategies designed to mitigate such risk.[7]

The Bush administration faced the obstacle of possible post-release violence against detainees in numerous ways. In cases where the administration concluded that it could not release detainees to governments because those governments might torture them, the administration sought other, third countries to take these people. Allies, however, have been reluctant to accept detainees (with some exceptions) scheduled for release or transfer who could not be returned to their home country because of fears of torture. To the extent that European governments in particular will be more willing to work with the next administration and take some or more detainees, abuse concerns would likely (or substantially) be alleviated. In other circumstances, the current system of diplomatic assurances has in multiple cases proven inadequate. The next administration must develop a plan to better ensure that no detainees are transferred to torture.

To be sure, there are security risks associated with releasing or transferring detainees from Guantánamo. Some of those released (either directly by the U.S. government or subsequently by a government to whom the U.S. government transfers custody) may undertake hostile acts against the United States or allies' forces, citizens, or facilities. Some have reportedly done so already, although the number is debated and the blue-ribbon panel may want to explore the veracity of claims as well as the criteria previously relied on that led to release. The fact remains that the overwhelming majority have not, whether by choice or because former associates are unwilling to reengage with those released. Moreover, such risks are not unique to Guantánamo detainees: according to Multi-National Force–Iraq figures, on average, 30 to 50 security detainees in Iraq are released from U.S. detention every day.

The working group considered the risks of some number of released or transferred detainees engaging in violence against the United States or others, and determined that, while these risks exist, they are not as great as the risks resulting from damage incurred to U.S. interests by continuing to hold detainees without charge indefinitely. We cannot guarantee nor will we pretend that the risk of releasing or transferring detainees is zero, or for that matter that the risk is

[7] Technical strategies might include biometrics and enhanced border security. Working group meeting, February 28, 2008, with retired intelligence officers William Murray and Tyler Drumheller.

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quantifiable with any certainty. The next administration can, however, develop a plan with allies to reduce and mitigate these risks by, for example, investing resources in law enforcement, detention facilities, guard training, and reintegration programs in states with weak infrastructure that might receive detainees. It could put the names of those transferred out of Guantánamo on internationally shared watch-lists, if there are sufficient reasons to do so. In short, a number of solutions, including technological, diplomatic, and intelligence-based ones, are available and ought to be explored as part of a comprehensive policy package for closing Guantánamo.

The process and the rationale for transferring those that the blue-ribbon panel determines ought to be prosecuted rests ultimately on an established system of law, viewed as legitimate internationally, with an impressive record of convictions since 2001. As of 2008, the U.S. criminal justice system, especially when compared with the military commissions, has proven an effective venue for prosecuting terrorist suspects. Put simply, the established U.S. criminal justice system has brought to justice since 2001 more than 107 jihadist terrorist cases with multiple defendants that have resulted in 145 convictions.[8] The assumption of the working group was that going forward the majority of cases would be tried in civilian criminal courts.

The transfer to the United States would occur after a detainee's indictment. Additional evidence in some cases might need to be gathered for trial.[9] Information gathered through coercive interrogation techniques could not be used and would not qualify as evidence. In using the criminal justice system to convict those who (returning to our categories of who should be detained) have allegedly engaged in terrorist activity, or have played key roles in organizations engaged in such activity, the next administration not only asserts the new policy of turning the page and closing Guantánamo, it also denies terrorists suspects the symbolic value of special, extra-judicial treatment. In making this argument, we do not mean to suggest that there are no challenges.[10] Indeed, some of the cases may pose difficult evidentiary challenges. But the U.S. government has a wide array of criminal laws available, such as material support statutes that do not require heavy evidentiary burdens and that can yield longer sentences than, for example,

[8] Working group meeting, February 21, 2008, former prosecutors Kelly Moore and Richard Zabel; Zabel and Benjamin Jr., *In Pursuit of Justice*.

[9] Teams of FBI officers would need to be deployed. Working group meeting, February 21, 2008, former prosecutors Moore and Zabel. We acknowledge that there are some differences between the kinds of cases that come before federal courts usually and the kinds of cases the U.S. government has sought to prosecute at Guantánamo. In the former, the government usually develops its case before it detains someone; for those detainees currently at Guantánamo who the blue-ribbon panel concludes ought to be prosecuted, the United States would effectively decide to try some of these people well after they were detained. We also acknowledge gathering evidence six years after a crime has occurred presents challenges and deserves additional inquiry. We note, however, that gathering evidence for actions and crimes that occurred overseas years prior is not unique to these cases. See, for example, the discussion of the Al-Moayad case in Kelly Moore, "The Role of Federal Criminal Prosecutions in the War on Terrorism," *Lewis and Clark Law Review* 11, no. 4 (Winter 2007): 841–845, and author's telephone conversation, New York, August 8, 2008.

[10] The group varied in its assumptions about the nature of these challenges and included a minority that believed these were substantial.

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Hamdan received from the military commission system. Moreover, some detainees, such as Khalid Sheikh Mohammed, were indicted in federal court long before they were brought to Guantánamo. Presumably, the U.S. government has enough existing evidence in those cases that it would not need to rely on statements made while in custody. Finally, going forward, former prosecutors and retired FBI special agents also emphasize that the potential intelligence value of investigative and prosecutorial work has been undervalued and needs to be better understood and appreciated.[11] In some cases, detainees may be willing to enter plea deals in exchange for providing information critical to understanding terrorist networks and stopping attacks. Moreover, bringing those who have committed crimes, or have been plotting to commit crimes, to justice provides greater finality than an indefinite detention regime with dubious legal grounding.

There are numerous policy issues relating to trials and convictions that the next administration will need to address. The working group discussed with Department of Defense personnel possible facilities that might be adapted to hold those awaiting trial, including Leavenworth, Pendleton, and Charleston. No option is ideal.[12] These facilities were originally constructed to detain military personnel who are being prosecuted or have been found guilty of a crime. Any facility would need to be reconfigured to handle civilian detainees awaiting trial in conformity with international standards. When the next president announces his plan for Guantánamo closure, if the military sites are deemed appropriate, then contractors will need to begin work almost immediately on adapting whatever facility is chosen. The facility should be made ready to receive detainees within 120 days of the announcement. The funding mechanism for this work will need to be addressed. We could find no figure assessing how much this work would likely cost the government.[13] Among several issues relating to construction, we noted the need to establish medical facilities, heightened security for the facility, housing for support staff and transport, court access, and the ability for family to visit.

Another more likely option—for reasons relating primarily to attorney-client access—may be that those detained ought to be held in the federal pretrial detention facilities of the respective courts that will hear their cases, most likely the Eastern District of Virginia and the Southern and Eastern Districts of New York—in which terrorist suspects have been successfully tried and convicted. There are numerous additional jurisdictions that might be considered including New Jersey, Connecticut, Boston, and Chicago.

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[11] Moore, "The Role of Federal Criminal Prosecutions in the War on Terrorism"; Working group meeting, February 21, 2008, former prosecutors Moore and Zabel; John E. Cloonan, "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know about Them?" testimony before the U.S. Senate Committee on the Judiciary, June 10, 2008."

[12] Working group meeting, May 21, 2008, DOD personnel.

[13] DOD personnel reported to working group meeting, May 21, 2008, that no financial assessment of costs had to date been conducted.

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Not discussed in any detail by the working group but clearly an issue worthy of serious consideration is the public safety aspect of such a plan. For Americans to help the next administration turn the page on the Guantánamo system will require that at least some of these detainees be brought to justice through the U.S. criminal justice system. The public will need and should be reassured that their security will be protected as this occurs. They should be reminded that the United States has convicted and put away dangerous terrorists who threatened to blow up airplanes. They are locked away for life. Our justice system did that.

III. Conclusions

Seven months and 18 meetings later, the conclusions of the working group on Guantánamo revolved around a straightforward set of policy recommendations: a panel of eminent persons should preside over a fresh review of who is held there; they must make decisions about who should be released and transferred to another country, including to the United States. The rest ought to be brought to the United States, following indictment, and where necessary, the United States should make serious efforts to gather fresh, untainted evidence, and bring detainees to justice through the tried and true U.S. criminal justice system. Our criminal justice system has a record that far outshines that of the current military commissions. Our reputation as a country that is built on and embraces the rule of law will be restored, and this restoration will have national security benefits.

A comprehensive, multitiered approach to closing Guantánamo, as opposed to the largely rhetorical stances taken to date by the current administration and both campaigns—will require a significant policy shift. If declared decisively at the beginning of the next administration and implemented aggressively, this shift should signify to the world that the next administration was moving to repair the well-documented damage done to U.S. credibility and influence as a result of Guantánamo and the detention and interrogation practices there.

As a testament to the complexities of issues we discussed, it should be no surprise that we were not able to address some large ones that will pose additional challenges for the next administration. Chief among these is future detention policy for terrorist suspects. Going forward, how should it work? The details of the future detention policy writ large were beyond the scope of the working group. Guantánamo closure has implications for that policy however. Specifically, a focused commitment to criminal prosecution as a main vehicle for incapacitation would undoubtedly reduce the legal, diplomatic, and practical challenges that the United States has faced over the last seven years with the Guantánamo population. Would it, however, push some in the U.S. government to increasingly rely on secret detention elsewhere or, alternatively, targeted killing? Serious oversight and safeguards will need to be put in place to make sure a shift to the criminal justice approach does not mean an increased reliance by the U.S. government on practices that are as controversial as holding detainees at Guantánamo, if not more so.

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Future interrogation policy regarding terrorist suspects is another issue that is beyond the scope of this study but which our work touched on. Our recommendations for how to close Guantánamo have implications for future interrogation policy. If the federal criminal justice system is used to handle future detainees, that system precludes the use of involuntary or coercive interrogation techniques. We need to accommodate these prohibitions, and we need professionals trained in noncoercive techniques who the administration can call on and deploy at a moment's notice. The next administration should develop a program to grow a cadre of interrogators with language skills, drawing lessons learned from experienced professionals to interview alleged terrorist suspects. Never again, if our country is attacked, should we frantically engage in techniques that our enemies have used against our uniformed service members in times of war. We are better than that. We can do better than that. We must prepare to do better than that.

Thank you.

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Written Testimony for Senate Judiciary Committee Constitution Subcommittee Hearing: Restoring the Rule of Law

September 16, 2008

Submitted by: Douglas A. Johnson, Executive Director, The Center for Victims of Torture

The Campaign to Ban Torture: *American Voices for American Values*

Reassessing U.S. Counterterrorism Strategy

There is an urgent need for a reversal of this country's counterterrorism strategy. The current strategy, based on retribution, human rights abuses, and violations of international law, has badly damaged the United States' reputation in the world. For generations, America's unparalleled strength and reputation set us apart. Through our example, other nations were moved to adopt the universal principles that we honored. The example we set today is altogether different; it is cloaked in shame, clouded by moral relativism.

Additionally, our policies have invited human rights violations by other governments. Credible reports have emerged that repressive regimes have justified their use of torture and other forms of cruel treatment by pointing to the U.S. use of torture and other abuses in Iraq, Afghanistan, Cuba/Guantanamo Bay and elsewhere. In addition, attorneys for Charles "Chuckie" Taylor have argued that because the U.S. government has committed abuses since September 11, 2001, there is no longer a universal condemnation of the use of torture when it takes place in the context of anti-terrorism efforts (Center for Justice and Accountability, 2-08. Also, Human Rights First, "Russian Government Using Counterterrorism as a Pretext," 2-16-05.) And senior military officials note that U.S. national security is being damaged by the current policies, as allies decline to cooperate in counterterrorism efforts because they refuse to be directly or tacitly involved in the use of torture and other forms of cruel, inhuman and degrading treatment of detainees.

Torture and cruelty are now expected from the U.S. by constituencies around the world, among our traditional allies, our opponents, and those who have not usually had a firm opinion. The repercussions of this attitude toward the U.S. are enormous, with some saying that it will take at least two generations to recover our national credibility and moral leadership. In addition, the public has been manipulated about torture's ability to extract intelligence. Defenders of U.S torture policy claim that torture and cruelty, while repugnant, are a necessary means to a virtuous end: keeping America safe. This argument, however, is premised on the mistaken notion that torture actually works. As FBI, military intelligence and CIA professionals have reported, using torture yields more faulty information than actionable intelligence. We know this to be true from more than 20 years of providing care and rehabilitative services to torture survivors. They have told us that they would have said anything to end the torture. Torture and cruelty elicit unreliable information and damage our national security.

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Regaining a Consensus against Torture

Recognizing this urgent need to make a clean break from the policies of torture and cruelty, for the last several years CVT has been examining ways to effectively re-orient U.S. counterterrorism strategy toward policies that are firmly grounded in the rule of law. In June 2007, Ambassador Marc Grossman suggested to us that a Presidential Executive Order could address many of CVT's priorities in our anti-torture work. Ambassador Grossman, now Vice Chairman of the Cohen Group, a global consulting firm headed by former Secretary of Defense William Cohen, previously served as U.S. Ambassador to Turkey (1994-97); Assistant Secretary of State for European Affairs (1997-2000); and Under Secretary of State for Political Affairs (2001-2005). With distinguished foreign policy experience in both Republican and Democratic Administrations, Ambassador Grossman has been a key advisor to CVT for more than a decade.

CVT explored this concept with a group of leaders from the military, foreign policy and security policy sectors in a June 23, 2007 meeting in Washington. Participants in this bi-partisan gathering encouraged CVT to pursue this approach, and agreed to serve as advisors and to help advance the initiative.

Also in June 2007, CVT and the National Religious Campaign Against Torture (NRCAT) and Evangelicals for Human Rights (EHR) began to discuss the notion of combining a strong moral argument against torture, issued by the nation's religious leaders, with a series of strategic arguments against torture, issued by the nation's military, foreign policy and security policy leaders. To accomplish this goal the three organizations formed a partnership to pursue the goal of an Executive Order against torture and cruelty.

Declaration of Principles

CVT, NRCAT and EHR, with advice from senior experts in the military, national security, foreign policy, and faith sectors, drafted the "*Declaration of Principles for a Presidential Executive Order on Prisoner Treatment, Torture and Cruelty.*" This *Declaration of Principles* forms the core of The Campaign to Ban Torture.

The Campaign is an effort to convince the next President of the United States to issue an Executive Order implementing a set of principles upon which U.S. counterterrorism policy, as it relates to detention, prisoner treatment and interrogation policies, ought to be based. It unequivocally rejects the current policy of torture and cruelty. This Presidential Executive Order would announce to the world a fundamental change in U.S. counterterrorism policies and a return to foreign policy approaches grounded firmly in respect for human rights.

The Declaration is printed below as well as attached to this testimony.

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Declaration of Principles for a Presidential Executive Order on Prisoner Treatment, Torture and Cruelty

Though we come from a variety of backgrounds and walks of life, we agree that the use of torture and cruel, inhuman or degrading treatment against prisoners is immoral, unwise, and un-American.

In our effort to secure ourselves, we have resorted to tactics which do not work, which endanger US personnel abroad, which discourage political, military, and intelligence cooperation from our allies, and which ultimately do not enhance our security.

Our President must lead us by our core principles. We must be better than our enemies, and our treatment of prisoners captured in the battle against terrorism must reflect our character and values as Americans.

Therefore, we believe the President of the United States should issue an Executive Order that provides as follows:

The "Golden Rule." We will not authorize or use any methods of interrogation that we would not find acceptable if used against Americans, be they civilians or soldiers.

One national standard. We will have one national standard for all US personnel and agencies for the interrogation and treatment of prisoners. Currently, the best expression of that standard is the US Army Field Manual, which will be used until any other interrogation technique has been approved based on the Golden Rule principle.

The rule of law. We will acknowledge all prisoners to our courts or the International Red Cross. We will in no circumstance hold persons in secret prisons or engage in disappearances. In all cases, prisoners will have the opportunity to prove their innocence in ways that fully conform to American principles of fairness.

Duty to protect. We acknowledge our historical commitment to end the use of torture and cruelty in the world. The US will not transfer any person to countries that use torture or cruel, inhuman, or degrading treatment.

Checks and balances. Congress and the courts play an invaluable role in protecting the values and institutions of our nation and must have and will have access to the information they need to be fully informed about our detention and interrogation policies.

Clarity and accountability. All US personnel—whether soldiers or intelligence staff—deserve the certainty that they are implementing policy that complies fully with the law. Henceforth all US officials who authorize, implement, or fail in their duty to prevent the use of torture and ill-treatment of prisoners will be held accountable, regardless of rank or position.

Campaign to Ban Torture

In order to build a national consensus against torture and create the broadest support possible, in the months leading up announcing the Campaign's public launch, the three organizations began the process of soliciting high level bipartisan endorsements for the Declaration.

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Recognizing the authority, expertise and integrity that respected military leaders and national security and foreign policy experts uniquely possess on this issue, CVT sought endorsements from these influential groups while NRCAT and EHR focused on securing endorsements from key leaders in the religious community. (NRCAT is submitting testimony outlining its efforts in this area).

We launched the Campaign on June 25 and announced the support of a broad array of more than 200 leaders from the military, national security, foreign policy, and religious sectors. The endorsers CVT secured include:

- Three former Secretaries of State: George Schultz, Madeline Albright and Warren Christopher
- Three former Secretaries of Defense: William Perry, William Cohen and Harold Brown
- Three former National Security Advisors: Zbigniew Brzezinski, Anthony Lake, and Samuel R. Berger
- Four former members of the Joint Chiefs of Staff
- Ambassador Richard Armitage, John Whitehead, Alberto Mora, Ambassador William Taft IV, Dr. John Hamre, Senator Sam Nunn, General Paul Kern, and numerous other retired flag officers

The full list of endorsers is attached to this testimony, as are several press clippings from the day of the launch.

These individuals agreed to endorse the Declaration and to engage others in this initiative because of a shared commitment to work against the use of torture and cruelty—both because they are morally wrong and because they produce highly unreliable information and are, in fact, damaging to U.S. national security. Since the launch we have continued to add to the list of high level endorsers. Updates to the endorser list and other Campaign activities can be found at www.CampaignToBanTorture.org).

An Executive Order

An Executive Order would end the ambiguity, confusion and doubt that have clouded U.S. treatment of detainees. By adopting six core principles grounded to serve as guideposts for the conduct of counterterrorism efforts as they related to detention and prisoner treatment, we can make a clean break from torture and cruelty.

The Executive Order will not only address many of the most egregious problems created by this Administration's counterterrorism policy, but it could also serve as the basis for legislative efforts aimed at creating reinforcing solutions (so that another President cannot reverse the policies by rescinding this Executive Order). The Executive Order will also help to create the conditions necessary for conducting effective accountability activities related to possible crimes committed by members of the current Administration if the next President decides to pursue such activities.

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Some may ask with both candidates for the Presidency signaling a significant difference from the Bush Administration on this issue, is it still necessary to pursue an Executive Order? We assert that it is essential, for several reasons.

First,, in an increasingly interconnected world, for the U.S. to make progress on a variety of issues (human rights, climate change, peace and security, Iraq, and others) we will need to regain the confidence of key allies, and in particular European nations. Foreign policy experts have asserted that in order for this to happen, the U.S. needs to make a forceful statement announcing a dramatic break with the policies of the Bush Administration. A number of these experts have advocated that the single most significant statement a new President could make would be a repudiation of this Administration's torture policy for it, more than any other issue, has deeply offended our allies and the world.

Second, and perhaps most important, our military and security policy endorsers discuss counterterrorism policy and the likelihood of another attack within this country in the context of "when," not "if." They call for urgent action in pursuing this Executive Order because they understand how difficult it will be to reverse the current torture policy if we try to do it in the wake of the next attack. Witness Secretary of State Rice's comments in response to revelations that the torture of prisoners was discussed and planned in White House meetings: "There was a climate of fear....we were all worried about the next attack....we thought they had information...." If anyone thinks that the next Administration would not face these same pressures when the next attack occurs—despite their current positions on torture and prisoner treatment—they are misleading themselves.

The Campaign is currently in the process of assembling a team of lawyers to draft the Executive Order based upon the six principles in the Declaration. Harry McPherson, senior counsel at the international law firm DLA Piper and former special counsel to President Lyndon B. Johnson, has agreed to co-chair the drafting committee and will seek a Republican co-chair. Alberto Mora and Admiral John Hutson have also agreed to serve on the drafting committee and we are asking other endorsers and legal experts to join us. We will offer the final Executive Order to the President-elect as technical assistance.

Conclusion

We hope the Judiciary Committee will agree that we need to restore the rule of law by renouncing policies that have facilitated the use of torture and other forms of cruel, inhuman and degrading treatment of detainees in this country's counterterrorism efforts. To begin this process a critical first step will be for the next President to issue an Executive Order based upon the six principles in the Declaration.

Attachments

- Declaration of Principles
- List of Declaration Endorsers
- News Articles

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The Center for Victims of Torture

The Center for Victims of Torture (CVT) (www.cvt.org) was founded in 1985 as the first organization in the U.S., and the third in the world, created to provide care and rehabilitative services to survivors of politically motivated torture. CVT's mission is to heal the wounds of torture on individuals, their families and their communities, and to stop torture worldwide. The organization works toward this mission by providing comprehensive care to torture survivors and members of their families; conducting ongoing research on the long term effects of torture and effective treatment and rehabilitation models; providing professional training to care providers and others who engage with torture survivors in the course of their work; and contributing to the prevention of torture through public education initiatives and cooperative advocacy efforts with national and international human rights, health care, religious, and civic organizations. In Minnesota, where the organization is headquartered, CVT extends these services to about 250 torture survivors annually.

During the past decade CVT has invested heavily in capacity-building initiatives aimed at supporting the emerging domestic and international torture survivor rehabilitation movement. CVT has launched healing and training centers in Africa that each year care for more than 2000 survivors of torture perpetrated during the civil conflicts in Liberia, Sierra Leone and the Democratic Republic of Congo—while at the same time training 150 African nationals to serve as mental health and human rights workers. CVT has also just received funding to establish a rehabilitation center that will extend care to Iraqi torture survivors.

CVT also organizes technical assistance and training for 35 domestic healing centers and 16 centers in other countries, focusing on building clinical capacities; strengthening organizational development efforts; and promoting public education, advocacy, and constituency-building initiatives.

Through its New Tactics in Human Rights Project, CVT promotes enhanced strategic thinking among the human rights community through research and dissemination of innovative approaches to human rights work, development of tools and resource materials, and sponsorship of cross-training opportunities. (More information on the New Tactics project is available at www.newtactics.org.)

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Subcommittee on the Constitution
Senate Judiciary Committee

Hearing on "Restoring the Rule of Law"

September 16, 2008

Statement of Citizens for Responsibility and Ethics in Washington

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During the past eight years we have witnessed some of the most flagrant abuses of executive power and privilege, carried out under the theme of a unitary executive and aided by an obsession with government secrecy. Citizens for Responsibility and Ethics in Washington ("CREW"), from its vantage point as a frequent user of and litigant under the Freedom of Information Act ("FOIA") and other information access statutes, has observed up close the administration's continued refusal to make public the bases for a wide variety of its policies and decisions, hiding behind secret Office of Legal Counsel ("OLC") opinions and contorting statutory loopholes beyond reason. CREW therefore offers some historical perspective, identifies some of the more pernicious examples of secrecy, and suggests specific actions for moving forward to restore the rule of law in our country. We focus most extensively on the FOIA in view of our particular expertise and experience with that statute.

Pattern of Secrecy

The tone for secrecy was set at the start of the Bush administration, when President George W. Bush established the National Energy Policy Development Group ("NEPDG"), chaired by Vice President Richard B. Cheney and tasked with formulating administration energy policy. Operating totally in secret, the White House rebuffed efforts by the General Accounting Office and private litigants to ascertain who was involved in making the NEPDG's recommendations and the specific roles played by top oil executives with known close links to Vice President Cheney.[1]

Quite apart from the dangerous legal precedents that emerged from this litigation,[2] the administration's handling of the task force and the related litigation showcase at least three themes that would be repeated for the next eight years. First, the administration has a sweepingly expansive view of executive power and secrecy and relies aggressively on privilege to prevent the public from knowing what goes on inside the administration. Second, the administration has a clear disdain for Congress' traditional legislative oversight role, a disdain that has stymied both the House and the Senate in their efforts to find out the truth behind such scandals as the forced resignations of eight U.S. Attorneys for partisan political reasons and the leak by top White House officials of Valerie Plame Wilson's covert CIA identity. And third, the

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[1] The three resulting lawsuits were Walker v. Cheney, 230 F.Supp.2d 51 (D.D.C. 2002) (suit by head of GAO); Judicial Watch v. Dep't of Energy, 412 F.3d 1108 (D.C. Cir. 2004) (FOIA suit for records created by agency heads participating as members of NEPDG); and Cheney v. U.S. District Court, 542 U.S. 367 (2004) (challenge to failure of the NEPDG to comply with the Federal Advisory Committee Act).

[2] For example, in Cheney, the Supreme Court equated the discovery burdens the plaintiffs sought to impose on the vice president as comparable to burdens the courts have refused to impose on the president, providing further support for the administration's unitary executive theory. 542 U.S. at 385-86. Similarly, in Judicial Watch v. Dep't of Energy, the U.S. Court of Appeals for the D.C. Circuit found that documents sought from agencies whose agency heads had participated in the NEPDG and that had been provided to the task force were protected by the deliberative process privilege under a unitary executive theory. 412 F.3d at 130.

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vice president plays a key role in not only making policy, but in expanding the power of his office to match that of the president.

The executive's use of secrecy to expand its powers is evidenced in the secret legal opinions issued by the Department of Justice's Office of Legal Counsel. As a growing body of secret law on critical issues of national importance, the OLC opinions represent a dramatic and alarming departure from the openness that is the hallmark of our democratic form of government. OLC opinions are binding on the executive branch and have been used to justify everything from the torture of detainees to the government's warrantless electronic surveillance program. Through its reliance on secret OLC opinions, the administration has been able to circumvent congressional efforts to promote the publication of laws and regulations, such as the Administrative Procedure Act and the Freedom of Information Act.[3] The harm that flows from this lack of transparency is exacerbated by the OLC's continued willingness to rubber stamp even the most egregious administration policies.[4]

Secret OLC opinions are by no means the only information that the Bush administration has kept from the American public. In keeping with its belief that the unitary executive has the power to interpret the law before deciding how to enforce it, the administration has stretched the limits of the FOIA almost to the breaking point. At the beginning of the Bush presidency the administration adopted a default policy of non-disclosure under the FOIA that stands the law on its head. That policy, first announced by then-Attorney General John Ashcroft, favors non-disclosure by requiring agencies to engage in "full and deliberate consideration of the institutional, commercial, and personal privacy interests" before releasing any document under the FOIA and commits the Department of Justice to defending all agency withholding decisions "unless they lack a sound legal basis" or adversely affect other agencies.[5] But the FOIA's nine exemptions are generally permissive, not mandatory, to be invoked if information in the

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[3] For example, Senator Whitehouse has identified one secret OLC opinion that upholds the president's ability to unilaterally abrogate an executive order without public notice. See Statement of Sen. Whitehouse, Dec. 7, 2007, Congressional Record, pp. S15011-15012, available at http://www.fas.org/irp/congress/2007_cr/fisa120707.html.

[4] CREW's experience with secret OLC opinions demonstrates their self-serving nature. When CREW sought copies under the FOIA of White House visitor records that the Secret Service creates and maintains, the White House claimed the records are actually presidential and therefore not available to the public, relying in part on an OLC opinion that it refused to produce. Similarly, when CREW sought records from the Office of Administration ("OA") -- an EOP component that had operated as an agency since its inception -- relating to the mysterious disappearance of millions of emails from White House servers, the White House suddenly claimed OA was no longer an agency, relying on yet another secret OLC opinion.

[5] Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 12, 2001), available at http://www.usdoj.gov/foiapost/2001foiapost19.htm.

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requested records requires protection.[6] Moreover, the numbers tell the true story; the Bush administration's implementation of the FOIA has resulted in longer response times, bigger request backlogs, more denials of requests and fewer reversals of administrative appeals challenging an agency's denial of access to requested records.[7]

The administration's response to CREW's request for White House visitor logs that the Secret Service creates and maintains as part of its statutory mandate to protect the president and vice president is a case in point, as it reveals the disdain this administration has for the rule of law, specifically the FOIA. The administration attempted to reclassify the agency's documents as presidential documents under the exclusive control of the White House after entering into a secret memorandum of understanding with the Secret Service in the midst of litigation over the records' status. U.S. District Court Judge Royce C. Lamberth rejected the administration's efforts, ruling that the visitor logs are agency records of the Secret Service and ordered the agency to complete its processing of CREW's request.[8] The D.C. Circuit dismissed the government's subsequent appeal on the ground that the district court order was non-final, specifically rejecting the notion that processing the request would impose an unconstitutional burden on the vice president that justified immediate appellate review.[9]

The theory behind the executive's efforts to transform agency records, left unchecked, has no limits. There is nothing to stop the president or vice president from claiming as their own the records of any other agency based on nothing more than their interest in the records and a concern that disclosure would reveal something the White House seeks to conceal. In this way, the White House can effectively place those records beyond the reach of the courts, Congress and -- for the foreseeable future -- the public.[10]

The White House has played similar games with the FOIA in its treatment of the records of the Office of Administration. First characterized as an agency by President Jimmy Carter's White House -- the very White House that created OA in the first place -- OA has functioned as an agency subject to the FOIA until very recently. When faced with a FOIA request from CREW that would reveal the extent to which OA has known about, but done nothing to address,

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[6] A Citizen's Guide On Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records, H. Rep. 107-371, 107th Cong., 2d Sess. (2002).

[7] Minjeong Kim, Numbers Tell Part of the Story: A Comparison of FOIA Implementation Under the Clinton and Bush Administrations, 12 Comm. L & Policy 313.

[8] See CREW v. U.S. Dep't of Homeland Security, 552 F.Supp.2d 76 (D.D.C. 2007).

[9] CREW v. U.S. Dep't of Homeland Security, 532 F.3d 860, 865-66 (D.C. Cir. 2008).

[10] That is because under the Presidential Records Act, the president and vice president have virtually unchecked control over their records while in office and once they leave office, the records are not generally available to the public for up to 12 years. See 44 U.S.C. § 2204.

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the disappearance of millions of emails from White House servers during a critical two and one-half year period, OA abruptly changed course and declared itself to be a non-agency.[11]

Pattern of Expanding Executive Privilege

One way the Bush administration has advanced its theory of a unitary executive and enhanced the power of the executive is through its unprecedented use of signing statements. As of July 27, 2008, President Bush had used signing statements to challenge 1,172 provisions within 164 bills while signing them into law.[12] Not only has the president issued more signing statements than any previous president, but he has also raised more constitutional objections in his signing statements (85%) than any other president.[13] Through these statements President Bush has announced either that he will decline to enforce a particular provision of a law or will enforce it in a manner inconsistent with congressional intent.

The president's repeated use of signing statements to raise constitutional challenges to legislation has served to entrench his theory of a unitary executive and to undermine congressional checks on his use of executive power. For example, 28 U.S.C. § 530D(a)(1)(A)(I) requires the attorney general to notify Congress when any formal or informal policy calls for the Department of Justice to refrain from enforcing a federal statute. But through his use of ambiguous signing statements, the president has been able to bypass this requirement.

The Bush administration's belief in a near limitless executive has also conflicted with the traditional powers of the legislative branch. Congress plays the pivotal role of acting as a check on abuses by other branches of government,[14] but has been unable to assume that role effectively because of the administration's refusal to comply with legitimate congressional requests for information. For example, Congress' efforts to investigate the forced resignations of eight U.S. attorneys seemingly for partisan political reasons have been blocked by the White House's refusal to provide documents and testimony, even in the face of congressional subpoenas from the House Committee on the Judiciary. When both former White House Counsel Harriet Miers

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[11] Although the district court agreed with OA, that ruling is now on appeal and the district court has stayed its order pending resolution of the appeal. CREW v. Office of Administration, 249 F.R.D. 2 (D.D.C. 2008), *stay granted in part and denied in part*, 2008 U.S. Dist. LEXIS (July 8, 2008).

[12] See http://www.users.muohio.edu/kelleycs/ (website of Dr. Christopher Kelley) (last visited Sept. 3, 2008).

[13] OpenTheGovernment.org, Secrecy Report Card 2007, available at http://www.openthegovernment.org/otg/SRC2007.pdf.

[14] H. Comm. on Gov't Reform - Minority Staff Special Investigations Division, Congressional Oversight of the Bush Administration, Jan. 17, 2006, available at http://oversight.house.gov/documents/20060117103554-62207.pdf.

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and former Chief of Staff Joshua Bolton refused to comply with congressional subpoenas for testimony and related documents, the Judiciary Committee sued to enforce the subpoenas. The executive, arguing that the Committee lacks standing and a proper cause of action, that the dispute is non-justiciable, that the court should decline to exercise jurisdiction, and that both Ms. Miers and Mr. Bolton enjoy absolute immunity and need not even produce a privilege log, moved to dismiss the complaint. In a lengthy opinion U.S. District Court Judge John D. Bates rejected all of these arguments and refused to stay his opinion pending the government's appeal, reasoning in part that the executive has failed to raise a serious and substantial question on the merits.[15] Notably, Judge Bates was quick to reject the unprecedented argument that Ms. Miers and Mr. Bolton are entitled to absolute immunity, an argument that flies in the face of Supreme Court precedent to the contrary.[16]

This is by no means the first instance where the Bush administration has refused to comply with congressional requests for information.[17] But the administration's unyielding refusal to comply with the congressional subpoenas issued to Ms. Miers and Mr. Bolton best reveals the depth of its contempt for the investigative functions of Congress. Without the check of the judiciary, the executive would be able to expand its powers under a theory of a unitary executive in a manner that eclipses the constitutionally assigned roles of the other two branches of government.

The views of the vice president on the power of his office and where it fits into our system of government present one of the most egregious examples of abuse of power by the executive. Not only has Vice President Cheney indicated his belief that he enjoys the same constitutional protections and immunities as the president,[18] but he has redefined his office as belonging to neither the executive nor the legislative branches, but "attached by the Constitution to the latter."[19]

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[15] Comm. on the Judiciary v. Miers, 558 F.Supp.2d 53 (D.D.C. 2008), *stay denied*, 2008 U.S. Dist. LEXIS 65852 (Aug. 26, 2008).

[16] See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[17] For example, in 2001, the House Committee on Government Reform had to file suit to compel the administration to release 2000 adjusted census data. Waxman v. Evans, 2002 U.S. Dist. LEXIS 25975 (Jan. 18, 2002). In 2002, the administration refused to provide the Senate Governmental Affairs Committee with records of White House communications with Enron until threatened with a subpoena. Richard A. Oppel, Jr., Senate Democrats Escalate Efforts to Get White House to Disclose Enron Contacts, *The New York Times*, May 18, 2002.

[18] See, e.g., Wilson v. Libby, 498 F.Supp.2d 174 (D.D.C. 2008), wherein the vice president argued that like the president, he is entitled to absolute immunity from suit.

[19] See, e.g., U.S. Government Policy and Supporting Positions, 2008 ed. ("Plum Book"); congressional testimony of Chief of Staff David Addington before the House Judiciary

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Consistent with this view, since 2003 the vice president and the Office of the Vice President ("OVP") have refused to file with the Information Security Oversight Office of the National Archives and Records Administration any reports about what data they have classified or declassified in accordance with Executive Order 12,958, as amended by Executive Order 13,292. On similar grounds, the vice president and the OVP have refused to comply with the requirement of the Ethics Reform Act of 1989 to file a semi-annual report of payments accepted from non-federal sources, 31 U.S.C. § 1353. And the OVP refused to submit its staff list to Congress as part of a recent report the White House submitted on its office staff. Thus, while seeking the protection of executive privilege, the vice president refuses to comply with the obligations that executive status imposes.

These actions have taken the vice president in a direction neither contemplated nor sanctioned by our Constitution, which establishes three co-equal branches of government, each acting as a check and balance on the other. Left unchecked, the vice president would establish his office as a fourth branch of government, immune from any accountability.

Recommendations

As this brief snapshot illustrates, the Bush administration has succeeded on multiple fronts in upsetting the careful balance of powers that the Framers intended, often by flouting some of the very laws that were enacted in the wake of the abuses of Watergate to ensure government accountability. The time is long overdue to restore the rule of law, and the incoming administration provides an opportunity to reverse the administration's abuses of the last eight years.

Toward that end, Congress should amend the FOIA so that it is uniformly implemented consistent with its underlying purpose to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[20] The radical policy shifts that occurred between the Clinton Administration, with its "Reno policy" of presumed disclosure,[21] and the Bush Administration with its non-disclosure-biased Ashcroft policy demonstrate that fulfilling these purposes should not be at the whim and discretion of each incoming administration. Accordingly, Congress should make express in the FOIA a presumption of disclosure and codify the policy that information can only be withheld where the agency "reasonably foresees that disclosure would

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Committee.

[20] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[21] See Memorandum from Janet Reno, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 4, 1993), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm. ("Reno Policy").

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be harmful to an interest protected" by a specific exemption.[22]

In addition, to further a more open society, Congress should amend the FOIA to require that any statute intended to specifically exempt records from disclosure under Exemption 3 of the FOIA must so provide explicitly and must explain the rationale behind the statute's requirement of non-disclosure.[23] Amendments to the FOIA should also address the disclosure of OLC opinions, making clear that as final opinions on questions of law for the executive branch they are protected by neither the deliberative process nor the attorney-client privilege.

To further promote open and transparent government, Congress should amend the FOIA to make clear that both the Office of Administration and the National Security Council, two EOP components deemed by the courts to be non-agencies, are agencies for purposes of the FOIA. Such an amendment would reconcile the FOIA with congressional intent in amending the FOIA in 1974 to include the EOP within the definition of agency. CREW also supports the Open and Transparent Smithsonian Act of 2008, which restores agency status to the Smithsonian Institution for purposes of the FOIA and the Federal Advisory Committee Act. The numerous scandals and embarrassments that followed at the institution after it was deemed a non-agency and therefore not subject to the FOIA demonstrate all too vividly the need to restore its transparency through legislation.

To give the fullest meaning to the principles that prompted the enactment of the FOIA, Congress should also amend the Federal Records Act, 44 U.S.C. §§ 2101, et seq., ("FRA"), to ensure that government agencies are taking the best advantage of technological advances in making their records accessible to the public. The proposed Electronic Communications Preservation Act, H.R. 5811, is a first step, but more is needed. Legislation needs to carry effective enforcement mechanisms for non-compliance and to set forth sufficiently comprehensive benchmarks for agencies to meet, especially with respect to training, education and compliance. Moreover, the provision of four years for agencies to fully implement electronic record keeping proposed in H.R. 5811 is unneeessarily long and does not take into account that records management software already is available. Amendments to the FRA should also mandate an active role for NARA in ensuring government-wide compliance, including the requirement that the archivist conduct regular inspections.

Congress should also amend the Presidential Records Act, 44 U.S.C. §§ 2201, et seq. ("PRA"), which has been sorely tested during this administration. Despite the PRA's requirement that the president preserve the records of his administration, millions of emails

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[22] Reno Policy.

[23] The OPEN FOIA Act, S. 2746, which is pending in the Senate, would likewise ensure transparency by requiring that every statutory carve-out to the FOIA expressly reference section 552(b)(3) of that Act. CREW supports the OPEN FOIA Act, but also supports more comprehensive amendments to the FOIA that would address all of the issues raised herein.

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covering critical events from the decision to go to war in Iraq to the disclosure by top White House officials of Valerie Wilson's covert CIA identity are missing from White House servers. The White House has refused to implement an electronic record keeping system, leaving all of its electronic records vulnerable to destruction, loss, or alteration. Further, the White House has dragged its heels for years, refusing to take any steps to restore the missing emails despite a statutory requirement that it do so.

This abysmal record of non-compliance with the White House's record keeping obligations was facilitated by the lack of any oversight in the PRA, which has been interpreted to give the courts the ability to review only a president's guidelines as to which materials will be treated as presidential records in the first place. Armstrong v. Nat'l Sec. Archive, 1 F.3d 1274, 1294 (D.C. Cir. 1993). But a president's specific disposal decisions and practices are not subject to judicial review under the current statutory scheme. Armstrong v. Bush, 924 F.2d 282, 291 (D.C. Cir. 1991). Legislative amendments to the PRA should reverse this course, making clear that a president's failure to comply with the PRA is subject to challenge by both the archivist and the public. An amended PRA should include effective enforcement mechanisms as well as penalties for noncompliance and create a direct oversight role for the archivist to ensure compliance by the White House. And Congress should amend the PRA to expressly define vice presidential records as including records that the vice president and his office create and receive in fulfillment of their constitutional, statutory, and other official and ceremonial duties.[24]

Finally, the litigation that has ensued over Congress' efforts to enforce its subpoenas against Ms. Miers and Mr. Bolton highlights the need to create a mechanism by which Congress can more easily enforce its subpoenas. Specifically, Congress should pass a statute granting federal courts jurisdiction to hear cases involving the enforcement of congressional subpoenas issued to the executive branch.[25] Such legislation should also provide for direct review to the

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[24] The PRA now provides that the vice president's records are to be treated the same as the president's records, 44 U.S.C. § 2207, and the definition of vice presidential records in NARA's implementing regulations mirrors the definition of presidential records in the PRA. See 36 C.F.R. § 1270.14(d). Nevertheless, through Executive Order 13,233 President Bush unlawfully narrowed the definition of vice presidential records by specifying that the PRA applies only to "*the executive records of the Vice President.*" Executive Order 13,233, section 11(a) (emphasis added). Vice President Cheney in turn has taken an unduly restricted view on when, if ever, he functions in an executive capacity, raising the substantial likelihood that he will treat the vast majority of his records as personal records falling outside the scope of the PRA.

[25] There is precedent for this approach. In 1973, the Senate Select Committee on Presidential Campaign Finance sought civil enforcement of its subpoena for Watergate tapes and documents. After a lower court refused to hear the matter, Congress passed legislation authorizing jurisdiction over just this specific suit. Pub. L. 93-190, Dec. 18, 1973. While the Select Committee did not ultimately prevail in its lawsuit because the House Judiciary Committee already had the tapes, it had its day in court.

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Supreme Court to ensure that the case is heard while a president is still in office and the result is still relevant.

The upcoming presidential transition presents an opportunity for Congress to reverse the course of the past eight years and restore our democracy to a rule of law. Congress should exercise its legislative and oversight powers to ensure that the abuses of executive power committed by the Bush administration and its replacement of transparency in government with secrecy and non-accountability are never again repeated.

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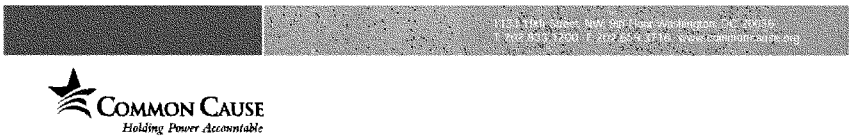

Testimony of Sarah Dufendach,
Vice President for Legislative Affairs at Common Cause
to the Senate Committee on the Judiciary,
Subcommittee on the Constitution

Restoring the Rule of Law

September 16, 2008

Chairman Feingold, Ranking Member Brownback and members of the Subcommittee on the Constitution, Common Cause is pleased to submit this testimony as you consider what steps must be taken by Congress and the next President to reverse the erosion of the rule of law that the country has experienced in the past seven years.

The Administration of President George W. Bush has seized, consolidated, and wielded executive power to a degree unparalleled in modern American history. The abuses of power include disregard for fundamental principles of American democracy: separation of powers and our system of checks and balances; politicization of the justice system; grotesque acts of torture; disregard for international laws and institutions; and violation of fundamental civil rights and liberties at home and abroad.

While the President will soon leave the White House, those problems will remain. Now, and for the foreseeable future, we as a nation must fight to reclaim and preserve our fundamental principles of liberty and justice, and ensure that the unprecedented power grabs of the current Administration are not institutionalized as a precedent for the future. We must stop the assault on our Constitution and restore our core American values.

Restoring the Core Values of American Democracy

The growing constitutional crisis in America has brought Common Cause back to its roots. Common Cause was founded in 1970, during the turmoil of the Vietnam War and growing abuses of power by the Nixon Administration, to "build a true 'citizens' lobby' – a lobby concerned not with the advancement of special interests but with the well-being of the nation." We now have a 38-year track record of fighting to improve democracy at all levels, chapters in 35 states, and nearly 400,000 members and supporters across the country.

Common Cause began to refocus its attention on Executive Branch abuses of power in 2007, when we decried the politicization of the Justice Department and launched a campaign to impeach Attorney General Gonzales. In September, 2007, our

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National Governing Board passed a resolution supporting an expeditious withdrawal from Iraq and formation of a commission to investigate abuses of power and corruption in the initiation and conduct of the Iraq war. Since then, we have backed the formation of the Webb-McCaskill Commission on Wartime Contracting to investigate fraud and abuse in the Iraq War effort, opposed immunity for telecommunication firms that cooperated with the Administration's illegal domestic surveillance program, and called for strengthening the War Powers Act.

On June 10, 2008, Common Cause convened a panel discussion at George Washington University, entitled "Abuse of Power: Forging a Path to Recovery," to explore strategies for righting our country and restoring the rule of law. The panel featured vigorous analysis and discussion by Stan Brand, Liz Holtzman, John Shattuck and Jonathan Turley. See attached transcript.

Most recently, Common Cause launched its new *Recapture the Flag* campaign to restore the core values of American democracy with a full-page ad in the *New York Times* on July 8, 2008. Although we have grave concerns about the lack of accountability for violations of the U.S. Constitution and law that have occurred in recent years, the campaign is forward looking and focuses on defining the principles that citizens should expect the next President and Congress to adhere to. To date, nearly 37,000 citizens have signed our *Recapture the Flag* pledge, and 204 congressional candidates have signed a parallel pledge to "Renew America's Promise."

Repeated abuses of power by the Bush Administration, and the failure of Congress to stand up as an institution to use or protect its powers, has damaged our democracy at home and tarnished our reputation abroad. As a result, America is less free *and* less secure.

In order to restore the core values of American democracy that have made us a beacon of hope to people around the world – freedom from tyranny, respect for individual liberty and human rights, and government based on the rule of law – we have called upon all who would serve as the next President or in the next Congress to abide by the following principles:

- To end torture, respect human rights and restore America's reputation in the world;
- To respect the rule of law and to fiercely challenge anyone who seeks to undermine the Constitution and the Bill of Rights;
- To root out corruption, special interest abuses and partisan prejudice in the administration of justice;
- To hold to account – without exception – anyone who breaks the law or violates the public trust; and
- To protect personal freedom by rejecting warrantless spying, stifling of dissent and other affronts to individual liberty.

Those principles encompass the steps needed to heal this country and reclaim our flag as the symbol of a democracy we can all be proud of. See attachments.

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The Common Cause Reform Agenda

Clearly, Congress has a lot to do to repair the damage that has been done to our Constitution, our values, and our stature in the world. Congress must fulfill its constitutionally mandated role, as a coequal branch of government and an indispensable check on the excesses of the Executive Branch. But let there be no mistake about it: Congress has the *power* to do that. It is time for Congress to flex its muscles and regain its rightful place in our ingenious tripartite system of government. In this regard, the path for Congress is clear. The Legislative Branch must investigate and enact laws to eorrect abuses in (at least) the following areas:

Stop the inappropriate uses of the State Secrets Privilege.

Assertion of the State Secrets Privilege is a recognized and legitimate legal procedure designed to suppress information in a court proceeding where the release of the information would be a threat to national security. However, there have been numerous times during the past seven years when the Bush Administration has asserted the State Secrets Privilege in order to hide its own wrongdoing. Congress should investigate the recent inappropriate assertions of these privileges.

Common Cause also supports legislation currently being considered by the House Judiciary Committee, H.R. 5607, sponsored by Rep. Nadler (D-NY) and Rep. Petri (R-WI), to allow the courts much more power to decide when the State Secrets Privilege is appropriate and when it is not, thus providing a balance to executive branch claims.

Stop the abuse of presidential signing statements.

President Bush has added signing statements to more bills than any president in history, and he has used them in ways that violate the constitutional separation of powers. Rather than veto bills with which he disagrees, this president has used signing statements to single out selected parts of bills he does not intend to enforce, thus circumventing the constitutionally defined legislative process.

Common Cause believes Congress must enact legislation to bring executive behavior into line with appropriate legislative procedures, constitutional limitations and restore the proper role of the veto and veto override process.

Common Cause supports legislation such as* S. 1747, *introduced by Senator Arlen Specter (R-PA), that would at least help mitigate the negative effects of President Bush's signing statements by prohibiting judges from considering signing statements when interpreting the law.

Require Executive Branch cooperation with congressional oversight.

When the House Judiciary Committee began investigating the politicization of the Justice Department and the firing of United States Attorneys, the Committee subpoenaed Harriet Miers, President Bush's former White House counsel, and Josh Bolten, his chief

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of staff. By exerting overbroad Executive Privilege, the President refused to allow either to testify before the Committee. Common Cause viewed the president's action as obstructing the Congress's constitutionally mandated duty to conduct oversight of the executive branch. Because Congress is a co-equal branch of government, Executive Branch personnel may not be allowed to flout its procedures or ignore its authority. The right of Congress to subpoena witnesses and take testimony is a necessary precondition to its investigative activities in support of its legislative powers.

Common Cause supported the House vote to hold both Meirs and Bolten in Contempt of Congress, and welcomed the decision by Judge Bates rejecting the notion of absolute immunity and compelling their testimony before the Committee. Common Cause also supports the House Judiciary vote of contempt against Karl Rove, who also ignored a committee subpoena and would support further measures by the House to compel his testimony such as a full House vote of Contempt of Congress and employing their power of inherent contempt if necessary.

The next President should issue an Executive Order mandating federal agencies' complete cooperation with congressional investigations in the future.

Stop politicization of the Department of Justice.

The Department of Justice has been allowed to become the most blatantly partisan, political and ideological of agencies, rather than the nation's law firm, dedicated to the pursuit of justice and serving the interests of the American people. It has become abundantly clear from recent Inspector General's reports that the improper firings of U.S. Attorneys and improper hiring practices of Honors Program attorneys are just the tip of the iceberg.

Common Cause believes that whether by legislation or Executive Order, sanctions must be imposed upon any current or former Justice Department official who improperly used their office to pursue an agenda inconsistent with their oath.

Restore respect for human rights and international law.

The Conventions Against Torture, the Geneva Conventions, and U.S. law clearly prohibit torture. However, the Administration has chosen to evade the spirit of the law by employing a legalistic strategy that parses words about the definition of torture and masquerades obvious acts of torture under the title of "advanced interrogation techniques." While Congress has attempted to address this issue, its efforts have fallen short. And while it should not be necessary to pass a law in the United States explicitly banning torture and secret renditions, current circumstances dictate that we must. The well-publicized violations of domestic and international law and norms with respect to treatment of prisoners have undermined respect for the United States abroad, as well as at home. This conduct should be thoroughly investigated and those responsible, at the highest levels, held accountable.

Common Cause supports measures to reestablish our honor internationally by seeing that we are living up to the rule of law as spelled out in domestic and

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international law. Common Cause supports legislation introduced by Congressman Bill Delahunt (D-MA), H.R. 6054, establishing a human rights commission to monitor U.S. compliance with all international human rights treaties to which the U.S. is a party. The commission would be made up of 18 members of Congress, nine from the House and nine from the Senate. It would also have subpoena power and report annually its findings to Congress.

Strengthen and clarify the War Powers Act.

Congress must pass legislation that clarifies the necessary and proper role of Congress in entering into military conflict. It is imperative that Congress have access to quality information and conduct a transparent public debate before performing its duty under the Constitution by making the decision to take the country into military conflict. Ambiguities in the current War Powers Resolution make it necessary for a new resolution that explicitly delineates each branch's responsibilities in these matters. We believe such action is especially urgent at this time due the current nature of conflict in the world and the actions of non state actors. Common Cause strongly supported the War Powers Act of 1973, and has consistently opposed any commitment of military forces that did not respect Congress's role as delineated by the War Powers Resolution and the Constitution.

Common Cause believes the best vehicle to address the ambiguities in the War Powers Resolution is legislation, H. J. Res. 53, introduced by Representative Walter Jones (R-NC), the "Constitutional War Powers Resolution." The legislation is based in part on the collaboration of a bipartisan panel of legal scholars organized by the Constitution Project to address the issues that have allowed presidents over the last several decades to ignore the role of Congress before entering into military conflict. We believe this is a particularly important issue to raise among policy makers and the news media now, especially as it relates to the potentially grave situation with Iran.

Common Cause would like to again thank the subcommittee for holding this hearing on Restoring the Rule of Law, and for inviting us to participate in the creation of a record of the abuses of power and violations of law committed by the Bush Administration. The work of the subcommittee in looking prospectively into how to advise the next Congress and Administration on how not to replicate past offences is very important. We hope we have been able to make some useful suggestions and recommendations as to what the legislature in particular needs to do to re-assert its role as a co-equal branch with the grave responsibility of keeping the Executive Branch from overreaching and abusing its power.

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Statement of the Constitution Project
Submitted to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Judiciary Committee

Hearing on "Restoring the Rule of Law"

September 16, 2008

Thank you for providing the Constitution Project with the opportunity to submit testimony for the Subcommittee's hearing on "Restoring the Rule of Law." The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to encourage constructive dialogue and to promote consensus solutions to pressing constitutional issues. Four of the witnesses testifying before this Subcommittee today work with us on rule of law issues. Mickey Edwards, Harold Koh, John Podesta, and Suzanne Spaulding are all members of our Liberty and Security Committee. Congressman Edwards is also a co-chair of our War Powers Committee. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical, accessible material designed to make constitutional issues a part of ordinary political debate.

In recent years, the Constitution Project has done extensive work to restore and promote the rule of law. Our Rule of Law Program addresses threats to the rule of law and to our constitutional liberties stemming from the assertions of expansive presidential authority since September 11, 2001; Congress's simultaneous failure to exercise its duties as a separate and independent branch of government; and efforts by both Congress and the President to strip the courts of their jurisdiction to oversee the actions of the executive and legislative branches. These threats include warrantless domestic surveillance, the denial of *habeas corpus* rights to "enemy combatants," the increasing and unrestricted use of terrorist watch lists, Congress's abdication of its exclusive authority to declare war, the abuse of immigration law as a counter-terrorism tool, and increasing governmental secrecy that conceals wrongdoing and prevents Americans from knowing what the government is doing in our names.

The statements and reports of our bipartisan, blue ribbon panels listed below convey the recommendations of influential leaders concerning these most pressing concerns.

Checks and Balances: The Constitution Project's Coalition to Defend Checks and Balances issued a powerful statement in February 2006 calling for renewed emphasis on the constitutional separation of powers within the federal government.
http://www.constitutionproject.org/pdf/Checks_and_Balances_Initial_Statement.pdf

MCA Habeas: In March 2007, a distinguished bipartisan group of over forty-five experts organized by the Constitution Project, released a statement calling on Congress to restore *habeas corpus* rights to non-citizens designated as "enemy combatants" eliminated by the Military Commissions Act (MCA). The group asserts *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system. The statement also points out the importance of full and fair *habeas* hearings to "ensure there is a meaningful process to determine

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[whether the United States] is holding the right people," and to "help repair the damage [to America's international reputation] and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy."
http://www.constitutionproject.org/pdf/MCA_Statement.pdf

National Security Courts: The Constitution Project condemns proposals to create a system of "national security courts" in a July 2008 white paper, *A Critique of 'National Security Courts.* In recent years, and particularly in the aftermath of the Supreme Court's decision in *Boumediene v. Bush* affirming the constitutional rights of "enemy combatants" to challenge their detentions through *habeas corpus*, several scholars and government officials have called for the creation of specialized hybrid tribunals that would review the preventive detention of suspected terrorists, conduct the detainees' criminal trials, or, in some cases, both. However, as our report makes clear, these provisions neglect basic and fundamental principles of American constitutional law, and incorrectly assume that the traditional processes have proved ineffective. The government can accomplish its legitimate goals using existing laws and legal procedures without resorting to such sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries.
http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts1.pdf

NSA Surveillance: In its *Statement on the National Security Agency's Domestic Surveillance Program*, the Liberty and Security Committee asserted that the spying program "upends separate, balanced powers by thwarting the will of Congress and preventing any opportunity for judicial review." The statement was issued on July 25, 2007, shortly before Congress passed the Protect America Act. As with the *Statement on the Protect America Act* described above, it outlines principles regarding the need for congressional and judicial oversight that remain relevant today.
http://www.constitutionproject.org/pdf/NSA_Statement_20071.pdf

Presidential Signing Statements: In the Coalition to Defend Checks and Balances' 2006 *Statement on Presidential Signing Statements*, Coalition members expressed their concern that unconstitutional uses of presidential signing statements are undermining our system of checks and balances. While noting that "there is nothing inherently troubling" about signing statement, they condemned the use of such statements "to challenge or deny effect to legislation" that the President has chosen to sign and not veto. They sharply urged the President "to immediately abandon these uses of the presidential signing statement," and Congress "to make unmistakably clear the link between a President's inappropriate use of signing statements and the costs of doing so."
http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf

Protect America Act: The Constitution Project's Liberty and Security Committee released a *Statement on the Protect America Act* in October 2007 to address the legislation that authorized the National Security Agency to conduct many types of surveillance in the without first seeking a warrant. The statement advised Congress that many of the amendments to the Foreign Intelligence Surveillance Act (FISA) contained in the Protect America Act (Pub. L. 110-55) were unnecessarily overbroad, undermined our constitutional system of checks and balances, and failed to sufficiently protect the privacy of the communications of Americans. The statement outlines several critical problems with the Protect America Act, and urged Congress "not to reauthorize these overbroad and harmful provisions." Although Congress

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passed new amendments to FISA in July 2008, the statement outlines principles regarding the need for congressional and judicial oversight that remain relevant today.
http://www.constitutionproject.org/pdf/Statement%20on%20PAA.pdf

War Powers: The War Powers Committee's 2005 Report *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* is an emphatic call to Congress to reassert its constitutional role as the branch responsible for deciding when the United States should use force abroad. The committee explains and applies the constitutional demands of the separation of powers in its recommendations, which include calling upon the President to supply Congress with timely and complete information about its recommendations for the use of force and upon Congress to authorize initiating the use of force only by declaration of war or a specific statute of appropriations, except in clearly stated cases of clandestine counter-terrorism operations requiring secrecy and speed.
http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf

State Secrets: In a statement released in May 2007, *Reforming the State Secrets Privilege*, members of the Constitution Project's Liberty and Security Committee and its Coalition on Checks and Balances outline the need to limit the state secrets privilege "to balance the interests of private parties, constitutional liberties, and national security." Since September 11th, the executive branch has increasingly asserted that this privilege prevents citizens from bringing lawsuits to challenge federal policies, including those associated with wiretapping and federal detention policies. In the statement, the more than forty expert signatories emphasize the importance of independent judicial review as a check on executive discretion.
http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf

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Statement by Leonard M. Cutler

Professor of Public Law
Siena College

to the
Subcommittee on the Constitution

Senate Judiciary Committee

"Restoring the Rule of Law"

September 16, 2008

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Mr. Chairman and members of the Subcommittee, as a Professor of Public Law who has written extensively about issues related to the Rule of Law, the Law of War, and National Security Policy Post 9/11, I am very pleased to share with you perspectives on the separation of powers and national security policy as we prepare for a new Administration and Congress to take office in 2009.

I want to express my gratitude to you Senator Feingold and your colleagues on the Subcommittee on the Constitution for convening this hearing because I believe it is essential that the next Presidential Administration and the Congress restore the vital collaborative partnership which is essential in protecting our nation's security interests while preserving vital constitutional values that we developed over two hundred and twenty one years ago at the Constitutional Convention in Philadelphia.

Background

In January of 2009, a new President will take office and it will be of significant interest to see what changes will be evidenced with respect to national security policy, particularly as it relates to restoring the necessary checks and balances of Congress and the Executive in conducting the continuing war on terrorism.

Since September 11, 2001, the Bush Administration has pursued an expansive conception of presidential power that has relied upon minimal deliberation, unilateral action, and legalistic defense in its approach to the war on terror. It has been clearly manifested in the detention and trial of suspected terrorists held at Guantanamo Bay, and the use of wiretapping and secret surveillance, some of the details of which remain unavailable today, even to Congress.

It is evident that the closest advisers to the President maintained a common view that the principal obstacle to an aggressive forceful response to the devastating attacks of 9/11 were the laws enacted by Congress and the international treaties and conventions adopted that responded to the excesses of executive abuse of power during the Vietnam War and Watergate. It is the congressional reassertion of constitutional authority in the 1970's to the imperial presidency that the Bush Administration intended to reverse when it came to power. This position is demonstrated by President Bush's decision that al-Qaida and Taliban terrorists were not entitled

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to, and could not receive, Geneva Convention protections, and that it could not be challenged by Congress or, for that matter, in a court of law. Additionally, any effort by Congress to regulate the interrogation of battlefield combatants would directly violate the President's sole authority as Commander-in-Chief, in Article II of the Constitution.

In March of 2003, John Yoo, a principal architect of the Bush Administration's policy on the capture, detention and interrogation of terrorist suspects held at Guantanamo Bay, Cuba, wrote a memorandum which contains a shocking view of the law that governed the Administration's conduct during the period that this document was in effect.

> In order to respect the President's inherent constitutional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress cannot interfere with the President's exercise of his authority as Commander-in-Chief to control the conduct of operations during a war.[1]

Yoo implies that Congress could not regulate in any way the President's ability in this critical area because it was vital to his role to regulate and direct troop movements on the battlefield. Furthermore, it was assumed that Congress wouldn't attempt to spark a constitutional confrontation with the executive branch in wartime because it would upset the separation of powers.[2] In reality, the actual text of the Constitution differs in several meaningful sections, yet the Yoo memo fails to recognize that Article I specifically assigns to Congress the power to make rules governing and regulating armed forces, as well as gives Congress the power to define and punish war crimes. The implication was that the Commander-in-Chief clause pre-empts Article I, Section 8 of the Constitution, as well as takes precedence over public law.

Perhaps the most severe example of unnecessary unilateralism exercised by President Bush was the controversy over the Foreign Intelligence Surveillance Act (FISA) and the terrorist-surveillance program (TSP). The Administration was convinced that FISA, enacted in 1978, was arcane and ineffective since it would prevent wiretaps on international calls involving terrorists. Therefore, the President claimed inherent constitutional authority to collect foreign intelligence on his say so alone, in direct contravention of the federal statute. The elaborate and sustained legal defense of the domestic wiretapping program advances the unprecedented contention that

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FISA is an unconstitutional infringement upon the President's exclusive authority as Commander-in-Chief.

In the formal testimony presented to the Subcommittee on the Constitution by Walter Dellinger, on behalf of former attorneys in the Office of Legal Counsel (OLC), and by Harold Koh, Dean of Yale Law School, we see the same observations reinforced as it relates to the conduct of the unitary executive in national security policy post 9/11.

Override Theory and Disabling Theory

The Commander-in-Chief Override Theory has vividly come into play by the Bush Administration.[3] This theory maintains that statutes otherwise purporting to limit the President's exercise of his war powers cannot do so without unconstitutionally infringing upon the Commander-in-Chief clause. An interesting question, however, arises where the constitutional authority of both Congress and the President overlap, which has been true in the war on terror post 9/11. To the extent that both the President and the Congress can claim constitutional authority in areas implicating the override, an assessment must be made as to which is to yield—the statute or the President.

Justice Tom Clark, in his concurring opinion in *Youngstown*[4] states the following:

> I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow the procedure in meeting the crisis, but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. It cannot sustain the seizure in question because here. . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand.[5]

This conception of Congress's power is derived from the idea that Congress can disable a President from acting by enacting a statutory prohibition that is within its constitutional authority. In *Hamdan,*[6] Justice Kennedy suggested in his concurrence that the power to establish and impose both procedural and substantive requirements on military commissions is traced to Congress's Art. I § 8 cl 10 power to define and punish. . .offences against the law of nations, and added that,

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> Respect for laws derived for the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[7]

Congress enacted two significant statutes authorizing several components of President Bush's response to September 11 in the immediate aftermath of the attacks. The Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No 107-56, 115 Stat. 272. However, for the next five years Congress remained principally on the sidelines as legal challenges worked their way through the courts. Major issues included the detention and trial of unlawful enemy combatants held at Guantanamo, as well as the domestic counter-surveillance initiatives, most notably the TSP which was exposed by the *New York Times* in 2005. Despite the existence of pre 9/11 laws, which arguably limited the President's authority even during a time of war, the Bush Administration in its formal legal response looked for authority to the language of the AUMF or inherent executive power.

The Military Commissions Act, Protect America Act, FISA Amendments Act

In September 2006, two months before the midterm elections, Congress passed the Military Commissions Act (MCA), which essentially authorized many components of the military commission that the Supreme Court had struck down in *Hamdan*.[8] The Military Commissions Act, as a policy measure, is the embodiment of the separation-of-powers principles that were at stake in *Hamdan*. The MCA permitted President Bush to accomplish in law what he had previously asserted to be his constitutional authority. Most importantly, it allowed the President or Secretary of Defense to decide unilaterally who was an enemy combatant; it precluded any oversight of the actions of the executive by the judiciary; it denied alien unlawful enemy combatants access to the courts for writs of habeas corpus; appeals that were permitted were strictly limited to issues concerning the constitutionality of the law itself and the Administration's compliance with it, but not the evidentiary basis for the detainee's imprisonment nor for that matter his treatment while in detention. Ratification of the President's

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authority by Congress made it far more difficult for the Supreme Court to constrain the President's position, unless Congress's action was clearly unconstitutional.

In the closing weeks of its 2007-08 term, the United States Supreme Court handed down its decision in the consolidated cases, *Boumediene et al. v. Bush* and *Al-Odah et al. v. United States*.[9] In this sharply divided ruling, Justice Anthony Kennedy, writing for the majority, held that the petitioners detained at Guantanamo Bay as enemy combatants were entitled to the constitutional privilege of habeas corpus. In reaching this decision, the majority determined that the jurisdiction stripping provision in the Military Commission Act, enacted by Congress at the request of the President, was unconstitutional. Furthermore, the Court held that the procedures and processes in the Detainee Treatment Act for review of the detainees' status were not an adequate or effective substitute for habeas corpus. Despite the support from both political branches of government for the approach taken by the Executive, in this instance, the Supreme Court was the final arbiter in saying what the law is. It effectively overrode the Executive and disabled the Congress.

Additionally, the executive branch disregarded federal statutory authority to violate a federal ban on torture by using presidential signing statements to obscure rather than clarify the law. The Bush Administration often claimed it simply was interpreting statutory requirements regardless of the fact that there appeared inconsistencies in the actual text and legislative intent of the provisions in law that were subject to such interpretation. If the President fails to notify Congress when he refuses to comply with a statutory requirement, Congress has little ability to effectively legislate because it doesn't know how the executive branch is implementing the law. Moreover, Congress has limited ability to monitor and oversee the executive branch's legal compliance. The testimony of both Walter Dellinger and Dean Harold Koh forcefully reinforced the points made here.

In August of 2007, just days before its recess, Congress enacted the Protect America Act of 2007, a temporary law of six months duration, which permitted the Director of National Intelligence and the Attorney General to authorize surveillance "directed at a person reasonably believed to be located outside the United States," whether or not that person is an agent of a foreign power. The role of FISC was diminished considerably because it only was permitted to

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review the Attorney General's procedures for implementing the Act to determine whether they were "clearly erroneous."

By giving the Attorney General and Director of National Intelligence the power to approve international surveillance, rather than the special intelligence court, Congress essentially implicated the separation of powers by placing authority for scrutinizing case review of individuals being monitored under the jurisdiction of the executive branch of government, rather than the judicial branch of government where it properly belonged. The FISC had been overseeing such activities for the last three decades, and by effectively cutting it out of this process, the executive was left unchecked. While the Attorney General was directed to submit a report to FISC on the procedures of the new program, the law did not require him to explain how Americans' calls or e-mails were treated when they were intercepted. The Court was provided no authority to receive information about how extensive a breach of privacy existed, nor any authority to remedy it.

President Bush, in his 2008 State of the Union Address, emphasized the necessity for a new law to be enacted that provided retroactive immunity to all phone companies and other telecom providers that had given the government access to e-mails and phone calls linked to people in the United States. In subsequent communications from President Bush, his Attorney General Michael Mukasey, and National Intelligence Director Michael McConnell to congressional leaders, the Administration insisted that any attempt to bar such immunity by the Congress or to have the FISA court decide whether to grant immunity to telecom firms would be met with a presidential veto.[10] The President was using his bully pulpit to reinforce his power at the expense of the Congress or the courts.

On February 16, 2008, the Protect America Act formally expired, although its authority remained in effect until August 2008 because the directives pursuant to the Act, according to the Department of Justice, permitted continuation of surveillance.[11] Just prior to the Congressional recess of July 4th, the leaders of Congress announced that a compromise had been reached with the Administration to enact surveillance reform legislation. The bill agreed to effectively provide retroactive immunity from liability for the telecommunication companies that cooperated with the Executive to undertake the TSP post 9/11. Even though the question of immunity was to be

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decided by a federal district court, the court would be instructed to make its decision based solely on whether the Bush Administration certified that the companies were told the spying was legal. The courts were essentially removed from resolving the pending lawsuits because the test in the Act is not whether the certifications were legal or constitutional, only whether they were issued. The President achieved his immediate objective with the passage of the FISA Amendments Act of 2008 while greatly reducing the role of judicial review as well as legislative oversight of electronic surveillance programs in the future.

The National Security Agency could have used existing authority under the Foreign Intelligence Surveillance Act (FISA) to track communications of terrorist organizations. Since Congress passed FISA in 1978, the court governing the law's use approved nearly 23,000 warrant applications and rejected only five. In an emergency the NSA or FBI could begin surveillance immediately and a FISA court order does not have to be obtained for three days.[12] If the FISA law, as written, was too cumbersome, or too narrow to permit the kind of surveillance considered essential to the Administration, President Bush could have requested that Congress amend the law, which it had done on over six separate occasions post 9/11. For six years the President preferred to ignore Congress and he secretly directed the NSA to conduct the surveillance, and when his actions were made public, rather than work with Congress, he initially maintained that he had the constitutional authority to ignore the law.

At issue is not whether there existed a serious threat from terrorism or whether the executive should be able to warrantless surveille American citizens. It may or may not be beneficial to adopt such surveillance policy to combat terrorism, and that must be considered on its own merits. The constitutional process for making such policy decisions involves the legislature as well as the judicial branch of government. President Bush consistently insisted that despite the laws enacted by Congress, and signed by previous presidents, he had the override authority to ignore them to establish the TSP. That goes to the very heart of checks and balances in the American constitutional process.

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Recommended Actions for Congress and the Executive

A successful separation of powers system depends upon interbranch norms of mutual accommodation and respect as well as each branch's ability, readiness, and willingness to use its inherent constitutional prerogatives and political powers where and when appropriate. After 9/11 the Bush Administration viewed national security law and policy to be the exclusive province of the executive branch of government. As a result, law became subservient to policy with respect to the status and treatment of individuals captured and detained at Guantanamo, the development of processes and procedures for the use of military commissions, and the use of the National Security Agency to conduct domestic surveillance.

The dubious legal opinions produced from senior levels of the executive branch undermined the legitimacy of the most critical national security decisions and many of them were subsequently invalidated because of their defective legal foundations.

The separation of powers system breaks down when the executive branch determines not to faithfully execute enacted laws, or interprets them in such a way as to deny constitutional legitimacy to a co-equal partner in the policymaking process. When one branch, Congress, acquiesces and fails to respond, the other branch, the Executive, effectively sets the precedent which is passed along to subsequent generations of policy makers. That is essentially what has happened with respect to executive claims of war power post 9/11 even though history reminds us all too well that war is a shared responsibility.

Congress has failed to demonstrate a leadership role in the war on terrorism. It has facilitated presidential actions by approving most directives introduced by the Bush Administration, and generally it has stood on the sidelines when the President claimed his powers to act were pursuant to the Commander-in-Chief Clause or were available under inherent authority in Article II of the Constitution.

A lesson in how not to legislate was the adoption of the Military Commissions Act of 2006, the Protect America Act of 2007 and the FISA Amendments Act of 2008. In each instance Congress provided sweeping authority to the Executive at the expense of the other two branches of government. Congress was wrong to eliminate the great writ of habeas corpus permanently for any non-citizen determined to be an enemy combatant, or even awaiting such a determination.

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Congress was wrong to delegate unilateral authority to the President to interpret the meaning and application of the Geneva Conventions without congressional or judicial oversight. Congress was wrong to eviscerate checks and balances under the Foreign Intelligence Surveillance Act while seriously threatening legitimate privacy rights and civil liberties of law abiding American citizens. Regrettably, Congress squandered opportunities to write balanced laws which set enforceable guidelines for fighting the war on terror without sacrificing basic legal and human rights. Congress failed to heed the words of Benjamin Franklin, who memorably warned that those who would give up an essential liberty for temporary security deserved neither liberty or security.

Seven years after the deadliest attack on American soil in its history, Congress has barely begun to consider what its own role should be with respect to setting rules for surveillance, or the proper procedures for military commissions. It is only quite recently that Congress has even demonstrated an interest in reexamining the legal responses of the fall of 2001.

It is incumbent upon Congress to restore a badly damaged oversight process and to reestablish executive accountability as policies and procedures are developed that effectively address continuing threats from global terrorism. While it is essential to support the monitoring of communications of suspected terrorists, it must be done lawfully, and with adequate checks and balances to prevent abuses. Congress, as the President's decision making partner in the war on terrorism, needs to perform its critical role in reviewing, debating and ultimately deciding what further changes are justified, and it should do so in an environment free from election cycle politics.

The Military Commissions Act has removed a vital check that the American legal system provides against the Executive arbitrarily detaining people indefinitely without charge, and it may well have made limits against torture and cruel and inhuman treatment unenforceable. This is contrary to the rule of law, the rights codified in the Constitution, and international treaties and covenants to which the nation subscribes. It is essential that Congress step up and develop a sound legal framework and process that addresses these concerns.

It is therefore essential, that as a minimum, the new Congress and the new President in 2009 revisit the controversial and hastily enacted flawed FISA Amendments Act of 2008 as well as the

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principal deficiencies that exist in the Military Commissions Act of 2006. The Supreme Court in the 2006 decision in *Hamdan,* and its 2008 ruling in *Boumediene,* recognized the vital role for the political branches to play in formulating national security policy. Congress should definitively address habeas actions by legislation to streamline the process effectively even though it will ultimately be up to the Supreme Court to determine what the constitutional right to habeas requires. This position was well articulated by Patrick Philbin as well as Suzanne Spaulding in their separate testimony provided to the Subcommittee.

In its most recent opinion addressing national security policy as it relates to the legal rights of unlawful enemy combatants, the Supreme Court recognized the fact that terrorism continues to pose a serious threat to the nation, and will most probably do so for years to come. The President and Congress, consistent with their duties and responsibilities, are critical actors in the debate about how best to preserve constitutional values while protecting the nation's security. As well, the Court performs a legitimate role in this process since the laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled within the framework of the law.[13]

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Biosketch

Dr. Leonard Cutler is Professor of Public Law in the Political Science Department of Siena College in Loudonville, New York. His areas of expertise include Criminal Law and Procedure, Constitutional Law, and International Law. His research has appeared in edited volumes and journals including the *Journal of Criminal Justice,* and *Criminal Law Review.* His study, *The Rule of Law and Law of War: Military Commissions and Enemy Combatants Post 9/11*, was published by Edwin Mellen Press in 2005, and was awarded the Adele Mellen Prize for Distinguished Contribution to Scholarship. In January of 2008, Dr. Cutler's article "Human Rights Guarantees, Constitutional Law and the Military Commissions Act of 2006," was published in *Peace and Change*, a Journal of Peace Research. In the fall of 2008 Dr. Cutler's most recent book, *Developments in the National Security Policy of the United States Since 9/11: The Separate Roles of the President, the Congress, and the Supreme Court*, was published by Edwin Mellen Press.

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Notes

[1] Unclassified Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003, at 13. A similar memorandum was written for the CIA in August 2002. It boldly concluded that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole resting of the Commander-in-Chief authority in the President." Both memos were subsequently rescinded by the head of the Office of Legal Counsel, Jack Goldsmith in December 2003.

[2] *Id.*

[3] For a full discussion of the use and defense of the override theory, *see* U.S. Dept. of Justice, Legal Authorities Supporting the Activity of the National Security Agency Prescribed by the President (Jan. 19, 2006) [NSA White Paper].

[4] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, (1952).

[5] *Id.* 343 U.S. 660 (1952) (Clark J. concurring in the judgment).

[6] *Hamdan v. Rumsfeld*, 126 S. Ct. 2786 (2006).

[7] *Hamdan v. Rumsfeld* 126 S. Ct. 2749, 2799 (2006) (Kennedy J. concurring in part).

[8] Military Commissions Act of 2006, Pub. L. No. 109-366, Stat. 2600.

[9] 128 S. Ct. 2229 (2008).

[10] "Bush to veto surveillance bill without telecom immunity, Mukasey letter," *available at* http://jurist.law.pitt.edu/paperchase/2008/02/bush-to-veto-surveillance-bill-without.php. (February 2008).

[11] *See,* Jay Rockefeller, Patrick Leahy, Silvestre Reyes, John Conyers, "Scare Tactics and Our Surveillance Bill," Commentary, *Washington Post*, February 25, 2008; A15.

[12] *Id.* In a United States Department of Justice Report for 2007, the Foreign Intelligence Surveillance Court approved 2,370 warrants targeting people in the United States believed to be linked to international terror organizations. The court denied three warrant applications and partially denied one. Eighty six times judges sent requests back to the government for changes before approving them. *See,* http://www.chicagotribune.com/ news/nationworld/sns-ap-domestic-spying,0,4632886.story.

[13] *Boumediene et al. v. Bush* (Kennedy, J.) 128 S. Ct. 2229 (2008).

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Statement of

Daniel Farber
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Before the
Senate Judiciary Committee
Subcommittee on the Constitution

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

September 16, 2008

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.

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- 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.

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[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).

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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 Vallandingham 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

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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

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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*.

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[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.

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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).

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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,

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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).

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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.

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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 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.

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[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).

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STATEMENT OF BRUCE FEIN

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

RE: HONORING THE CONSTITUTION; RESTORING CHECKS AND BALANCES

SEPTEMBER 16, 2008

Dear Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to share my views on strategies to prevent the constitutional usurpations of the Bush-Cheney duumvirate and to a lesser degree their predecessors from becoming enshrined as constitutional law short of the impeachments, convictions, and removals from office of the President and Vice President for high crimes and misdemeanors prior to January 20, 2009.

I have detailed the Bush-Cheney constitutional transgressions in my book Constitutional Peril: The Life and Death Struggle for the Constitution and Democracy. They are generally well known to this Committee and do not need repeating. I will confine myself to forward-looking remedies to end or blunt their mischief.

One strategy is congressional censure. I testified in support of a censure resolution against President Bush introduced by Chairman Feingold a few years ago, and was dismayed at the overwhelming congressional indifference.

Another strategy would be a sense of the committee, sense of the Senate, or sense of the Congress resolution that establishes a non-exclusive roster of impeachable high crime and misdemeanor—the equivalent of a yellow flashing light to the President. I would recommend as examples a President's withholding information from Congress that bears on a decision to initiate war or lying to the American people about the same; ordering current or former White House or other executive officials to decline to appear before Congress to testify in response to subpoenas; initiating war without a congressional declaration of war or its equivalent, refusing to investigate or prosecute executive branch officials suspected of complicity in torture; knowing violations of the Foreign Intelligence Surveillance Act; or, state sponsored kidnappings, secret imprisonments, or torture abroad free from judicial supervision or oversight.

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Moving on to particular strategies to address particular abuses, I would suggest the following for consideration:

1. Signing statements. A prohibition on the expenditure of any monies of the United States to enforce any provision of any law which the President has signed with a statement expressing his intent to disregard those provisions which he maintains are unconstitutional.

2. FISA violations. A prohibition on the expenditure of any monies of the United States to gather foreign intelligence contrary to the provisions of the Foreign Intelligence Surveillance Act, as amended.

3. Presidential wars. Making it a criminal offense for the President to initiate war without a declaration of war or its equivalent or to deceive Congress about intelligence bearing on a declaration of war or its equivalent.

4. Permanent war on international terrorism. Repeal the AUMF and enact a law that declares that the United States is not at war with international terrorists; and, that the United States criminal law in lieu of the law of war will apply to the apprehension, detention, trial, and punishments of suspected international terrorists. Among other things, this would mean an end to indefinite detentions of alleged unlawful enemy combatants without accusation or trial.

5. Executive privilege. Enactment of a law that establishes a three-judge court to appoint an independent counsel to enforce contempt findings by Congress against executive branch officials for refusing to answer questions, testify, or deliver requested documents.

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6. Standing to challenge allegedly unconstitutional wars. Enact a law conferring standing on military personnel summoned to fight in allegedly unconstitutional wars initiated by the President either unilaterally or pursuant to a delegation from Congress.

7. Extraordinary rendition. Enact a law making criminal the abduction, secret imprisonment, or torture abroad under color of United States law of suspected international terrorists, provided that abductions for the purpose of bringing a suspect to trial in the United States with the trappings of due process would be permitted.

8. State secrets. Enact a law that in civil litigation directs the presiding judge to enter judgment in favor of a plaintiff alleging a constitutional violation by government officials and who presents a prima facie case of proof when the government invokes state secrets to decline to present a defense.

9. Mistake of law defense. Dramatically narrow the circumstances in which an executive official suspected of crime can invoke reliance on legal advice from the Department of Justice as a defense.

In addition to these ideas, I would also suggest that the House and Senate establish a permanent team of professional lawyers tasked to fashion and to defend constitutional theories and tactics that strengthen the hand of Congress vis-à-vis the executive just as the Office of Legal Counsel in the Department of Justice does for the President.

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Statement by Louis Fisher

Specialist in Constitutional Law
Law Library of the Library of Congress

before the
Subcommittee on the Constitution

Senate Committee on the Judiciary

"Restoring the Rule of Law"

September 16, 2008

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Mr. Chairman, thank you for inviting me to offer my views on ways to restore the rule of law. In previous periods of emergency and threats to national security, the rule of law has often taken a backseat to presidential initiatives and abuses. Although this pattern is a conspicuous part of American history, it is not necessary to repeat the same mistakes every time. Faced with genuine emergencies, there are legitimate methods of executive action that are consistent with constitutional values. There are good precedents from the past and a number of bad ones.

In response to the 9/11 terrorist attacks, the United States decided to largely adopt the bad ones. The responsibility for this damage to the Constitution lies primarily with the executive branch, but illegal and unconstitutional actions cannot occur and persist without an acquiescent Congress and a compliant judiciary. The Constitution's design, relying on checks and balances and the system of separation of powers, was repeatedly ignored after 9/11. There are a number of reasons for these constitutional violations. Understanding them is an essential first step in returning to, and safeguarding, the rule of law and constitutional government.

I. Making Emergency Actions Legal

The Constitution can be protected in times of crisis. If an emergency occurs and there is no opportunity for executive officers to seek legislative authority, the Executive may take action sometimes in the absence of law and sometimes against it — for the public good. This is called the "Lockean prerogative." John Locke advised that in the event of Executive abuse the primary remedy was an "appeal to Heaven."

A more secular and constitutional safeguard emerged under the American system. Unilateral presidential measures, at a time of an extraordinary crisis, must be followed promptly by congressional action — by the entire Congress, not some subgroup within it.[1] To preserve the constitutional order, the executive prerogative is subject to two conditions. The President must (1) acknowledge that the emergency actions are not legal or constitutional and (2) for that very reason come to the legislative branch and explain the actions taken, the reasons for the actions, and ask lawmakers to pass a bill making the illegal actions legal. (Under Article 48 of the Weimar Constitution, as implemented by the Nazi government, emergency powers were invoked without ever coming to the legislative body.)[2]

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[1] After 9/11, the Bush administration met only with the "Gang of Eight" to reveal what became known as the "Terrorist Surveillance Program." The Gang of Eight consists of four party leaders in the House and the Senate and the chair and ranking member of the two Intelligence Committees. The administration did not seek congressional authorization until after the program had been disclosed by the *New York Times* in December 2005.

[2] Joseph W. Bendersky, Carl Schmitt: Theorist for the Reich 195-98 (1983); John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law 146-78 (1991); Ingo Mhller, Hitler's Justice: The Courts of the Third Reich 33-34, 46-47 (1991); Ellen Kennedy, Constitutional Failure: Carl Schmitt in Weimar 154-69 (2004).

The steps needed to maintain constitutional legitimacy are seen in the conduct by President Abraham Lincoln after the Civil War began. He took actions we are all familiar with, including withdrawing funds from the Treasury without an appropriation, calling up the troops, placing a blockade on the South, and suspending the writ of habeas corpus. In ordering those actions, Lincoln never claimed to be acting legally or constitutionally and never argued that Article II somehow allowed him to do what he did.

Instead, Lincoln admitted to exceeding the constitutional boundaries of his office and therefore needed the sanction of Congress. He told Congress that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them." He explained that he used not only his Article II powers but the Article I powers of Congress, concluding that his actions were not "beyond the constitutional competency of Congress." He recognized that the superior lawmaking body was Congress, not the President. When an Executive acts in this manner, he invites two possible consequences: either support from the legislative branch or impeachment and removal from office. Congress, acting with the explicit understanding that Lincoln's actions were illegal, passed legislation retroactively approving and making valid all of his acts, proclamations, and orders.[3]

II. The Illusory Claim of "Inherent" Powers

President Lincoln acted at a time of the gravest emergency the United States has ever faced. What happened after 9/11 did not follow his model. Although President George W. Bush initially came to Congress to seek the Authorization for the Use of Military Force (AUMF), the USA Patriot Act, and the Iraq Resolution of 2002, increasingly the executive branch acted unilaterally and in secret by relying on powers and authorities considered "inherent" in the presidency.

On several occasions the Supreme Court has described the federal government as one of enumerated powers. In 1995 it stated: "We start with first principles. The Constitution creates a Federal Government of enumerated powers."[4] It repeated that claim two years later.[5] In fact, it is incorrect to call the federal government one of enumerated powers. If that were true, the Court would have no power of judicial review, the President would have no power to remove department heads, and Congress would have no power to investigate. Those powers (and other powers routinely used) are not expressly stated in the Constitution.

The framers created a federal government of enumerated and implied powers. Express powers are clearly stated in the text of the Constitution; implied powers are those that can be reasonably drawn from express powers. "Inherent" is sometimes used as

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[3] 12 Stat. 326 (1861). See Louis Fisher, Presidential War Power 47-49 (2d ed. 2004).

[4] United States v. Lopez, 514 U.S. 549, 552 (1995).

[5] Boerne v. Flores, 521 U.S. 507, 516 (1997).

synonymous with "implied" but it is radically different. Inherent powers are not drawn from express powers. Inherent power has been defined in this manner: "An authority possessed without it being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers."[6]

The purpose of the U.S. Constitution is to specify and confine governmental powers in order to protect individual rights and liberties. Express and implied powers serve that principle. The Constitution is undermined by claims of open-ended authorities that cannot be located, defined, or circumscribed. What "inheres" in the President? The standard collegiate dictionary explains that "inherent" describes the "essential character of something: belonging by nature or habit."[7] How does one determine what is essential or part of nature? Those words are so nebulous that they invite political abuse, offer convenient justifications for illegal and unconstitutional actions, and endanger individual liberties.[8]

Whenever the executive branch justifies its actions on the basis of "inherent" powers, the rule of law is jeopardized. To preserve a constitutional system, executive officers must identify express or implied powers for their actions. They must do so reasonably and with appropriate respect for the duties of other branches and the rights and liberties of individuals.

It is sometimes argued that if the President functions on the basis of "inherent" powers drawn from Article II, Congress is powerless to pass legislation to limit his actions. Statutory powers, it is said, are necessarily subordinate to constitutional powers. There are several weaknesses with this argument. First, when the President says he is acting under "inherent" powers drawn from Article II, that is nothing more than a *claim* or an *assertion*. Congress is not prevented from acting legislatively because of executive claims and assertions. Neither are the courts. Second, if the President wants to claim that powers exist under Article II the door is fully open for Congress to pass legislation pursuant to Article I. Constitutional authority is not justified by presidential ipse dixits. The same can be said of congressional and judicial ipse dixits. When one branch claims a power the other two branches should not automatically acquiesce. Doing so eliminates the system of checks and balances that the framers provided.

III. Misunderstanding *Curtiss-Wright*

Of all the misconceived and poorly reasoned judicial decisions that have expanded presidential power in the field of national security, thereby weakening the rule of law and endangering individual rights, the *Curtiss-Wright* case of 1936 stands in a class by itself. It is frequently cited by courts and the executive branch for the existence

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[6] Black's Law Dictionary 703 (5th ed. 1979).

[7] Merriam Webster's Collegiate Dictionary 601 (10th ed. 1993).

[8] See Louis Fisher, "Invoking Inherent Powers: A Primer," 37 Pres. Stud. Q. 1 (2007), available at http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

of "inherent" presidential power. In language that is plainly dicta and had no relevance to the issue before the Supreme Court, Justice George Sutherland wrote: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[9]

Justice Sutherland's distortion of the "sole organ" doctrine is examined in the next section. Here it is sufficient to point out that the case before the Court had absolutely nothing to do with presidential power. It concerned only the power of Congress. The constitutional dispute was whether Congress by joint resolution could delegate to the President *its* power, authorizing President Franklin D. Roosevelt to declare an arms embargo in a region in South America.[10] In imposing the embargo, President Roosevelt relied solely on this statutory — not inherent — authority. He acted "under and by virtue of the authority conferred in me by the said joint resolution of Congress."[11] President Roosevelt made no assertion of inherent, independent, exclusive, plenary, or extra-constitutional authority.

Litigation on his proclamation focused on legislative power because, in 1935, the Supreme Court twice struck down the delegation by Congress of *domestic* power to the President.[12] The issue in *Curtiss-Wright* was therefore whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court held that the joint resolution impermissibly delegated legislative authority but said nothing about any reservoir of inherent or independent presidential power.[13] That decision was taken directly to the Supreme Court, None of the briefs on either side discussed the availability of inherent or independent presidential power. Regarding the issue of jurisdiction, the Justice Department advised that the question for the Court went to "the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose."[14] The joint resolution passed by Congress, said the Department, contained adequate standards to guide the President

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[9] United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

[10] 48 Stat. 811, ch. 365 (1934).

[11] 48 Stat. 1745 (1934).

[12] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Corp. v. United States, 295 U.S. 495 (1935).

[13] United States v. Curtiss-Wright Export Corp., 14 F.Supp. 230 (S.D. N.Y. 1936).

[14] U.S. Justice Department, Statement as to Jurisdiction, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term, 1936, at 7.

and did not fall prey to the "unfettered discretion" found by the Court in the two 1935 decisions.[15]

The brief for the private company, Curtiss-Wright, focused solely on the issue of delegated power and did not explore the availability of independent or inherent powers for the President.[16] A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not attempt to locate any freestanding or freewheeling presidential authority.[17] Given President Roosevelt's stated dependence on statutory authority and the lack of anything in the briefs about inherent presidential power, there was no need for the Supreme Court to discuss independent sources for executive authority.

Anything along those lines would be dicta. The extraneous matter added by Justice Sutherland in his *Curtiss-Wright* opinion has been subjected to highly critical studies by scholars. One article regarded Sutherland's position on the existence of inherent presidential power to be "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous."[18] Other scholarly works find similar deficiencies with Sutherland's dicta.[19]

Federal courts repeatedly cite *Curtiss-Wright* to sustain delegations of legislative power to the President in the field of international affairs and at times to support the existence of inherent and independent presidential power for the President in foreign policy. Although some Justices of the Supreme Court have described the President's foreign relations power as "exclusive," the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.[20]

IV. The False "Sole Organ" Doctrine

Another defective argument for inherent presidential power is Justice Sutherland's reference in *Curtiss-Wright* to a speech given by Rep. John Marshall on March 7, 1800: "The President is the sole organ of the nation in its external relations, and

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[15] Id. at 15.

[16] Brief for Appellees, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term 1936, at 3.

[17] Brief for Appellees Allard, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term, 1936.

[18] C. Perry Patterson, "*In re the United States v. the Curtiss-Wright Corporation*," 22 Texas L. Rev. 286, 297 (1944).

[19] Those works on summarized in Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139, 149-50 (2007). For more detailed treatment of the sole-organ doctrine, see my August 2006 study for the Law Library. The article and the study are available at http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

[20] See pp. 23-28 of the August 2006 study cited in Note 19.

its sole representatives with foreign nations."[21] When one reads Marshall's entire speech and understands it in the context of a House effort to either impeach or censure President John Adams, nothing said by Marshall gives any support to independent, exclusive, plenary, inherent, or extra-constitutional power for the President. Marshall's only objective was to defend the authority of President Adams to carry out an extradition treaty by turning over to England a British subject charged with murder. In that sense the President was not the sole organ in formulating the treaty. He was the sole organ in *implementing* it. Marshall was stating what should have been obvious. Under the express language of Article II it is the President's duty to "take Care that the Laws be faithfully executed." Under Article VI, all treaties made "shall be the supreme Law of the Land."

Far from being an argument for inherent or plenary power, Marshall was relying on the express constitutional duty of the President to carry out the law. He emphasized that President Adams was not attempting to make foreign policy single-handedly. He was carrying out a policy made jointly by the President and the Senate (for treaties). On other occasions the President might be charged with carrying out a policy made by statute. In that sense, the President was the sole organ in implementing national policy as decided by the two branches.

Even in carrying out a treaty, Marshall said, the President could be restrained by a subsequent statute. Congress "may prescribe the mode" of carrying out a treaty.[22] For example, legislation later provided that in all cases of treaties of extradition between the United States and another country, federal and state judges were authorized to determine whether the evidence was sufficient to sustain the charge against the individual to be extradited.[23]

In his capacity as Chief Justice of the Supreme Court, Marshall held firm to his position that the making of foreign policy is a joint exercise by the executive and legislative branches, through treaties and statutes, and not a unilateral or exclusive authority of the President. With the war power he looked solely to Congress — not to the President — for constitutional authority to take the country to war. He had no difficulty in identifying the branch that possessed the war power: "The whole powers of war being, by the constitutional of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry."[24] When a presidential proclamation issued in time of war conflicted with a statute enacted by Congress, Marshall ruled that the statute prevailed.[25]

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[21] 299 U.S. at 320.

[22] 10 Annals of Cong. 614 (1800).

[23] 9 Stat. 320 (1846), upheld in In re Kaine, 55 U.S. 103, 111-14 (1852).

[24] Talbot v. Seeman, 5 U.S. 1, 28 (1801).

[25] Little v. Barreme, 2 Cr. (6 U.S.) 170, 179 (1804).

Despite this clear meaning of Marshall's meaning of "sole organ," the Justice Department repeatedly cites *Curtiss-Wright* as authority for inherent presidential power, as it did on January 19, 2006 in offering a legal defense for the NSA surveillance program. The Department associated the sole-organ doctrine with inherent power, pointing to "the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."[26] Later in this analysis the Department stated: "the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence."[27] Only by relying on the misconceptions of the dicta by Justice Sutherland in *Curtiss-Wright* could language like that be used. Nothing in Marshall's speech offers any support for inherent or preeminent authority of the President.

V. Usurping the War Power

Beginning with President Harry Truman's war against North Korea in 1950, Presidents over the last half century have claimed the constitutional authority to take the country to war without seeking either a declaration of war or statutory authorization from Congress. Nothing is more destructive to the rule of law than allowing Presidents to claim that the Commander in Chief Clause empowers them to initiate war. With that single step all other rights, freedoms, and procedural safeguards are diminished and sometimes extinguished.

I have dealt with this issue in previous testimony and in my writings, so will merely summarize the argument for congressional dominance in matters of going to war. Congress, and only Congress, is the branch of government authorized to decide whether to initiate war. That constitutional principle was bedrock to the framers. They broke cleanly and crisply with the British model that allowed kings to control everything abroad, including wars. The framers created a Constitution dedicated to popular control through elected representatives. They dreaded placing the war power in the hands of a single person. They distrusted human nature, especially executives who possessed a natural appetite for war, fame, and military glory. Contrary to the July 2008 Baker-Christopher war powers report, the Constitution is not "ambiguous" about placing the war power with Congress.[28]

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[26] Office of Legal Counsel, U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006, at 1.

[27] Id. at 30.

[28] Louis Fisher, "When the Shooting Starts: Not Even an Elite Commission Can Take Away Congress' Exclusive Power to Authorize War," Legal Times, July 28, 2008, at 44-45. For my testimony and other articles on the war power, see http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

VI. Hazards of State Secrets

Especially in recent years, the executive branch has invoked the "state secrets privilege" to prevent litigants from challenging actions that appear to be illegal and unconstitutional. These civil cases include the extraordinary rendition lawsuits of Maher Arar and Khaled El-Masri and the NSA surveillance cases brought against the administration and telecoms. The rule of law is threatened if judges accept the standards of "deference" or "utmost deference" when evaluating executive claims. Assertions of "national security" documents are only that: assertions. When judges fail to assert their independence in these cases, it is possible for an administration to violate statutes, treaties, and the Constitution without any effective challenge in court.

Congress has full authority to act legislatively to redress this problem. The House and the Senate have in the past year held hearings on this issue and on August 1, 2008 the Senate Judiciary Committee reported its bill.[29] The Justice Department relies on the Supreme Court's decision in *United States* v. *Reynolds* (1953), the first time that the Court recognized the state secrets privilege. The history of that litigation makes plain that the executive branch misled the courts about the presence of "state secrets" in the document sought by the plaintiffs. When the document, an Air Force accident report, was declassified and made public, it is evident that the report contained no state secrets.[30]

VII. Secret Law

Increasingly, the executive branch operates on the basis of secret executive orders, memoranda, directives, and legal memos. On March 31, 2008, the administration declassified and released a Justice Department legal memo prepared five years earlier on military interrogation of alien unlawful combatants outside the United States. Other legal memos remain secret. A society cannot remain faithful to the rule of law when governed by secret law, especially policies that promote broad and unchecked presidential power. If legal memos contain sensitive information, items can be redacted and the balance of the document made public. No plausible case can be made for withholding legal reasoning. Secret policy means that the rule of law is not statute or treaty, enacted in public, but confidential executive policies unknown to citizens or even members of Congress. The public and executive agencies cannot comply with secret law. Lawmakers are unable to review and amend legal interpretations never released by the executive branch.[31]

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[29] S. Rept. No. 110-442, 110th Cong., 2d Sess. (2008).

[30] Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case (2006). Articles and testimony are available at the Web site listed in Note 28.

[31] The issue of secret legal memos was explored at a hearing on April 30, 2008, before the Senate Judiciary Committee. See also Louis Fisher, "Why Classify Legal Memos?," National Law Journal, July 14, 2008, available at the Web site listed in Note 28.

VIII. Signing Statements

A form of secret law appeared in a signing statement by President Bush on December 30, 2005. Congress, responding to criticism of abusive interrogations of detainees, passed legislation prohibiting cruel, inhuman, or degrading treatment or punishment of persons held in U.S. custody.[32] In signing the bill, President Bush stated that the provision would be interpreted "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."[33] References to the unitary executive theory and the Commander in Chief Clause are far too general to understand either the nature of the objection or the scope of the claimed presidential authority. Other signing statements are generally impossible to comprehend and analyze because they are couched in such abstract references as the Appointments Clause, the Presentment Clause, the Recommendations Clause, and other shortcut citations.[34] Constitutional concerns deepen when President raise objections at the time they sign a bill and proceed to adopt policies — as with the interrogation of detainees — unknown to the country or to Congress.

Signing statements encourage the belief that the law is not what Congress places in a bill but what Presidents say about the language. In 1971, President Richard Nixon signed a bill that included a provision calling for the withdrawal of U.S. troops from Southeast Asia. The signing statement expressed the view that the provision "does not represent the policies of the Administration."[35] A year later, a federal district court instructed President Nixon that the law was what he signed, not what he said about it.[36] When he signed the bill it established U.S. policy "to the exclusion of any different executive or administration policy, and had binding force and effect on every officer of the Government, no matter what their private judgments on that policy, and illegalized the pursuit of an inconsistent executive or administration policy."[37] No executive statement, including that of the President, "denying efficacy to the legislation could have either validity or effect."[38]

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[32] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005), codified at 42 U.S.C.A. ' 2000dd (West Supp. 2007).

[33] 41 Weekly Comp. Pres. Doc. 1919 (2005); see Elizabeth Bumiller, "For President, Final say on a Bill Sometimes Comes After the Signing," New York Times, January 16, 2006, at A11.

[34] "Presidential Signing Statements," Findings of the Subcommittee on Oversight and Investigations, House Armed Services Committee, August 18, 2008, available at http://www.fas.org/sgp/congress/2008/signing.pdf

[35] Public Papers of the Presidents, 1971, at 1114.

[36] DaCosta v. Nixon, 55 F.R.D. 145 (E.D.N.Y. 1972).

[37] Id. at 146.

[38] Id. See also Louis Fisher, "Signing Statements: Constitutional and Practical Limits," 16 Wm. & Mary Bill of Rights J. 183 (2007).

IX. "Authorizing" What Is Illegal

To provide assurance to the public and other branches, administrations will often announce that what it has done is fully authorized. That pattern was illustrated when the Bush administration, having violated the FISA statute by not seeking approval from the FISA Court, publicly stated that its Terrorist Surveillance Program was "authorized," regularly "reauthorized," and was "legal" and "lawful." Those words implied that the administration was acting in compliance with the rule of law, or "consistent" with the law, when it was in fact operating squarely against it and doing so in secret.[39]

Legislation passed by Congress on July 10, 2008 compounds the problem by giving retroactive immunity to the telecoms that assisted the administration with the surveillance program. Civil actions in federal or state court may be dismissed if the Attorney General certifies to the court that the activity was "authorized by the President" and "determined to be lawful."[40] Through this procedure, what was illegal under FISA becomes legal if the President "authorized" it and someone, for whatever reason, determined that the action was "lawful."

What counts under this procedure is not the law, as enacted by Congress, but independent and contradictory executive operations. Justice Robert Jackson reminded us what is meant by the rule of law: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberation."[41]

X. Misuse of Executive Privilege

In the past, the executive branch recognized that the President should not invoke executive privilege to undermine the rule of law. In particular, it was improper to block congressional access to information when "wrongdoing" had been committed by executive officials. The Supreme Court has noted that the power of Congress to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[42] Attorney General William Rogers told a Senate committee in 1958 that the withholding of documents from Congress "can never be justified as a means of covering mistakes, avoiding embarrassment, or for political,

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[39] Louis Fisher, The Constitution and 9/11: Recurring Threats to America's Freedoms 291-98, 300-02 (2008).

[40] Pub. L. 110-261, 122 Stat. 2469 (2008). See Edward C. Liu, Legislative Attorney, American Law Division, Congressional Research Service, "Retroactive Immunity Provided by the FISA Amendments Act of 2008," RL 34600 (July 25, 2008).

[41] Youngstown Co. v. Sawyer, 343 U.S. 579, 655 (1952).

[42] Watkins v. United States, 354 U.S. 178, 187 (1957).

personal, or pecuniary reasons."[43] In 1982, Attorney General William French Smith said he would not try "to shield [from Congress] documents which contain evidence of criminal or unethical conduct by agency officials from proper review."[44] During a news conference in 1983, President Ronald Reagan remarked: "We will never invoke executive privilege to cover up wrongdoing."[45] In a memo of September 28, 1994, White House Counsel Lloyd Cutler stated that executive privilege would not be asserted with regard to communications "relating to investigations of personal wrongdoing by government officials," either in judicial proceedings or in congressional investigations and hearings.[46]

Those statements promote a basic principle. A privilege exerted by the executive branch should not be used to conceal corruption, criminal or unethical conduct, or wrongdoing by executive officials. A privilege should not be used to shield government officials who violate the law. Yet in the last two years, when Congress attempted to investigate several activities within the Justice Department, including the firings of U.S. Attorneys, the administration decided that a privilege would attach to top White House officials, both past and present. That interpretation provided those individuals with total immunity against any congressional investigation. Legislative efforts to exercise the power of contempt against those officials would be ineffective. Under this policy, the U.S. attorney who is required under law to take a contempt citation to a grand jury to investigate possible wrongdoing, is prohibited from discharging that statutory duty. Through this policy the investigative power of Congress to probe agency corruption is neutralized. Existing checks would come only from the executive department investigating itself.

On July 31, 2008, District Judge John D. Bates rejected a number of Justice Department arguments that were used to block the House contempt votes. Most importantly, he rejected the claim of absolute immunity from compelled congressional process for senior presidential aides. He found clear precedent and persuasive policy reasons to conclude that "the Executive cannot be the judge of its own privilege."[47]

This case did not concern matters of national security, an area where the executive branch frequently claims special and exclusive privileges to keep documents from

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[43] "Freedom of Information and Secrecy in Government," hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 5 (1958).

[44] Letter of November 30, 1982, to Congressman John Dingell, reprinted in H. Rept. No. 698, 97th Cong., 2d Sess. 41 (1982).

[45] Public Papers of the Presidents, 1983, I, at 239.

[46] Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, "Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege," September 28, 1994, at 1. See Louis Fisher, The Politics of Executive Privilege 49-51, 111-34, 199-27 (2004).

[47] Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, Civil Action No. 08-0409 (JDB), (D.D.C. July 31, 2008), at 91.

Congress and the judiciary. The Justice Department relies heavily on the Supreme Court's 1988 decision in *Egan*. The Court acknowledged the President's responsibilities to protect documents bearing on national security.[48] Yet, as noted by District Judge Vaughn R. Walker in a recent ruling, the Court in *Egan* specifically said that presidential power is broad "unless Congress specifically has provided otherwise."[49] To Judge Walker, the Court's decision in *Egan* "recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch."[50]

XI. Consultation is Not Law-Making

However valuable and useful interbranch consultation can be, it is never a substitute for legislation that specifically authorizes a presidential action. Lawmaking is the action of the full Congress, not subgroups like the "Gang of Eight." The decision to make law is set aside for each member of Congress, from the Speaker of the House and the Senate Majority Leader to the newly elected lawmaker. A President and his executive aides should not be able to co-opt a small group of lawmakers, who might "sign off" on a military or financial commitment and thereby pledge House and Senate report. A recent attempt to confer power on a "Consultative Committee" is the Baker-Christopher War Powers Commission report released in July 2008.[51]

XII. Depending on Structural Checks

The framers did not pin their hopes on the President or federal courts to protect individual rights and liberties. They distrusted human nature and chose to place their faith in a system of checks and balances and separated powers. The rule of law finds protection when political power is not concentrated in a single branch and when all three branches exercise the powers assigned them, including the duty to resist encroachments of another branch. The rule of law is always at risk when Congress and the judiciary defer to claims and assertions by executive authorities. That is the lesson of the last two centuries and particularly of the past seven years. James Madison looked to a political system where ambition would counteract ambition. With Congress (and the judiciary) there is often a lack of ambition to assert and defend institutional powers and duties.

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[48] Department of the Navy v. Egan, 484 U.S. 518 (1988).

[49] Id. at 530.

[50] In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791 VRW (D. Cal. July 2, 2008), at 22. For additional analysis of *Egan* and why Congress has access to sensitive and classified documents, see Louis Fisher, "Congressional Access to National Security Information," 45 Harv. J. Legis. 219 (2008), available at the Web cite listed in Note 28. For example, *Egan* was a matter of statutory construction, not constitutional interpretation.

[51] James A. Baker III and Warren Christopher, "Put War Powers Back Where They Belong," New York Times, July 8, 2009, at A23; Louis Fisher, "When the Shooting Starts: Not Even an Elite Commission Can Take Away Congress' Exclusive Power to Authorize War," Legal Times, July 28, 2008, at 44-45.

WRITTEN TESTIMONY OF AMANDA FROST* AND JUSTIN FLORENCE** ON

"REFORMING THE STATE SECRETS PRIVILEGE"

SUBMITTED TO THE CONSTITUTION SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE FOR ITS HEARING ON "RESTORING THE RULE OF LAW"

SUMMARY

In recent years, the state secrets privilege has been transformed from a narrow evidentiary privilege into a broad doctrine of nonjusticiability. The Supreme Court first recognized the privilege in 1953, applying it to prevent disclosure of a few documents sought by plaintiffs in a negligence case against the United States. Although the Court stated that the privilege "is not to be lightly invoked," it has nonetheless been asserted with increasing frequency over the past several decades. Misuse of the state secrets privilege has culminated in the George W. Bush Administration's assertion of the privilege as grounds for immediate dismissal, prior to discovery, of all cases challenging the practice of extraordinary rendition and the National Security Agency's warrantless wiretapping program. Although the Bush Administration has acknowledged the existence of both programs, it nonetheless asserts that the "very subject matter" of these cases is a state secret, and thus argues that no court can hear the plaintiffs' challenges to the legality of these programs.

The Bush Administration's unprecedented use of the state secrets privilege undermines the federal judiciary's ability to check the power of the executive. Under the constitutional structure, the judiciary safeguards individual constitutional rights against executive overreaching and ensures that all citizens abide by statutory limits established by Congress. Through its broad assertions of the privilege, the Bush Administration has attempted to oust the courts from their historic role as protector of constitutional guarantees and enforcer of statutory restrictions. In so doing, the executive has undermined the rule of law, and has led many to question the credibility of an Administration that asserts the privilege with such frequency in cases challenging publicly-acknowledged executive programs.

We advocate that the next administration rein in its use of the state secrets privilege to ensure that the privilege is applied to protect only truly sensitive information with a minimum of disruption to judicial review of executive action. Whether led by Senator John McCain or Senator Barack Obama, the new administration should review pending cases in which the Bush Administration has asserted the privilege to ensure its necessity, and should establish clear guidelines regarding the privilege's future use. We hope that under the next President the executive and judicial branches can work together to craft methods of protecting state secrets without sacrificing citizens' access to justice or courts' ability to review executive conduct.

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The views expressed in this testimony are those of the authors alone, and do not speak for these organizations.

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We further urge Congress to enact pending legislation that would protect sensitive information concerning national security while at the same time ensuring that citizens have access to the courts to challenge the legality of executive conduct. The proposed State Secrets Protection Act, versions of which are currently pending in both the House of Representatives and the Senate, carefully balances the need for secrecy against litigants' interests in judicial review of executive activity. We advocate that Congress take action on this legislation in the near future.

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SUBMITTED TO THE CONSTITUTION SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE FOR ITS HEARING ON "RESTORING THE RULE OF LAW"

INTRODUCTION

Since September 11, 2001, George W. Bush's Administration has repeatedly asserted the state secrets privilege as grounds for the dismissal of civil cases contesting the legality of its conduct in the war on terror. Specifically, the Administration has sought dismissal of all cases challenging two different government practices: the "extraordinary rendition" program, under which the executive removes suspected terrorists to foreign countries for interrogation; and the National Security Agency's warrantless wiretapping of electronic communications. The government argues that the plaintiffs' claims in these cases can neither be proven nor defended against without disclosure of information that would jeopardize national security, and thus it seeks to have all cases related to these practices dismissed on the pleadings.[1]

This testimony provides a brief overview of the state secrets privilege, and then discusses its recent assertion in cases challenging extraordinary rendition and the NSA's warrantless wiretapping program. After the privilege was formally established by the Supreme Court in 1953, it was used only sparingly for several decades. Starting in the 1970s, however, the privilege was asserted with increasing frequency by each new administration, culminating in the current administration's blanket assertion of the privilege as grounds for immediate dismissal of entire categories of cases. The current use of the privilege is far removed from the narrow evidentiary privilege recognized by the Supreme Court, and it threatens to eliminate the judiciary's role as a check on executive action and deny justice to affected parties.

For these reasons, we urge the next administration to adopt a series of measures that would limit assertion of the state secrets privilege so as to ensure it is used as originally intended, rather than as a de facto attempt to immunize executive action from judicial review. We also advocate that Congress enact pending legislation to rein in indiscriminate use of the state secrets privilege and thereby prevent future abuse.

[1] *See, e.g.* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007); ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); Hepting v. AT&T, Corp. 439 F. Supp. 2d 974 (N.D. Cal. 2006), *remanded by* __ F.3d __, 2008 WL 3863931 (9th Cir. Aug. 21, 2008); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).

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I. THE ORIGINS OF THE STATE SECRETS PRIVILEGE

The state secrets privilege was first explicitly recognized by the Supreme Court in its 1953 decision in *United States v. Reynolds*.[2] *Reynolds* involved a claim for damages against the federal government brought by the widows of three civilians killed in the crash of a B-29 aircraft. During discovery, plaintiffs sought production of the U.S. Air Force's official accident investigation report and the statements of three surviving crew members. The United States objected, claiming that it had constitutional authority to refuse to disclose information related to national security.[3] The Supreme Court rejected this "broad proposition[],"[4] but explicitly acknowledged for the first time the existence of a privilege that could protect military and state secrets.

As described in *Reynolds*, the state secrets privilege is a common law evidentiary privilege that derives from the President's authority over national security.[5] The privilege can be asserted only by the head of an executive branch agency with control over state secrets, and only after that person has filed an affidavit demonstrating that he or she has personally reviewed the information at issue and determined that it qualifies as state secrets.[6] *Reynolds* made clear that the court itself must ultimately decide whether the evidence is admissible.[7] The *Reynolds* Court ultimately accepted the government's representations about the classified nature of the materials and refused to require their disclosure.[8] The Court then remanded the case so that litigation could proceed, declaring that "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets."[9]

Unfortunately, *Reynolds* left the contours of this privilege unclear. The Supreme Court did not describe the specific types of information that qualified for protection as a "state secret," or explain how courts should determine whether the privilege had been properly asserted. Unsurprisingly, lower courts have differed in their application of the privilege.

Extrapolating from the brief description of the privilege in *Reynolds*, lower courts have concluded that it can affect litigation in a number of different ways. First, it is clear from the result in *Reynolds* that the privilege can bar evidence from admission in litigation. The plaintiff's case will then go forward without the excluded evidence, as it did in *Reynolds*, but the case may be dismissed if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, lower courts have concluded that if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for

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[2] 345 U.S. 1 (1953). Although this was the first case in which the Court explicitly recognized the privilege, the Court stated that the privilege was "well established," stretching back at least to the 1807 trial of Aaron Burr for treason. *Id.* at 9. For an in depth discussion of the *Reynolds* litigation, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 29-118 (2006).
[3] Brief for the United States at *8, United States v. Reynolds, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378.
[4] Reynolds, 345 U.S. at 6.
[5] Reynolds, 345 U.S. at 6.
[6] Reynolds, 345 U.S. at 7-8.
[7] *Id.* at 8.
[8] The accident report was eventually declassified and, according to Louis Fisher, "revealed . . serious negligence by the government" but "contained nothing that could be called state secrets." Fisher, *supra* note 2, at xi.
[9] *Id.* at 11.

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the defendant.[10] And third, some courts have held that "if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."[11] However, as explained below, the Supreme Court has only taken the drastic action of dismissing litigation on the ground that it concerned a state secret in the very narrow category of cases involving covert espionage agreements, and it is not clear that the Supreme Court ever intended the evidentiary privilege it recognized in *Reynolds* to serve as such a jurisdictional bar.

Although *Reynolds* marked the first explicit recognition of a state secrets privilege by the Supreme Court, it was not the first time that the Supreme Court had dealt with the problem of litigation that raises secrecy concerns. The 1875 decision in *Totten v. United States* is one of the Court's earliest cases addressing the issue, and is also one of only two cases in which the Court ordered that a case be dismissed because its "very subject matter" concerned secret evidence.[12] *Totten* involved a contract dispute between a Union spy and President Abraham Lincoln. The contract, which the parties entered into in July 1861, provided that the spy was to travel behind rebel lines and transmit information about the Confederate Army in return for payment of $200 per month. The spy performed the tasks agreed upon, but was reimbursed only for his expenses. The Supreme Court concluded that although President Lincoln had the authority to enter into the contract, no court could enforce it. The Court then stated: "[A]s a general principle . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[13] Accordingly, the Court dismissed the case.

Totten was recently reaffirmed by the Supreme Court in *Tenet v. Doe*, a case in which two former spies claimed that the government had reneged on its agreement to provide lifetime support for them in the United States in return for espionage services in their native country.[14] Their complaint alleged that the government had violated their equal protection and due process rights by refusing to abide by the terms of their original agreement. The Supreme Court held that the so-called "*Totten* bar" precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States.[15] Aside from these two cases concerning the terms of covert espionage agreements, the Supreme Court has never affirmed the dismissal of litigation on the ground that it concerns state secrets.

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[10] *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984).
[11] *Id.*
[12] *See* Reynolds, 345 U.S. at 7 n.11 (1953) (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).
[13] Totten, 92 U.S. at 107.
[14] 544 U.S. 1 (2005).
[15] *See* Tenet, 544 U.S. at 3.

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II. THE STATE SECRETS PRIVILEGE POST-SEPTEMBER 11

A. The George W. Bush Administration's Unprecedented Assertion of the Privilege

Reynolds admonished that the state secrets privilege "is not to be lightly invoked,"[16] and for over two decades following that decision the executive rarely asserted the state secrets privilege. Starting in 1977, however, the privilege was raised with greater frequency by both Democratic and Republican administrations. The privilege was asserted two times between 1961 and 1970, fourteen times between 1971 and 1980, twenty-three times between 1981 and 1990, twenty-six times between 1991 and 2000.[17]

From 2001 through 2006 both the number of invocations of the privilege and the occasions on which the administration sought to dismiss a case in its entirety increased significantly. A recent article by Professor Robert Chesney reviewed all the published cases in which the executive has invoked the state secrets privilege since *Reynolds*. He found that in its first six years, the Bush Administration has raised the privilege 20 times, which amounts to twenty-eight percent more cases per year than in the previous decade.[18] The sample size is small, and it is hard to draw conclusions from published decisions alone.[19] But to the degree that the published cases provide any insight into the policy of this Administration, they are consistent with the conclusion that it has used the privilege with greater frequency than ever before.[20]

Furthermore, and of greater significance, the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs. Professor Chesney's data shows that the Bush Administration sought dismissal in ninety-two percent more cases per year than in the previous decade.[21] In comparison, the government responded to

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[16] Reynolds, 345 U.S. at 7.

[17] *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation,* 75 Geo. Wash. L. Rev. 1249 (2007), appendix.

[18] Chesney, *supra* note 17, at appendix. The government has asserted the privilege even more frequently since 2006. In *Conner v. AT&T*, the government informed the court that it "intends to assert the military and state secrets privilege in all of the[] actions" pending against the telephone company that allegedly provided the United States access to telephone communications without a warrant, and would "seek their dismissal." No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. Jun. 30, 2006).

[19] As Professor Chesney is careful to note, using published decisions as the basis for determining the frequency of a particular administration's assertion of the privilege is problematic. *Id.* at 1301-02. The executive's claims may often be decided in unpublished rulings that are not available for analysis. Furthermore, cases decided during one administration might have arisen out of an assertion of the privilege that originated in another administration. And in any event the frequency of the privilege's assertion might have more to do without the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege. That said, Professor Chesney analyzed these cases because they provide the only data on the privilege, and because even with the aforementioned limitations they help to guide discussion of patterns in executive assertion of the privilege.

[20] Professor Chesney did not think these numbers were significant, and in fact argued that they "do[] not support the conclusion that the Bush Administration employs the privilege with greater secrecy than prior administrations." *Id.* at 1301. We disagree with that conclusion.

[21] The executive sought outright dismissal in five cases between 1971 and 1980, nine cases between 1981 and 1990, thirteen cases between 1991 and 2000, and fifteen cases between 2001 and 2006. *See* Chesney, *supra* note 17, at appendix.

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lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.[22] The current practice is thus unprecedented.

The Bush Administration has asserted the privilege in every case challenging two controversial government programs: the extraordinary rendition program, under which the United States transferred foreigners suspected of having ties to terrorist organizations to foreign countries;[23] and the NSA's warrantless wiretapping program, under which the NSA has eavesdropped on domestic communications without first obtaining a warrant.[24] In these cases, the executive has invoked the state secrets privilege not just as grounds for excluding specific pieces of evidence, but as a basis for having all litigation challenging these two programs dismissed with prejudice prior to discovery. The government makes almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Summarized below are a few cases in each category to provide a sense of the underlying controversies, the position taken by the Bush Administration, and the courts' responses.

B. Challenges to the Extraordinary Rendition Program

Secretary of State Condoleezza Rice has acknowledged that the "United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held or brought to justice."[25] The United States denies, however, that the purpose of rendition is to send suspected terrorists to countries that engage in torture. Two subjects of the extraordinary rendition program, Khaled El-Masri and Maher Arar, claim that the United States mistakenly identified them as suspected terrorists and sent them to countries where the United States knew they would be tortured. Both filed lawsuits against the United States and the private contractors involved in the rendition. In both cases the United States filed motions to dismiss on the ground that the very subject matter of the cases involved state secrets.

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[22] *See* Chesney, *supra* note 17, appendix.

[23] Nina Bernstein, *U.S. Defends Detention at Airports*, N.Y. Times, Aug. 10, 2005, at B1; Don Van Natta, Jr., *Germany Weighs if it Played Role in Seizure by U.S.*, N.Y. Times, Feb. 21, 2006, at A1.

[24] James Risen & Erich Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1. On January 17, 2007, the Bush Administration announced that it would submit its domestic surveillance program to supervision by the Foreign Intelligence Surveillance Court. *See* Adam Liptak, *The White House as a Moving Legal Target*, N.Y. Times, Jan. 19, 2007, at A1. The effect of this change in conduct in the pending cases is unclear. The Administration has argued that these cases are now moot, but plaintiffs will contend that the executive's voluntary cessation of the challenged conduct does not moot their litigation. See Adam Liptak, *Judges Weigh Arguments in U.S. Eavesdropping Case*, N.Y. Times, Feb. 1, 2007, at A11 (describing the arguments by the government and the ACLU before the U.S. Court of Appeals for the Sixth Circuit in the government's appeal from the district court's decision in ACLU v NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006)).

[25] Statement of Condoleezza Rice, December 5, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120500462.html> (visited on September 8, 2008). On September 6, 2006, President Bush publicly acknowledged a CIA program of detaining and interrogating suspected terrorists in foreign locations. El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007).

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1. *El-Masri v. Tenet*

Khaled El-Masri, a German citizen of Lebanese descent, filed a lawsuit in federal district court against CIA officials and private contractors alleging that he was transported against his will to Afghanistan as part of the United States' extraordinary rendition program, and that he was repeatedly interrogated, drugged, and tortured throughout his ordeal. El-Masri claimed violations of his constitutional rights, as well as international legal norms prohibiting prolonged, arbitrary detention and cruel, inhumane, and degrading treatment.[26]

The United States filed a motion to dismiss, claiming that maintenance of the suit would inevitably require disclosure of state secrets. The government asserted that "the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," but could not give more details about the potential damage because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."[27]

El-Masri responded that the government's practice of extraordinary rendition, as well as his rendition specifically, had been widely discussed in public.[28] His counsel submitted evidence demonstrating that Secretary Rice, White House Press Secretary Scott McClellan, and CIA Directors Tenet and Goss had all publicly acknowledged that the U.S. conduct renditions,[29] and that El-Masri's rendition had been recounted in "numerous" media reports.[30] Thus, El-Masri argued that neither he nor the government needed to rely on privileged information to make their case.

U.S. District Judge T.S. Ellis granted the government's motion and dismissed the case. Judge Ellis observed that "courts must not blindly accept" the executive branch's assertion of the privilege, but then stated that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[31] Although the government had publicly acknowledged that it engaged in rendition of suspected terrorists, Judge Ellis concluded that this general information did not render the details of the program as it may have been applied to El-Masri less worthy of being kept classified. Judge Ellis then determined that the case must be dismissed because the United States could not mount a defense without the privileged information.[32] Judge Ellis rejected El-Masri's suggestion that the court establish protective procedures to allow the case to go forward, such as providing defense counsel with clearance to review classified documents. Such measures would be "plainly ineffective," Judge

[26] 437 F. Supp. 2d 530 (E.D. Va. 2006). Specifically, El-Masri brought: 1) a *Bivens* claim against George Tenet, former Director of the CIA, and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process and not to be subject to treatment that "shocks the conscience"; 2) a claim pursuant to the Alien Tort Statute for violations of international legal norms prohibiting prolonged, arbitrary detention; and 3) a claim pursuant to the Alien Tort Statute for each defendant's violation of international legal norms prohibiting cruel, inhuman, and degrading treatment.
[27] Motion to Dismiss at 11-12, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).
[28] El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007).
[29] *Id.*
[30] *Id.*
[31] 437 F. Supp. 2d at 536.
[32] *Id.* at 538.

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Ellis concluded, because the "entire aim of the suit is to prove the existence of state secrets."[33] Accordingly, "El-Masri's private interests must give way to the national interest in preserving state secrets."[34]

El-Masri appealed the dismissal to the Fourth Circuit, which affirmed the district court.[35] Like Judge Ellis, the Fourth Circuit noted that the Bush Administration had publicly acknowledged the existence of the CIA's extraordinary rendition program generally, and El-Masri's detention and rendition specifically. Nonetheless, the court held that El-Masri could not demonstrate that the defendants were involved in his detention and interrogation without relying on information constituting state secrets.[36] The Fourth Circuit also rejected El-Masri's suggestion that the privileged evidence be admitted under seal, to be reviewed only by the court and El-Masri's counsel, who would first obtain the requisite security clearance.[37] The Fourth Circuit explained that it "need not dwell long" on this proposal because it was "expressly foreclosed by *Reynolds*."[38]

2. *Arar v. Ashcroft*

Maher Arar's claims parallel those raised by Khaled El-Masri.[39] Like El-Masri, Arar alleges that he was abducted, detained, and then sent to another country where he was tortured as part of the United States' practice of extraordinary rendition. Arar, a Syrian born Canadian citizen, was employed as a software engineer in Massachusetts. In September 2002, Arar was detained by U.S. authorities at J.F.K. International Airport in New York City while flying back from Switzerland. He was then flown by private jet to Amman, Jordan, where federal officials delivered him to Jordanian officials, who in turn brought him to Syria. In Syria, Arar was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian security forces. Arar claimed that his Syrian interrogators worked with U.S. officials, who provided information and questions and received reports from the Syrians about Arar's responses. Arar was released on October 5, 2003. No charges were ever filed against him.[40]

Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and Treaties. Prior to discovery, the government moved for dismissal or summary judgment on

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[33] *Id.* at 539.
[34] *Id.* The district court did not address the United States' alternative argument that the case was nonjusticiable pursuant to the "*Totten* bar." *Id.* at 540.
[35] El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
[36] *Id.* at 310.
[37] *Id.* at 311.
[38] *Id.*
[39] 414 F. Supp. 2d 250 (E.D.N.Y. 2006).
[40] In January 2007, a Canadian commission charged with investigating Canada's role in Arar's extradition concluded that Canadian intelligence officials had erroneously linked Arar to Al Queda, and then provided that inaccurate information to their American counterparts. Canada issued an official apology to Arar and awarded him approximately $10 million. *See* Scott Shane, *Justice Dept. Investigating Deportation to Syria*, N.Y. Times, Jun. 6, 2008.

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state secrets grounds.[41] The executive's arguments were identical to those made in El-Masri's case: the very subject matter of the case concerned the details of a program that was secret, and needed to be kept that way to safeguard national security. The government's reasons for detaining Arar, concluding that he was a member of al Queda, and then sending him to Syria rather than to Canada cannot be disclosed, the government argued, without jeopardizing national security. Because information at the "core" of Arar's first three claims is a state secret, the government argued that these claims must be dismissed.

The district court dismissed all of Arar's claims, holding that Arar could not seek damages for violation of his constitutional rights "given the national-security and foreign policy considerations at stake."[42] Thus, although the court did not address the executive's claim that the case should also be dismissed on state secrets grounds, the government's national security concerns were the basis for dismissal of some of his claims.[43]

A panel of the Second Circuit affirmed the dismissal, and the state secrets privilege again was a factor in its conclusion that Arar could not seek damages from federal officials for violations of his constitutional rights.[44] The Second Circuit stated that assertion of the privilege serves as "a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers," and thus "constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication deployed by the federal courts."[45]

In August 2008, the Second Circuit took the very unusual step of sua sponte granting rehearing *en banc*. Oral argument is scheduled for December 9, 2008.

B. Challenges to NSA's Warrantless Wiretapping Program

President Bush publicly acknowledged the existence of the NSA's warrantless wiretapping program in December 2005 after an article describing the practice appeared in the *New York Times*. As the President explained at a press conference on December 19, 2005, he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates."[46] Shortly thereafter, a number of different

[41] The government did not seek dismissal of Arar's fourth claim on state secrets grounds. That claim concerned his alleged mistreatment while detained in the United States. The United States and the individual defendants sought to dismiss that claim on other grounds.
[42] Arar, 414 F. Supp. 2d at 287.
[43] *Id.*
[44] Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008).
[45] *Id.* at 183.
[46] United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment By the United States at 1, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. C-06-0672-VRW), 2006 WL 2038464 (citing Press Release, Press Conference of the President (Dec. 19, 2005) *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>).

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individuals who believed they had been subjects of the warrantless wiretaps filed suit challenging the legality of this practice.

1. *Hepting v. AT&T Corporation*

In *Hepting v. AT&T Corp.*, filed in the Northern District of California, plaintiffs alleged that AT&T collaborated with the NSA to eavesdrop on the communications of millions of Americans.[47] The complaint asserted that AT&T, acting as an agent of the U.S. government, violated the First and Fourth Amendment rights of U.S. citizens, as well as the Foreign Intelligence Surveillance Act (FISA) and various other state and federal laws. Plaintiffs sought damages, restitution, disgorgement, and injunctive and declaratory relief on behalf of the class.[48]

The United States sought to intervene and moved for dismissal or summary judgment on the basis of the state secrets privilege, for three reasons:[49] First, because the "very subject matter of [the action]" concerns privileged information; second, because the plaintiffs could not make their prima facie case without the privileged information; and third, because the absence of the privileged information would deprive AT&T of a defense.[50] In addition, because the case concerned a covert agreement between AT&T and the government, the United States contended that it qualified for dismissal under *Totten v. United States.*

District Judge Vaughn Walker denied the government's motion, explaining that there was a great deal of publicly available information about the NSA terrorist surveillance program that cut against application of so-called "*Totten* bar."[51] Turning to the state secrets privilege, the court noted as a threshold matter that "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights," as were alleged here, but instead most cases concerned "classified details about either a highly technical invention or a covert espionage relationship."[52] In addition, the court stated that the "very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."[53] Finally, Judge Walker concluded that it was "premature" to decide whether the case should be dismissed on the ground that plaintiffs could not make out a prima facie case or AT&T could not assert a valid defense.[54] Instead, he decided to let discovery proceed and then assess whether any information withheld pursuant to the state secrets privilege would require the suit's dismissal. In conclusion, Judge Walker commented that he viewed the state secrets privilege as limited, at least in part, by the role of the judiciary in the constitutional structure:

> [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from

[47] 439 F. Supp. 2d 974 (N.D. Cal. 2006).
[48] *Id.* at 979.
[49] *Id.* at 979.
[50] *Id.* at 985.
[51] *Id.* at 993.
[52] *Id.*
[53] *Id.* at 994.
[54] *Id.*

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threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .[55]

The decision was appealed to the Ninth Circuit. On August 21, 2008, a panel of the Ninth Circuit remanded the case to the district court "in light of the FISA Amendments Act of 2008."[56]

2. *American Civil Liberties Union v. National Security Agency*

ACLU v. NSA was filed by a group of journalists, academics, attorneys, and nonprofit organizations.[57] The plaintiffs regularly communicate with individuals from the Middle East whom the government might suspect of being affiliated with al Queda, and thus plaintiffs claim a "well-founded belief" that their telephone calls and internet communications have been intercepted under NSA's warrantless wiretapping program. They contend that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.[58] Plaintiffs brought suit in federal court in the Eastern District of Michigan challenging the surveillance program as a violation of the separation of powers doctrine, their First and Fourth Amendment rights, and FISA and other federal laws. They sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant.

The United States filed a motion to dismiss very similar to that in *Hepting*. Although the executive conceded that the "issues before the Court" regarding the constitutionality of the NSA's surveillance program "are obviously significant and of considerable public interest,"[59] it contended that these questions cannot be explored in litigation to prevent disclosure of "intelligence activities, information, sources, and methods" relevant to the litigation.[60] Without this evidence, the executive claimed that plaintiffs could neither establish standing to sue nor prove the merits of their claims. Furthermore, the executive argued that the "very subject matter" of the lawsuit is a state secret, and thus asserted that the litigation must be dismissed, or alternatively, the court should grant defendants' motion for summary judgment.[61]

The plaintiffs responded that statements already in the public record acknowledging the existence of the NSA's surveillance program were sufficient to determine their standing and the lawfulness of the program. The government, however, strongly disagreed: "[T]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of

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[55] *Id.* at 995 (internal citations omitted).
[56] __ F.3d __, 2008 WL 3863931 (9th Cir. Aug. 21, 2008).
[57] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
[58] Complaint at 2, ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 10204).
[59] Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 1, ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 10204).
[60] *Id.* at 4.
[61] *Id.* at 5 (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1952)).

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enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate."[62] The government argued that the President's exercise of his "core Article II and statutory powers to protect the Nation from attack" cannot be resolved on the basis of the public record alone.[63]

On August 17, 2006, U.S. District Judge Anna Diggs Taylor rejected the government's claim that the case should be dismissed on state secrets ground, and found the NSA's warrantless wiretapping program to be unconstitutional.[64] The government's attempt to have the case dismissed prior to discovery suggested to Judge Taylor that the government was arguing that the case was not justiciable under the *Totten* doctrine. Judge Taylor concluded, however, that the *Totten* bar was not applicable because the case did not concern an "espionage relationship between the Plaintiff and the Government," as had been the case in *Totten* and in the most recent application of that doctrine in *Tenet v. Doe*.[65]

Following the lead of Judge Walker, Judge Taylor reviewed the aspects of NSA's warrantless wiretapping program that had been publicly admitted by the administration, and the defense of that program that the administration had articulated thus far. She concluded that plaintiffs' challenge to the program could be resolved based on the government's on-the-record statements, and that neither the plaintiffs nor the government needed to discuss the allegedly privileged details of the program to pursue the litigation. For those reasons, Judge Taylor denied the government's motion to dismiss or for summary judgment, and went on to address the merits of the constitutional and statutory challenges to the NSA warrantless wiretapping program.

The government filed an appeal in the Sixth Circuit, which reversed the district court and concluded the plaintiffs lacked standing to litigate their claims. Like the district court, the Sixth Circuit found that because the government acknowledged engaging in warrantless wiretapping, the case could not be dismissed on the grounds that the subject matter of the lawsuit was a state secret.[66] But the Sixth Circuit concluded that the state secrets privilege applied to bar disclosure of documents that could have established standing because, without such records, the plaintiffs could not demonstrate that their own communications had been intercepted by the NSA.[67]

C. Conclusion

The George W. Bush Administration's recent blanket assertion of the state secrets privilege in cases challenging its conduct in the war on terror cannot be equated with the use of the privilege in *Reynolds*. *Reynolds* concerned a single accident, not a challenge to the legality of an ongoing government program. The plaintiffs in *Reynolds* were seeking damages for negligence; they made no claims that the government had violated their constitutional rights or was ignoring the restrictions established by federal statute. Nor was the executive's assertion of the privilege part of a pattern under which it sought to bar any case of its type from being heard in court. Most important, the *Reynolds* decision permitted the government to withhold a few

[62] *Id.* at 3.
[63] *Id.*
[64] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
[65] *Id.* at 763.
[66] American Civil Liberties Union v. National Security Agency, 493 F.3d 644, 650 n.2 (6th Cir. 2007).
[67] *Id.* at 653.

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documents from discovery, not put an end to litigation. To the contrary, the Court remanded *Reynolds* for further proceedings, explaining "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets."[68]

In short, the state secrets privilege has strayed far from the narrow evidentiary privilege described in *Reynolds*.[69] Although the privilege was originally applied to bar specific pieces of evidence from admission, it is now asserted as a basis for dismissal of categories of litigation challenging government programs. *Reynolds* admonished that the privilege is "not to be lightly invoked," and yet it is now cited regularly by the government in numerous cases. As one commentator put it, the state secrets privilege has been "transform[ed] from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity."[70]

III. THE STATE SECRETS PRIVILEGE AND SEPARATION OF POWERS

The cases described above illustrate the Bush Administration's unprecedented practice of asserting the state secrets privilege as grounds for immediate dismissal of legal challenges to specific, ongoing government programs. Although some courts have noted that current assertions of the state secrets privilege differ in quality and quantity from past practice, they nonetheless find it difficult to resist executive claims that proceeding with litigation will jeopardize national security. Judges explain that they are ill-equipped to determine whether the information sought in discovery would undermine relations with foreign governments, put informants at risk, or alert terrorists to government surveillance. Judges repeatedly assert that they must defer to the executive because they lack the ability to make independent judgments about the executive's claimed need for the privilege, and frankly concede that they are reluctant second-guess the executive's assertions that disclosure will put the nation at risk.

But the executive is also not a good judge of the need for the privilege. When the United States is sued for violating the law, it has an obvious self-interest in avoiding scrutiny of its actions and the liability that might well follow. Although there have been many legitimate assertions of the privilege, the executive has also been known to overuse the privilege to avoid the embarrassment, cost, and hassle of litigation. Indeed, *Reynolds* itself may have been just such a case. Although the United States had asserted that the accident investigation report sought in that case contained state secrets, when the report was eventually declassified many years later a leading expert on the case observed that the report "revealed . . . serious negligence by the government" but "nothing that could be called state secrets."[71]

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[68] 345 U.S. at 11. On remand, the plaintiff's counsel deposed the surviving crewmembers, and the case eventually settled. Barry Siegel, *The Secret of the B-29*, L.A. Times, Apr. 18, 2004, at A1.

[69] The rarely-applied "*Totten* bar" also fails to provide precedent for the dismissal of cases challenging extraordinary rendition and the NSA's warrantless wiretapping program. Both *Totten* and the more recently-decided case of *Tenet v. Doe* concerned attempts to sue the government for violating espionage agreements. The categorical *Totten* bar precludes judicial review in the "distinct class of cases" involving "clandestine spy relationships," *see Tenet v. Doe*, 544 U.S. at 10, but it has never been applied to cases challenging the legality of established government programs.

[70] Henry Lanman, *Secret Guarding*, Slate, May 22, 2006, *available at* <http://www.slate.com/id/2142155>.

[71] *See* Fisher, *supra* note 2, at xi.

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Thus, the new administration should take care to limit its assertion of the privilege so that it protects only truly sensitive material, and does not preclude judicial review of ongoing executive branch activities. As James Madison explained, the federal courts play an essential role in checking the power of the executive, thereby preventing the "tyranny" that results from the "accumulation of all powers legislative, executive and judiciary in the same hands."[72] The Framers of the Constitution provided federal judges with life tenure and salary protections to ensure that courts can block legislative and executive branch overreaching without fear of retribution. When the executive demands that courts dismiss from their dockets cases challenging the legality of executive conduct, it eliminates the judiciary's vital role in the tripartite system of government.

Of particular importance is the federal judicial role in safeguarding individual constitutional rights against executive abuse of power—issues directly implicated by challenges to the extraordinary rendition and warrantless wiretapping programs. The Supreme Court has repeatedly claimed the power to review constitutional claims, despite executive and legislative attempts to strip courts of jurisdiction, observing that "serious constitutional questions [] would arise" if a plaintiff were denied "any judicial forum for a colorable constitutional claim."[73] In the leading case on this question, *Webster v. Doe,* the government made many of the same arguments against judicial review as it raises in cases challenging extraordinary rendition and warrantless wiretapping. In *Webster*, a former CIA employee challenged his dismissal on the ground that it violated his constitutional rights to equal protection and due process. The government responded that no court could review the decision to terminate Webster, arguing that "judicial review even of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security."[74] The Court rejected this argument, concluding that the need for a judicial forum in which to litigate constitutional claims was too weighty an interest to preclude litigation entirely. The Court explained that the district court could control discovery so as to "balance [the employee's] need for access to proof . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."[75] The recent decisions denying plaintiffs a forum in which to litigate their claims challenging the constitutionality of extraordinary rendition and warrantless wiretapping are incompatible with this long tradition of judicial protection of individual rights.

Plaintiffs challenging the NSA's warrantless wiretapping program claim that it exceeds statutory as well as constitutional limits, and thus these cases should be even harder for courts to dismiss without review. Congress enacted FISA precisely to limit executive power to monitor the communications of those within the United States. When the executive seeks dismissal of claims that FISA has been violated, it undermines Congress's authority by rendering laws like FISA a nullity. The Supreme Court has repeatedly rejected the executive's attempt to assume the unilateral power to decide for itself what the law requires. As the Court explained in *Hamdi v. Rumsfeld*, "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court . . . simply because the Executive opposes making available

[72] James Madison, The Federalist No. 47, at 324 (J. Cooke ed., 1961).
[73] Webster v. Doe, 486 U.S. 592, 603 (1988) (citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)).
[74] *Id.* at 604 (citing Tr. of Oral Arg. 8-13).
[75] *Id.* at 604.

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such a challenge."[76] Likewise, the executive cannot ignore the limits of federal law and then avoid judicial review entirely on the ground that the case concerns a "state secret."

Federal courts are well-equipped to apply safeguards and protective procedures that would allow litigation to proceed without jeopardizing national security. Indeed, courts have done so on a regular basis for decades. Long before the Bush Administration took office, courts responded to the executive's claimed need for secrecy in challenges to the CIA's employment practices, in Freedom of Information Act cases, and in countless criminal cases. Such cases were not dismissed on the pleadings. Rather, courts applied longstanding litigation tools designed to allow litigation to proceed while at the same time safeguarding national security.

The new administration, whether that of John McCain or Barack Obama, should trust that courts can play their usual supervisory role in cases raising national security concerns. For example, rather than seeking to dismiss cases or withhold evidence, the government can employ some of the techniques used successfully in the past to provide relevant evidence without disclosing information that could jeopardize national security. In Freedom of Information cases the executive has long been required to generate an index describing each document withheld and explaining the basis for the executive's claim that its disclosure would harm national security.[77] This procedure allows both the court and the opposing party to determine which documents are truly relevant and to challenge the basis for the executive's claim that the documents must remain secret. The government is also accustomed to segregating any non-classified material from classified documents to provide the opposing party with as much information as possible.[78] Finally, the government could submit the allegedly privileged documents to the judge for her in camera review, which would provide an important check on indiscriminate use of the privilege.

Significantly, courts and Congress have successfully worked together in the past to manage classified evidence in criminal prosecutions. In 1980, Congress enacted the Classified Information Procedures Act ("CIPA") to balance the government's interest in protecting such information from disclosure against criminal defendants' need to obtain all information relevant to their defense. Under CIPA, the court responds to a defense request for classified documents by first determining whether the evidence sought is relevant and material. If so, the burden shifts to the government to show that the information contains sensitive information about national security that cannot be publicly disclosed.[79] Even if the government satisfies its burden, the information is not completely withheld from the defendant. Rather, the court decides whether a modification or substitute for the evidence is possible. CIPA requires the government to produce redacted versions of documents, submit a summary of the information in the classified documents, or substitute a statement admitting relevant facts that the classified documents would prove.[80] If the government fails to provide a sufficient substitute for the requested documents, the court may dismiss specified counts or even the entire prosecution.[81] There is no reason that

[76] 542 U.S. 507, 536-37 (2004).
[77] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
[78] *See, e.g.,* Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("Under FOIA, administration agencies 'shall' disclose '[a]ny reasonably segregable portionof a record . . . .' 5 U.S.C. § 522(b).").
[79] *See* United States v. Yunis, 867 F.2d 617, 622 (D.C. Cir. 1989).
[80] 18 U.S.C. App. § 4.
[81] 18 U.S.C. App. § 6.

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similar procedures could not be followed in the context of civil cases, as is proposed in pending legislation to reform the state secrets privilege described in more detail in Part V.

Even better, the new administration should police its own use of the privilege. As discussed in Part IV, below, the incoming administration should reexamine assertion of the privilege in pending cases, and should establish guidelines to shape use of the privilege in the future. Members of the legislative and judicial branches have become skeptical of executive claims that the "very subject matter" of litigation regarding extraordinary rendition and warrantless wiretapping constitutes a state secret when those programs have been widely debated in the media and acknowledged to exist by the executive branch. Thus, it is in the executive branch's interest to cabin its use of the privilege and maintain its credibility with courts and legislators.

IV. A BLUEPRINT FOR THE NEW ADMINISTRATION

A. The Need for the Executive Branch to Reform the Privilege

The next Presidential administration, whether led by Senator McCain or Senator Obama, should take a series of measures to reform the use of the state secrets privilege. By adopting some or all of the steps proposed below, the new administration can ensure that the coordinate branches of government are able to fulfill their constitutional roles. These measures will reduce inter-branch friction, restore Congress's and the court's trust in the executive branch, and ensure that Americans are not denied justice by their own government.

The bills pending before Congress, discussed below, will establish a firm foundation for the state secrets privilege over the long term. But given the likelihood of a closely divided Congress and the vast legislative agenda that will confront the new President and Congress next January, it may take some time to enact legislation. Accordingly, the new administration should lead the way by taking a series of actions to reform use of the privilege.

As scholars, lawyers, and policymakers have recognized, the executive branch can place its programs on firmer ground, and better protect both the nation's security and liberty, through working with and not against the coordinate branches of government. Jack Goldsmith, a former senior official in the Bush Pentagon and Justice Department, testified before the Senate Judiciary Committee last year that "[t]he administration's failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process."[82] As Professor Goldsmith explained, "[w]hen the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President's job demands."[83] Just as an extreme unilateralist approach with respect to Congress ultimately undermines authority and support for administration programs, so too will an administration's efforts to limit the role of the courts

[82] Testimony of Jack Goldsmith on "Preserving the Rule of Law in the Fight Against Terrorism" Before the S. Comm. on the Judiciary (Oct. 2, 2007) [hereinafter Goldsmith Testimony], *available at* http://judiciary.senate.gov/testimony.cfm?id=2958&wit_id=6693

[83] *Id.*

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through excessive use of the state secrets privilege eventually backfire. By depriving courts of the ability to perform their constitutional job of interpreting the law and administering justice, the administration will call into question the legal basis for its programs, and cause judges and the public at large to question whether the executive branch is operating in good faith. This may over time lead to a "boy cries wolf" scenario in which the executive cannot rely on the privilege in a situation in which it is truly necessary.

Indeed, Maher Arar's case illustrates the growing skepticism regarding the Bush Administration's assertion of the privilege. Even as the government was claiming that Maher Arar's case could not proceed because it might damage U.S. relations with Canada, the Canadian government was holding public hearings on the matter, and ultimately issued an apology to Arar and awarded him approximately $10 million.[84] Distrust of the administration's claimed need for secrecy may have been the basis for the Second Circuit's highly unusual decision to sua sponte grant rehearing en banc of a panel's dismissal of Arar's case. If the new administration wishes to avoid judicial and legislative second-guessing of its claims of privilege, it should better police its assertions of the privilege.

B. Specific Measures the New Administration Should Adopt

In particular, the new administration should consider implementing the following measures upon taking office. The following proposals could be adopted individually, or grouped together as a comprehensive new package. The list below is not intended to be exhaustive, but rather to suggest useful avenues for the new administration to pursue.

First, the new administration should conduct an across-the-board review of all pending litigation in which the government--either as an original party or intervenor--has invoked the state secrets privilege. This comprehensive review should assess whether there are ongoing cases in which use of the privilege is unnecessary or inappropriate. Just because the Bush Administration has invoked the privilege in a particular cases does not mean the new administration should consider itself bound by its predecessor's litigation approach.

This across-the-board review should be carried out by a joint group of career employees and political appointees of the new administration, and should include officials from both the Justice Department and the intelligence and national security communities. It should cover not only to cases that are pending in district courts, but also those in which the state secrets privilege is at issue on appeal, including for example the *Hepting* case challenging the administration's domestic surveillance program.[85] To the extent necessary, the new administration may wish to seek extensions of time in pending cases while it completes this review.

Second, the new President should issue an Executive Order, binding all federal agencies, that sets out substantive legal standards regarding use of the privilege. This Order might include a new definition of what constitutes a state secret and what evidence the government believes is appropriately subject to the privilege, based either on the current classification system,[86] or the

[84] *See* Scott Shane, *Justice Dept. Investigating Deportation to Syria*, N.Y. Times, Jun. 6, 2008.
[85] *See supra* Section II.B.1, discussing the *Hepting* case.
[86] *See* Executive Order 13292 (specifying classification guidelines).

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definitions of "state secrets" in the pending legislation. An important element of an Executive Order on the privilege would be creating a standard for when the government may seek outright dismissal of a case, at the pleadings stage, on the basis of the privilege. For example, an effective Order could emphasize that this approach is supported by precedent only in cases involving secret espionage agreements, such as those at issue in *Totten v. United States* and *Tenet v. Doe*, and may not be appropriate in cases relating to other subjects.[87]

Whatever precise standard the administration writes into an Executive Order should take into account the harm to litigants and the public of invoking the privilege either to prevent introduction of evidence or seek dismissal of the case. The President's constitutional responsibilities include not only protecting the nation's security, but also taking care that the laws are properly enforced.[88] If important evidence is kept out of court, or entire cases are dismissed on the pleadings, the law cannot be optimally followed and enforced. Accordingly, the executive branch should adopt a substantive standard that requires it to evaluate the harm that will result when invoking the state secrets privilege.

Third, either as part of this Executive Order or through a formal Memorandum issued by the new Attorney General, the administration should create a durable and extensive review process within the executive branch for deciding when to assert the privilege in future cases. Internal procedural requirements within the bureaucracy can create a strong layer of checks and balances, taking advantage of the benefits of multiple viewpoints and the experience and judgment of career civil servants.[89] When just a few executive branch officials make decisions without broader consultation and input, the results can be severely flawed. This is especially the case with complex legal analysis, as demonstrated by the failures resulting from the Bush Administration's refusal to seek input from different officials within the administration.[90] As Professor Goldsmith testified before the full Judiciary Committee, "[c]lose-looped decisionmaking by like-minded lawyers resulted in legal and political errors that would be very costly to the administration down the road. Many of these errors were unnecessary and would have been avoided with wider deliberation and consultation."[91]

Judicial doctrine provides that the state secrets privilege may only be "lodged by the head of the department which has control over the matter"—not a low-level official.[92] That official must give "actual personal consideration" to the issue, and attest to this in a formal declaration.[93] Recent practice suggests, however, that satisfying these doctrinal procedural requirements can be

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[87] *See supra* Part I (discussing *Totten v. United States*, 92 U.S. 105 (1875) and *Tenet v. Doe*, 544 U.S. 1 (2005)).
[88] *See* U.S. CONST., Art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").
[89] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2317 (2006) (arguing that the bureaucracy can serve as a "critical mechanism to promote internal separation of powers" in part because it "contains agencies with differing missions and objectives that intentionally overlap to create friction.").
[90] *See* Goldsmith Testimony, *supra* note 82 ("For example, the controversial interrogation opinion of August 1, 2002, was not circulated for comments to the State Department, which had expertise on the meaning of torture and the consequences of adopting particular interpretations of torture. Another example is the Terrorist Surveillance Program ('TSP'). Before I arrived at OLC, the NSA General Counsel did not have access to OLC's legal analysis related to the TSP.").
[91] *Id.*
[92] *See* Reynolds, 345 U.S. at 7-8.
[93] *Id.*

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somewhat pro forma. And although officials from the George W. Bush Justice Department have asserted that officials from the Justice Department, in addition to counsel from the relevant agency, are involved in determining when to invoke the privilege, they have not indicated the existence of any formal review process within the Justice Department.[94]

The new administration or Justice Department should institute a formal process for invoking the privilege, by setting out a list of offices or officials who must sign off on the decision. To begin, a senior official within the Department, perhaps the Deputy Attorney General, should be required to personally approve all invocations of the privilege. This will provide accountability for secrecy at the highest levels of the administration. Moreover, a new review process might include a referral to the Department's Professional Responsibility Advisory Office (PRAO)[95] to ensure that the privilege is not being invoked out of a conflict of interest.[96] Further, the Justice Department should consider establishing a Litigant's Ombudsman who could serve as an advocate for the members of the public who would be harmed by invocation of the privilege.[97] By requiring that these offices approve the government's exercise of the privilege, the new administration would bring more viewpoints into its deliberations and reduce the likelihood of error or unnecessary harm to the interests of justice.

Fourth, the administration should institute a system to automatically refer evidence that it asserts is protected by the privilege to an Office of the Inspector General (OIG). Even if invoked appropriately and narrowly by the administration, and subjected to careful review by the courts, the state secrets privilege will prevent the introduction of some important evidence in court. This is the very purpose of the privilege, and it may sometimes be necessary to prevent the disclosure of secret information that would harm the nation's security—even if that evidence demonstrates illegal activity. (For example, evidence revealing an illegal burglary in the course of an authorized and secret intelligence operation might be properly privileged if necessary to protect national security). Because even proper use of the privilege can disrupt the usual system of checks and balances and limit oversight of the executive branch, it is important that an independent body within the executive branch be able to review the evidence and take action to prevent or ameliorate violations of the law that cannot be disclosed in court.

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[94] *See* Letter from Michael Mukasey, Att'y Gen, U. S. to Sen. Patrick Leahy (March 31, 2008) [hereinafter Mukasey Letter] (asserting that "[s]everal procedural and substantive requirements preclude the state secrets privilege from being lightly invoked or accepted" but not delineating any within the Justice Department); Statement of Carl J. Nichols, Deputy Assistant Attorney General, Before the S. Comm. On the Judiciary (Feb. 13, 2008), *available at* http://www.fas.org/sgp/congress/2008/021308nichols.html ("In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.").

[95] *See* Professional Responsibility Advisory Office Website, *available at* http://www.usdoj.gov/prao/mission.htm (stating that the mission of PRAO includes providing "definitive advice to government attorneys and the leadership at the Department on issues relating to professional responsibility").

[96] *See supra* Part III, discussing the Executive's self-interest in avoiding scrutiny of its actions.

[97] A model for this would be the Justice Department's Office of the Victims' Rights Ombudsman. *See* http://www.usdoj.gov/usao/eousa/vr/index.html (describing that office's mission and operations).

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By mandating referral of assertedly privileged evidence to an Inspector General, the new administration can ensure that any evidence of abuse or wrongdoing—even if properly covered by the privilege—can be addressed and corrected. The Department of Justice's OIG has demonstrated extraordinary integrity and independence in recent years, and in the normal course, this would be the appropriate office to conduct the review. However, if the administration believes it appropriate, the referral of evidence could, in certain cases, go to the relevant Department or Agency OIG, for example that within the Department of Defense or the CIA. The OIG could then serve as a substitute for the courts by investigating and providing accountability for any wrong-doing revealed by the privileged evidence.

Fifth, the new administration could significantly lessen the danger of the state secrets privilege if it adopted new practices with respect to legal opinions prepared by the Justice Department's Office of Legal Counsel (OLC). In the Bush Administration, as this Subcommittee documented in an important hearing held this April,[98] OLC has issued a series of secret legal opinions interpreting the Constitution and Acts of Congress. These include memoranda interpreting the federal torture statute, the Geneva conventions, FISA, and the Authorized Use of Military Force Against Terrorists. Opinions issued by OLC carry the force of law within the executive branch, and have been used to legally authorize national security programs including the Terrorist Surveillance Program and enhanced interrogation. Although these OLC opinions essentially become the law guiding the government, the administration has strongly resisted providing them to not just the public at large, but also Members of Congress.

By withholding these OLC opinions from Congress, the administration seriously frustrates Congress's lawmaking and oversight functions. Without knowing how the executive branch has interpreted and applied the laws it has enacted, Congress lacks the information it needs to consider amending or reauthorizing certain laws. Moreover, Congress cannot conduct oversight to ensure that the administration has stayed within the bounds of what the legislative branch has authorized. When the practice of secret executive branch laws is combined with aggressive use of the state secrets privilege, the consequences are deeply troubling. For in that situation, neither Congress nor the federal courts can fulfill their respective constitutional roles in making the laws[99] and interpreting them to adjudicate particular disputes.[100] To avoid replacing the Founders' constitutional framework with a system in which the executive alone makes, interprets, and enforces the laws, the new administration should adopt a policy of providing *all* OLC legal opinions to, at a minimum, the Members of the Congressional Committees on the Judiciary and the relevant authorizing committee for the particular program or statute at issue. By so doing, the administration can ensure that even when it invokes the state secrets privilege, at least one coordinate branch of government is able to conduct oversight and provide appropriate redress to harmed members of the public.

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[98] *See Secret Law and the Threat to Democratic and Accountable Government*, Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Committee (Apr. 30, 2008).

[99] *See* U.S. CONST. Art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[100] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

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Sixth, the new administration should encourage the next Congress to enact the State Secrets Protection Act (described below) or similar legislation. Rather than work with Members of Congress to craft state secrets legislation, the Bush Administration has attempted to undermine the proposed legislation by making specious attacks on its constitutionality and vowing to veto any bill Congress passes.[101] The new administration should work with members of the House and Senate Judiciary Committees to pass and sign into law the State Secrets Protection Act. At a minimum, it should cooperate with the Judiciary Committees to modify these bills to address its concerns. The following Part discusses in more detail the pending legislation, and the benefits it would bring.

Adopting these measures would enable the new administration to restore a proper balance between the branches of government, fulfill its constitutional responsibilities to enforce the rule of law, and protect both national security and the interests of justice.

V. PROPOSED LEGISLATION: THE STATE SECRETS PROTECTION ACT

Congress also has the power to shape the judicial response to the state secrets privilege, and a bi-partisan group of legislators has recently introduced legislation seeking to do so. In January 2008, Senators Edward Kennedy, Patrick Leahy, and Arlen Specter introduced the State Secrets Protection Act, a bill to regulate the use of the state secrets privilege.[102] Senator Kennedy explained that the Bill arose from "growing concern about the state secrets privilege," in light of the frequent assertions of the privilege by the Bush Administration. As a result, Kennedy declared that "[i]njured plaintiffs have been denied justice" and "courts have failed to address fundamental questions of constitutional rights and separation of powers." The Act was voted out of the Senate Judiciary Committee, but did not reach the floor during that session. The House of Representatives also introduced a Bill to reform the use of the state secrets privilege that is awaiting committee action.[103] Although neither Bill has yet been enacted into law, they should be revived by a future Congress to provide much-needed guidance to courts struggling to resolve blanket assertions of privilege.

A. Overview of The State Secrets Protection Act (S. 2533)

This section will briefly describe the Senate Bill, which is similar to that pending in the House.[104] The Act states that a court shall not dismiss a case on state secrets grounds prior to holding a hearing on the matter. As is already the case, the Act requires that the government provide an affidavit, signed by the head of the executive branch agency responsible for the information, explaining the factual basis for the claim of privilege. In addition, the government must make all the evidence it claims is subject to the privilege available for review by the judge, together with an index explaining the basis for withholding each item of evidence. For each item the government asserts is privileged, the court must determine whether the claim is valid, and whether it might be possible to segregate and disclose non-privileged evidence.

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[101] *See* Mukasey Letter, *supra* note 94.
[102] The State Secrets Protection Act of 2008, S. 2533, 110th Cong.
[103] The State Secrets Protection Act of 2008, H.R. 6507, 110th Cong.
[104] In the interest of full disclosure, we consulted with the Senate Judiciary Committee on the bill.

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If the court agrees with the government that material evidence is privileged, the Act provides that the court should then attempt to craft a non-privileged substitute that will allow the case to go forward. This portion of the Act is modeled after CIPA, which has proven effective in governing the use of classified evidence in criminal cases. For example, the court might order the government to provide a summary of the privileged information, or a statement admitting relevant facts established by the privileged information. If the government refuses to comply with such an instruction, the court must resolve the disputed question of fact or law to which the evidence relates in favor of the plaintiff. If, however, the court concludes that material evidence is privileged and a substitute is not possible, it may dismiss the claim if it concludes that, in the absence of evidence, the defendant would be unable to pursue a valid defense to the claim.

If attorneys for the nongovernmental parties obtain security clearance, the Act states that they may review the affidavits and motions, and participate in the hearings. The court also has the authority to appoint a guardian ad litem with the necessary clearance to represent a party at a hearing on the privilege, and to stay proceedings while an attorney applies for such a security clearance.

Finally, the Act provides that the Attorney General report to Congress any assertion of the state secrets privilege so that Congress can monitor its use.

B. The Constitutionality of the State Secrets Protection Act

Some have argued that the state secrets privilege is rooted in the executive's constitutional role as commander-in-chief, and thus contend that this legislation might impermissibly encroach on executive authority. The Supreme Court has never held that the privilege is constitutionally required, however, or that it is within the exclusive control of the executive branch. In *Reynolds*, the United States argued that it had "inherent" power to withhold information that it claimed contained claimed secrets, but the Court expressly eschewed reliance on this "broad proposition[]."[105] The Court made clear that the judiciary should not blindly accept the executive's assertions of the privilege, but rather declared that the "court itself must determine whether the circumstances are appropriate for the claim of privilege."[106] In short, administration of the privilege has always been shared by the executive and the judicial branches of government, and the Constitution certainly does not bar Congress from playing an active role as well.

Moreover, the legislative, executive, and judicial branches have a long tradition of working together to provide access to information for litigants without jeopardizing national security. For example, the Freedom of Information Act provides that the government may withhold from public disclosure information that has been classified under Executive Order, but gives the courts the authority to decide *de novo* whether the classification is reasonable.[107] Likewise, CIPA demonstrates that it is possible to enact legislation that protects sensitive information without sacrificing either national security or the role of the courts in upholding the

[105] 345 U.S. at 6 & n.9.
[106] *Id.* at 8.
[107] 5 U.S.C. § 552(b)(1).

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law. The State Secrets Protection Act is a useful addition to this existing body of legislation, the constitutionality of which is well-established.

C. Merits of the State Secrets Protection Act

The Act accomplishes a number of important objectives.

First, by setting out parameters for use of the privilege, the Act ensures that most cases challenging the legality of government conduct will proceed despite the presence of privileged information, and will do so without jeopardizing national security. The Act clarifies that the court, not the executive, determines whether information is privileged, and it also gives parties an opportunity to make a preliminary case without using the disputed evidence. Using CIPA as its model, the Act provides judges with several different options as to how to proceed when the executive raises a claim that relevant evidence contains state secrets. These guidelines will assist the courts and litigants as they seek to find a means to litigate cases that involve evidence relating to national security, rather than leaving them to flounder under the *ad hoc* procedures and varying standards employed by the courts today.

Second, the Act ensures that sensitive national security information will not be publicly disclosed. The Act provides the same security safeguards that have proven effective in CIPA cases, and prevents privileged evidence from ever being produced. At the same time, the Act attempts to ameliorate the impact this might have on innocent litigants as much as is possible.

Third, the Act requires the Attorney General to report within 30 days to the House and Senate Intelligence and Judiciary Committees each instance in which the United States claims the privilege. In the unusual circumstance that a case must be dismissed due to the sensitive nature of evidence vital to a valid defense, Congress will be alerted to the problem and thus will be able to engage in the executive oversight that is no longer possible in court.

Fourth, the Act reestablishes Congress's role in regulating the cases that come before federal courts and the evidence that can be heard in such cases. Under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution, Congress has broad authority both to grant federal courts jurisdiction over cases challenging executive conduct and to establish rules regarding the evidence that may be presented in such litigation. Indeed, Congress has always taken an active role in providing rules regarding the admission of evidence in federal court, as illustrated by FOIA, CIPA, and the Federal Rules of Evidence. Furthermore, Congress is ideally situated to craft procedures to protect national security information without sacrificing litigants' rights to hold the executive accountable for violations of federal law. The State Secrets Protection Act provides a systematic approach that takes into account both the security of the country and the interests of litigants, and thus would provide essential guidance to courts struggling with this question.

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CONCLUSION

The George W. Bush Administration has engaged in unprecedented use of state secrets privilege as grounds for immediate dismissal of challenges to the executive branch's extraordinary rendition and warrantless wiretapping programs. Although the Administration has acknowledged both programs exist, and even revealed details of how they operate, it nonetheless claims that the very subject matter of the litigation is too sensitive to undergo judicial review. In short, the privilege is no longer being used to exclude documents from litigation, as in *Reynolds*, but rather now is asserted as a bar to any judicial review of executive conduct in these areas. The transformation of the privilege into a claim of immunity is not supported by Supreme Court jurisprudence and is incompatible with the judicial role in overseeing the executive branch.

Fortunately, there is no need to choose between full disclosure of state secrets on the one hand, or immediate dismissal of all pending litigation challenging these programs on the other. A middle ground exists that can accommodate both interests. The incoming administration should work with courts to balance the need for secrecy against the rights of litigants. At a minimum, the new administration should reexamine its assertion of the privilege in pending cases and establish standards and procedures that will cabin use of the privilege in the future. Congress should also not hesitate to get involved. The State Secrets Protection Act described above demonstrates that Congress can play an important role in balancing the interests of litigants against the need to safeguard national security.

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Statement
By
Former Congresswoman Elizabeth Holtzman
Submitted to
The Subcommittee on the Constitution
of
The Senate Committee on the Judiciary
In Connection with its Hearing
On
Restoring the Rule of Law
On September 16, 2008

Chairman Feingold, Members of the Subcommittee:

I very much appreciate the opportunity to submit this statement to you.

During his term of office, President George W. Bush systematically engaged in serious and dangerous abuses of power in defiance of the Constitution, his oath of office and various statutes and treaties. The abuses included: deceiving and misleading Congress and the American people about the need to invade Iraq, refusing to adhere to the requirements of the Foreign Intelligence Surveillance Act with respect to obtaining court approval for wiretaps and other invasions of personal privacy, refusing to adhere to the prescriptions of the War Crimes Act of 1996 and the anti-torture act that prohibit the mistreatment and torture of detainees, refusing to implement the Geneva Conventions with respect both to the mistreatment of detainees and to bringing to justice those responsible for the mistreatment, refusing to enforce bills signed into law (the so-called "signing statements" issue) and abusing claims of executive privilege, particularly with respect to Congress' right to investigate whether the President and his team had tried to secure political prosecutions to influence the outcome of elections.

These presidential abuses have deprived American citizens and others of important constitutional rights, incalculably harmed the country by forcing us into a tragically mistaken war at the cost of more than 4,000 American killed, more than 30,000 wounded, untold numbers of Iraqis killed and wounded and hundreds of billions if not trillions of dollars, desperately needed here at home. The mistreatment of detainees has also endangered Americans and American troops by triggering extreme anti-American sentiment abroad and producing recruits for Al Qaeda.

The prime remedy created by the framers for vindicating the rule of law and protecting the democracy against the systematic abuse of power by high government officials is impeachment. The impeachment proceedings during Watergate succeeded in holding President Richard Nixon accountable for his misdeeds; it forced his resignation and created an indelible and comprehensive historical record of wrongdoing. Just as important, the proceedings educated Congress and the American people about the system of checks and balances, the proper limits on executive power and the harm to our democracy that results when presidents put themselves

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above the law. The impeachment proceedings against President Nixon, because they were conducted fairly and responsibly an with bipartisan support, and were based on substantial evidence, united our country in a renewed commitment to the principle that more important than a president or party was the preservation of the rule of law.

Regrettably, no such action was commenced against President Bush and other top officials in the Administration against whom there is a clear, prima facie case of impeachable offenses.

While there is nothing comparable to impeachment that would hold President Bush accountable, restore the constitution and the rule of law, educate the public and send a clear warning signal to future presidents, there are still actions that can undo some of the damage.

Here are some key recommendations:

1) The full scope of President Bush's abuse of power must be documented. This means a comprehensive investigation should be undertaken of the Administration's constitutional misdeeds, including the deceptions that drove the country into the Iraq war, the orders for and the nature of the torture and mistreatment of detainees, the scope and nature of the violations of FISAl, the signing statements, the US attorneys' scandal and the President's and Vice-President's role in the Libby matter.

2) Prosecutions where laws have been violated must be undertaken. It should be noted that some of the abuses of power may not be crimes, such as war deceptions, the refusals to enforce the law (signing statements) and the abuses of executive privilege.

3) Where appropriate, laws should be revised and new ones added to curb executive branch abuses. But here a cautionary note is in order. Given President Bush's repeated flouting of the law and his view that a president may ignore laws, particularly those affecting his powers as commander in chief, simply rewriting laws will not stop a future president bent on violating them. They may simply refuse to obey the law, following the precedent set by President Bush. Nonetheless, federal legislation should be considered that would revive the former independent prosecutor law (with substantial modifications to avoid past abuses), toll statutes of limitations with respect to any criminal statutes violated by a president or vice-president during their term of office and narrow the state secrets privilege as formulated by the Administration.

Rather than spelling out how the investigations should be carried out and the prosecutions should be handled and all the laws that need revisions, I want to focus on one particular change that is central.

As the former District Attorney of Brooklyn, New York, the country's fourth largest office, I know the price society pays for a doctrine of impunity. When crimes go unpunished, a clear message is sent that the misdeeds are trivial and not serious enough to warrant prosecution. This encourages the commission of more of these crimes. The same holds true of political abuses—the failure to hold those who engaged in them accountable condones those actions and helps create a climate in which their repetition is far too likely.

Not surprisingly, impunity for political leaders who violate the law is a key feature of dictatorships and authoritarian regimes. It has no place in a country that cherishes the rule of law or that considers itself a democracy.

The doctrine of impunity suggests, too, that there is a dual system of justice in America—one for powerful officials and the other for ordinary Americans. Because the concept of equal justice under law is the foundation of democracy, impunity for high officials who abuse power or commit crimes in office will ultimately erode our democracy itself.

We dare not see impunity enshrined as an operative principle in our country. That is why prosecutions are essential for violations of the law, no matter how high an official the law breaker is.

But the Administration succeeded in shielding itself from the most likely vehicle for the prosecution of a number of top officials, the War Crimes Act of 1996. That shield must be removed and the statute restored to life.

The War Crimes Act, which was intended to implement the Geneva Conventions, made it a crime to subject detainees to cruel and inhuman treatment. Plainly, many of the forms of mistreatment of detainees ordered by this Administration, whether singly or in combination--water boarding, sexual abuse, the threatening use of dogs, exposure to extremes of cold and heat, stress positions--would clearly meet the cruel and inhuman standard.

President Bush and his minions have repeatedly contended that they do not do torture; implying that water boarding, which they concede occurred, is not torture. Even Attorney General Mukasy has pirouetted around the question of whether water boarding is torture. These denials and obfuscations are obviously an effort to avoid criminal liability under the anti-torture statute. That definitional issue would not arise under the War Crimes Act. There can be no question that water boarding (as well as many of the other forms of mistreatment described above) is cruel and inhuman and therefore prosecutable. That is undoubtedly why there has been such consternation in the Administration about the War Crimes Act.

Violation of the War Crimes Act is felony; and it carries the death penalty if mistreatment results in the death of the detainee. Under federal law, when the death penalty applies, there is no statute of limitations. This means that those who violated the Act, where the violations resulted in death, could face the threat of prosecution for the rest of their lives. As we know, there are a number of cases in which detainee mistreatment resulted in death.

White House Counsel, Alberto Gonzales, who later became Attorney General, was so worried about the prospect of future prosecutions under the War Crimes Act that he suggested to President Bush, in a January 2002 memo, that the US opt out of the Geneva Conventions as a way of reducing the likelihood of War Crimes Act prosecutions.

Gonzales' "reasoning" was that since the War Crimes Act carried out the Geneva Conventions, if the US opted out of the Conventions then the Geneva Conventions would not

apply and the War Crimes Act would not apply. In response to Gonzales' recommendation, President Bush declared that the Geneva Conventions would not apply to members of Al Qaeda, and would only partially apply to the Taliban. That they thought would preclude prosecutions under the War Crimes Act. But when the US Supreme Court ruled in the summer of 2006 in the Hamdan case that the Geneva Conventions still applied to detainees, the Administration panicked. Under Gonzales' reasoning, once the Geneva Conventions applied to detainees, the War Crimes Act would apply to the mistreatment of detainees. Afraid of prosecution, the Bush Administration slipped into the Military Commissions Act in the fall of 2006 a provision making the War Crimes Act retroactively inoperative to the date of its initial enactment.

In one fell swoop, it erased 10 years of possible criminal conduct.

This was one of the most cynical acts of the Administration with respect to the rule of law. In essence, the Administration issued a blanket pardon to anyone who had violated the War Crimes Act, including the President and Vice-President. There was no examination of the facts of any particular case. The violations--whether egregious or minor, whether done out of sadism or misguided patriotism--were treated alike: swept under the rug. No one was ever to be called to account. The crimes were made to disappear, as if they never happened--pouf.

Making the War Crimes Act retroactively inoperative is one of the worst embodiments of the doctrine of impunity for high government officials in US history. It cannot be allowed to stand.

Fortunately, the inoperative feature of the law can be undone and the law resurrected without running afoul of either the Constitution's ban on ex post facto laws or its requirement of due process. There is no ex post facto issue because cruel and inhuman treatment of detainees was already a crime when the misconduct took place. There is no due process issue, among other things, because of the relatively short period of time that the Act was rendered inoperative.

Once the War Crimes Act is restored to its former state, questions of whether and how to prosecute under it can be made in a thoughtful and deliberative manner. Even if no prosecutions are ever brought under the Act, the example will not stand for all to see that a criminal statute was retroactively decriminalized after crimes were committed to protect persons in high office.

Restoring the Act will send the clearest signal that crimes cannot be ordered in secret, committed in secret and essentially pardoned in secret. Restoring the Act will be the clearest attack on the doctrine of impunity and it will be the clearest signal that the rule of law is still alive and well.

Dated: September 12, 2008

September 16, 2008

Heidi Kitrosser,
Associate Professor, University of Minnesota Law School

Testimony of Heidi Kitrosser, Associate Professor, University of Minnesota Law School

Before the United States Senate Committee on the Judiciary, Subcommittee on the Constitution

Hearing on "Restoring the Rule of Law"

I. EXECUTIVE SUMMARY

Thank you for inviting me to share my views on how we, as a nation, might move forward to restore the rule of law in the United States. The abuses of the past eight years leave us with much to repair and rebuild. But they have also fostered a degree of public engagement and a public hunger for knowledge and change that present remarkable opportunities. The next President and Congress, whoever they are and to whatever parties they belong, should seize this moment to do two main things: (1) Make concrete changes by statute, executive order, congressional rule, and otherwise, to restore and enhance government checks and balances, transparency, and respect for the rule of law; and (2) Encourage and lead a national dialogue on constitutional checks and balances to rally public support for these changes and to help the public to understand and debate the changes' constitutional foundations.

There is, of course, a tremendous and growing range of areas in which legal change and renewed public engagement would be deeply beneficial. In my testimony, I focus on one such area: congressional oversight of national security activities.

My testimony suggests changes that Congress might make to the system of congressional oversight of national security activity. The current system has tremendous flaws, as evidenced by the relative ease with which the Bush Administration evaded effective congressional oversight of its post-9/11 electronic surveillance program. One of the key problems in the current system is that it structurally provides few political incentives for Congress to demand information from an intransigent administration. Indeed, it generally is politically safest under the current system for Congress to acquiesce in administrative intransigence. My suggestions for change include, among other things, amendments to existing oversight rules that would enhance Congress' political incentives to demand information and their political disincentives to acquiesce in secrecy.

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I also attach an appendix to my testimony. The appendix is my May 19, 2008 "Responses to questions for the record from Senator Kennedy pertaining to the Hearing of April 30, 2008 on 'Secret Law and the Threat to Democratic and Accountable Government,' Before the United States Senate Committee on the Judiciary, Subcommittee on the Constitution." In the Responses, particularly that regarding Senator Kennedy's first question, I provide a bullet-point list of areas for potential legislative and other reforms to restore and enhance the rule of law in the United States.

II. Congressional Oversight of National Security Activities[1]

A. To Whom Should National Security Information Be Funneled[2] and Under What, if any, Clearance Requirements?

1. Existing Requirements

The President and the intelligence agencies are statutorily required to keep the "congressional intelligence committees . . . fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity."[3] This is to be done with "due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."[4] There are separate and somewhat less stringent reporting requirements for covert actions.[5] Covert actions are defined narrowly and do not include intelligence acquisition.[6] Initial notice of covert actions may be limited to the "Gang of Eight" when the President deems it "essential to limit access to [his report] to meet extraordinary circumstances affecting vital interests of the United States."[7] Such reports must, however, be given to the "intelligence committees in a timelyfashion" along with a "statement of the reasons for not giving prior notice."[8]

The House and the Senate each are required to "establish, by rule or resolution . . . procedures to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to the intelligence committees or to Members of Congress . . . ."[9] Members are not subject to security clearance requirements in either congressional chamber.[10] Congressional employees are, however, subject to clearance requirements to access classified

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[1] This discussion is drawn, with a few minor adjustments, from Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels,* 29 Cardozo L. Rev. 1049, 1073 - 1089 (2008).

[2] I use the term "funneling" throughout to refer to information-sharing with discrete groups, rather than with the entire public or some other relatively large audience.

[3] 50 U.S.C.S. § 413(a)(1) (2007); *see also* 50 U.S.C.S. § 413a(a)(1) (2007).

[4] 50 U.S.C. S. § 413a(a)(1)

[5] 50 U.S.C. S. § 413b.

[6] 50 U.S.C. S. § 413b(e).

[7] 50 U.S.C. S. § 413b(c)(2).

[8] 50 U.S.C. S. § 413 b(c)(3).

[9] 50 U.S.C. S. § 413(d).

[10] Frederick M. Kaiser, Cong. Research Serv., Protection of Classified Information by Congress: Practices and Proposals 5 (2006). Such requirements could raise difficult questions regarding separation of powers should the clearance be done by the executive branch. *Id.* Questions of political bias might arise if clearance were handled by a congressional office or committee. *Id.*

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information.[11] "The Senate Office of Security mandates such requirements for all Senate employees needing access to classified information."[12] No one without the "appropriate security clearances" may be employed by the Senate Intelligence Committee.[13] House employees receiving classified information are subject to office-specific clearance requirements.[14] House Intelligence Committee Rules specify that "[C]ommittee Staff must have the appropriate clearances prior to any access to compartmented information."[15]

Each chamber also subjects members and employees accessing classified information to non-disclosure requirements. The Senate Intelligence Committee Rules forbid Committee members and employees from disclosing non-public information except in accordance with Committee or Senate disclosure rules.[16] Breach of this prohibition is "grounds for referral to the Select Committee on Ethics."[17] Committee employees must sign an agreement to this effect.[18] The House requires all Members, officers and employees of the chamber who access classified information to take a non-disclosure oath.[19] A committee-specific non-disclosure oath also is required of all Intelligence Committee members and staff to access classified information.[20] The House Intelligence Committee's Rules also forbid the disclosure of classified information except pursuant to Committee or House procedures.[21] Committee staff members must sign agreements indicating that they will comply with these terms.[22]

Each Chamber also takes measures to secure classified information on its premises. The Senate centralizes such measures through its Office of Senate Security whereas House measures are largely committee and office generated.[23] In addition to any centralized Senate measures, the Senate Intelligence Committee Rules require that staff offices be secured with at least one security guard at all times[24] and that sensitive or classified documents be segregated in a secure storage area.[25] House Intelligence Committee Rules impose similar requirements. Committee offices are secured and must be patrolled by at least one U.S. Capitol Police officer at all times.[26] Classified documents must be segregated in secure locations.[27]

2. Rethinking the Circumstances in Which the Gang of Eight Provisions should be used

It is hard to justify limiting notice of intelligence activity to the Gang of Eight on the

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[11] *Id.* at 3.
[12] *Id.*
[13] 149 CONG. REC. S2689, S2690 (Rule 10.1) (2003). *See also Id.* at S2690 (Rule 9.5, limiting classified information access to "staff members with appropriate security clearance and a need-to-know, as determined by the Committee, and, under the Committee's direction, the Staff Director and Minority Staff Director").
[14] Kaiser, *supra* note 10, at 3.
[15] 149 CONG. REC. H5350, H5352 (Rule 14(c)).
[16] 149 CONG. REC. S2689, S2690 (Rule 9.6).
[17] *Id.* (Rule 9.7.) *See also* S. Res. 400, 94th Cong., 2d Sess. 8(d)-(e).
[18] 149 CONG. REC. S2689, S2690 (Rule 10.6-10.8).
[19] Kaiser, *supra* note 10, at 3.
[20] 149 CONG. REC. H5350, H5352 (Rule 14(d)).
[21] *Id.* (Rules 12-13).
[22] *Id.* (Rule 12(b)(1)).
[23] Kaiser, *supra* note 10, at 2.
[24] 149 CONG. REC. S2689, S2690 (Rule 9.1).
[25] *Id.* (Rule 9.2).
[26] 149 CONG. REC. H5350, H5352 (Rule 14(a)(1)-(3)).
[27] *Id.* (Rule 14(a)(4)-(7)).

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basis of reasonable fears of information leakage that could harm national security. Congress is considered to have a reliable track record for non-leakage[28] and it has a political incentive to avoid leaks in order to avoid blame by the executive branch for the same.[29] Furthermore, the intelligence committees have a variety of methods to protect classified information including staff clearance policies, non-disclosure policies for members and office security measures.[30] Executive branch claims of national security secrecy needs also must be taken with a grain of salt given historical indications that such claims are dramatically overused and that the executive branch itself routinely leaks classified information for political reasons.[31]

There may, however, be reasons related to democratic deliberation values to permit Gang of Eight notice under very limited circumstances. Whether reasonable or not, fears may arise that the more persons notified—even within the relatively secure realm of the intelligence committees—the greater the likelihood of leakage. More cynically, such fears may provide an easy and politically palatable excuse for avoiding—or later explaining the avoidance of—disclosures. If no alternative to full intelligence committee notice is provided, some disclosures thus may simply not be made at all.

There are at least two responses to this conundrum. The first is for Congress to eliminate the Gang of Eight exception to full committees notice and simultaneously to make public cases for Congress' constitutional prerogative to do so, for the relative safety of such a change from a national security perspective, and for the risks to democracy and national security of an under-informed Congress. Admittedly, the odds may be against many in Congress willingly and effectively spending political capital to argue these points, let alone to simultaneously amend the Gang of Eight provisions. But given the right political climate — which may exist now — and willing and able congresspersons and others in government, academia and elsewhere, this is not an inconceivable set of events.

Alternatively, a more moderate response might be offered. This response would retain a statutory option to notify the Gang of Eight but would resolve a statutory ambiguity to diminish the likelihood of that option's abuse. Presently, the statutory text leaves unclear whether the Gang of Eight option applies only to covert operations or to intelligence operations generally.[32] The statute explicitly cites the option only with respect to covert operations.[33] The statute also refers to the executive branch's general responsibility to conduct its informing obligations with "due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."[34] As the NSA surveillance controversy reflects, the latter provision—if interpreted to allow Gang of Eight notice in lieu of full committees notice—gives the executive branch substantially more leeway to justify limiting notice than does the covert operations exception. The impact of this heightened leeway is exacerbated by the fact that the due regard provision,

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[28] *See, e.g.,* Frederick M. Kaiser, Cong. Research Serv. Congressional Oversight of Intelligence: Current Structure and Alternatives 13 (2007); L. BRITT SNIDER, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 5 (1997), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/toc.htm.

[29] *See infra* notes 92 - 94 and accompanying text.

[30] *See infra* Section A.1.

[31] *See, e.g., Note, Keeping Secrets: Congress, the Courts and National Security Information*, 103 HARV. L. REV. 906, 910-14 (1990).

[32] *See* Kitrosser, *supra* note 1, at 1056, nn. 45-47 and accompanying text.

[33] *Id.*

[34] 50 U.S.C.S § 413a(a) (2007).

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which again makes no reference to the Gang of Eight, also makes no reference to an eventual requirement to notify the intelligence committee or to explain the reasons for initially notifying a smaller group.[35] Such requirements are outlined in the covert operations notice provisions.[36]

One way to limit the Gang of Eight option would be to explicitly extend it to "due regard" situations, while also extending the accompanying requirements of eventual notice to the intelligence committees and explanation of the lesser initial notice. Another approach would be to clarify in the text that the "due regard" provision does not encompass the Gang of Eight option. Before making the latter change, though, consideration should be given to whether it would have the perverse effect of increasing the occasions on which the executive branch notifies no one at all. Such consideration should include assessing whether other measures—such as increased pressure by Congress to comply with notice requirements or the more formal accountability-enhancing measures raised below—might mitigate such effect.

3. When if Ever Should Staff be Excluded?

Excluding staff from hearings seems no more reasonable from a security-based perspective than does excluding members. Staff employees work amidst the same physical security and under the same non-disclosure agreements as do members. Unlike members, they also are subject to pre-clearance requirements.[37]

Furthermore, staff presence often is necessary to make information-sharing meaningful. Complex information about intelligence programs may be incomprehensible to members, or members may simply lack the time to sift through and make sense of the information, without staff assistance.[38]

As with member access, however, insistence on staff inclusion poses the risk of heightened executive intransigence based on genuine or pre-textual concerns about security or intra-executive branch deliberative candor.[39] Means to balance this risk against the benefits of staff inclusion thus should be considered.

The balance might be struck through a statutory presumption in favor of staff access to statutorily required disclosures. The presumption may, however, be overcome by executive branch objection combined with a negotiated agreement as to terms between the executive and involved congresspersons. The objection and the terms of any negotiated agreement should be detailed in writing. As discussed below,[40] written documentation regarding disclosures can enhance political accountability in the realm of information funneling (that is, in the realm of information-sharing with discrete groups, rather than with the entire public or some other relatively large audience)[41], particularly when the documentation is subject to the possibility of public disclosure at some future point.[42] Thus, both the executive's reasons for excluding staff and congressional responses to executive objections might be documented, with such documentation subject to public disclosure after a specific term of years or otherwise.[43] These conditions might

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[35] *Id.*
[36] 50 U.S.C.S § 413b(c) (2007).
[37] *See supra* notes 11 - 27 and accompanying text.
[38] *See* Kitrosser, *supra* note 1, at n. 1059, n.66 and accompanying text.
[39] *See supra* Section.A.2.
[40] *See infra* Section C.2.a.
[41] *See infra* n. 2.
[42] *Id.*
[43] *See id.* for a more detailed discussion of the use of written documentation and possible public

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deter the executive branch from frivolously objecting to staff inclusion and deter congresspersons from too readily acquiescing in frivolous objections. At the same time, these requirements would preserve the possibility of reasoned limitations on staff access.

4. Which Committees Should Have Access to Information?

The NSA surveillance controversy also exposed difficulties that arise when a committee with jurisdiction overlapping that of an intelligence committee wishes to hold hearings, but lacks background on or access to some of the complicated, classified matters involved. These difficulties arose, most notably, when the Senate Intelligence Committee declined to hold investigative hearings on the surveillance program,[44] while the Senate Judiciary Committee held several hearings to determine what had transpired and to consider responsive legislation.[45] The Senate Judiciary Committee does not receive statutorily required, ongoing notice as does (in theory) the Senate Intelligence Committee. Staff and member expertise and member clearance requirements also differ between the committees.[46]

Detailed assessment of which committees, beyond the Intelligence Committees, should receive notice and on what basis they should receive it is beyond this testimony's scope. It is, however, worth flagging the issue and suggesting two relevant factors that deserve consideration.

First, there is the question of whether any committees beyond the intelligence committees should receive statutorily mandated, ongoing intelligence updates.[47] Broader regular disclosures are not novel. Between 1974 and 1981, the President was required by statute to notify "between six and eight congressional committees of covert intelligence actions."[48] The statutory requirement was modified in 1981, "replacing the reporting requirement to as many as eight committees with a general requirement to keep the two intelligence committees fully and currently informed of intelligence activities."[49] A potential cost of broader required disclosures is that the content and frequency of disclosures generally will become diluted. This might be caused by increased executive branch intransigence based on real or pre-textual concerns about national security or intra-executive branch deliberative candor. On the other hand, broader disclosures could spread information to more committees and enable these committees to better do their intelligence related work. Broader disclosures also might create healthy intra-chamber competition between committees, reducing the possibility of complacency or capture on the part of a single, information-monopolizing committee.[50]

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disclosures of the same.

[44] *See* Walter Pincus, *Senate Panel Blocks Eavesdropping Probe*, WASH. POST, Mar. 8, 2006, at A3.

[45] *See, e.g.*, Hearing before the S. Judiciary Comm. on Wartime Executive Power and the National Security Agency's Surveillance Authority, 109th Cong.; Hearing before the S. Judiciary Comm. On Wartime Executive Power and the NSA's Surveillance Authority II, 109th Cong.; Hearing before the S. Judiciary Comm. on NSA III: Wartime Executive Powers and the FISA Court, 109th Cong, *available at* http://judiciary.senate.gov/schedule_all.cfm.

[46] *See supra* Section A.1; *see infra* Section B.1 (citing rules specific to the intelligence committees).

[47] For detailed discussion of the costs and benefits of expanding the number of committees with jurisdiction to oversee the intelligence community see Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1691-99 (2006).

[48] Denis McDonough et al., Ctr. for Am. Progress, No Mere Oversight: Congressional Oversight of Intelligence is Broken 11 (June 2006) [hereinafter CAP Report].*See also* Kaiser, *supra* note 28, at 12.

[49] *CAP Report*, *supra* note 48, at 32 n.31.

[50] For a similar discussion regarding the potential costs and benefits of reducing the two current

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Second, apart from the question of ongoing disclosures, there is the question of what capacity committees other than the intelligence committees should have to request, demand and share classified information. Chambers-wide rules, combined with rules specific to each chambers' intelligence agencies, offer a sound framework for handling, requesting and considering broader disclosures of classified information.[51] Some of these rules were elaborated on previously,[52] and others are elaborated on below.[53] There seems to be no good reason not to apply similar, perhaps uniform, rules regarding classified information across committees. To the extent that a committee rarely needs to deal with classified information, the rules generally will be irrelevant to that committee. But when classified information must be dealt with, the benefits of the current rules (along with those of potential amendments discussed herein[54]) should apply across committees.[55]

B. What Non-Disclosure Conditions Should Be Imposed on Recipients of Funneled Information?

1. Existing Requirements

As explained above, the House and Senate Intelligence Committees impose non-disclosure rules on members and employees.[56] Disclosures may be made only pursuant to official procedures. These procedures are "successive funneling" rules. That is, they are procedures through which the select group to whom information initially is funneled may make the information available to broader audiences should they so choose. Under these procedures, for example, there are instances where non-committee members may access committee information. The procedures also provide means for committees or chambers to disclose classified information publicly.

a. Senate Rules

The Intelligence Committee may make classified information available to other Senate Committees or individual Senators. Such disclosures must be accompanied by a verbal or written notice instructing recipients not to divulge such information except in accordance with Committee or Chamber rules.[57] The Clerk of the Committee must ensure that such notice is provided and must make a written record of the information transmitted and the Committee or Senators receiving it.[58]

There are a detailed set of procedures by which classified information in the Committee's possession may be disclosed publicly. If a committee member requests public disclosure, then the Committee must vote on whether to grant or deny the request.[59] If a majority of the Committee votes to grant the request, then the Committee must notify the Majority and Minority leaders of the Senate of this vote and then must

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Intelligence Committees to one Joint Committee, *see* Kaiser, *supra* note 28, at 9-13.

[51] *See supra* Section A.1, *infra* Section B.

[52] *See supra* Section A.1.

[53] *See infra* Section B.

[54] *See supra* Section A.3, *infra* Sections B.2, C.2.

[55] *Cf.* O'Connell, *supra* note 47 at 1672 (noting that "[i]n July 2006, Representatives Jeff Flake (R-AZ) and Adam Schiff (D-CA) introduced a bill that would require the House Intelligence Committee to disclose considerable classified information to at least eight other House committees.").

[56] *See supra* Section A.1.

[57] 149 CONG. REC. S2689, S2690 (Rule 9.4).

[58] *Id. See also* S. Res 400. 94th Cong. § 8(c)(2) (1976).

[59] S. Res 400. 94th Cong. § 8(a) (1976).

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notify the President of the United States.[60] If the President raises no objection to disclosure within five days, then the information may publicly be disclosed.[61] If the President personally and in writing objects to public disclosure, certifying that such disclosure so gravely threatens the United States as to outweigh any public interest in the same, then immediate public disclosure may not occur.[62] Instead, the Majority and Minority leader jointly, or the Intelligence Committee by majority vote, may refer the question to the full Senate.[63] If the question is referred to it, then the full Senate must deliberate on the matter in closed session.[64] Following the closed session, the Senate publicly shall vote "on the disposition of such matter in open session, without debate, and without divulging the information with respect to which the vote is being taken."[65] Any Senator may request reconsideration of a vote for public disclosure.[66]

Unauthorized disclosures are subject to punishment by the Senate Ethics Committee.[67] Penalties for Senators can include censure, removal from a committee or expulsion from the Senate.[68] Penalties for employees can include removal from employment or punishment for contempt.[69]

The Congressional Research Service and the Center for American Progress both reported recently that the public disclosure provisions have never been used by the Intelligence Committee.[70]

b. House Rules

The House has a more detailed set of rules than does the Senate for disclosures by Intelligence Committee Members. There is one set of rules for disclosure to specified categories of Senators and Representatives, one set of rules for disclosure to other Representatives and one set of rules for disclosure to the full House in closed session. There also is a separate set of rules for public disclosure.

Intelligence Committee Rules permit Committee members and staff to disclose non-public matters with designated members and staff of the Senate Intelligence Committee; the Chairpersons, ranking minority members and designated staff persons of the House and Senate Committees on Appropriations; and the chairperson, ranking minority member and designated staff persons on the Subcommittee on Defense of the House Committee on Appropriations.[71] Committee members and staff also may disclose limited types of non-public information with the chairpersons, ranking minority members and designated staff of the House and Senate Committees on Armed Services[72] and with the chairpersons, ranking minority members and designated staffs of certain subcommittees of the House Appropriations Committee.[73]

Other non-committee-member Representatives may access non-public committee

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[60] *Id.* at § 8(b)(1).
[61] *Id.* at § 8(b)(2).
[62] *Id.* at § 8(b)(2), (3).
[63] *Id.* at § 8(b)(3).
[64] *Id.* at § 8(b)(5).
[65] *Id.*
[66] *Id.*
[67] *Id.* at § 8(d).
[68] *Id.* at § 8(e).
[69] *Id.*
[70] Kaiser, *supra* note 28, at 8; *CAP Report*, *supra* note 48, at 27.
[71] 149 CONG. REC. H5350, H5353(Rule 12(a)(3)(A)).
[72] *Id.* (Rule 12(a)(3)(B)).
[73] *Id.* (Rule 12(a)(3)(C)).

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information upon written request to the Committee's Chief Clerk and upon approval by the Committee of the request.[74] The requesting Representative must be given a non-disclosure oath and must agree in writing not to disclose any classified information except in accordance with House or Committee rules.[75]

When the Intelligence Committee discloses information to other Committees or to non-committee Representatives, the Committee's "Director of Security and Registry . . . [must] maintain a written record identifying the . . . material provided . . . , the reasons agreed upon by the Committee for approving such transmission, and the name of the committee or Member . . . receiving such document or material."[76]

At the request of a Committee member, the Committee may determine that a matter involving non-public information "requires the attention of all Members of the House."[77] In making this decision, the Committee may consult other committees or executive branch officials.[78] If the committee determines that disclosure to the full House is warranted, it may request a closed session of the House for this purpose.[79]

As an alternative to requesting a closed House session, the Committee may determine that the information should be made public.[80] The Committee first must vote on the matter.[81] If they vote for public disclosure, they must notify the President of the United States of this fact.[82] If the President does not object within five days of notice, then public disclosure may occur.[83] If the President objects personally and in writing within five days, then the Committee may determine, by majority vote, to refer the matter to the full House.[84] After such referral, the House must determine, in closed session, whether the information should be disclosed publicly.[85] The House then must vote on the question in open session, "but without divulging the information with respect to which the vote is taken."[86]

The Center for American Progress reports that the House Intelligence Committee, like its counterpart in the Senate, has never made use of its public disclosure provisions.[87]

2. Commentary on Existing Requirements

On their faces, the existing requirements seem to soundly balance the costs and benefits of information disclosures. Information funneling to the intelligence community is made potentially more consequential, and hence more meaningful, by the opportunities for members successively to funnel information to other congresspersons and to the public. At the same time, the multiple stages of voting and consultation required for public disclosure and the limitations placed on informed congresspersons seem sufficient to allay reasonable concerns about national security or the integrity of intra-executive branch discussions.

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[74] *Id.* (Rule 14(f)(1)-(3)).
[75] *Id.* (Rule 14(f)(4)).
[76] *Id.* (Rule 14(o)).
[77] *Id.* (Rule 14(g)(1), (2), (h)(i)).
[78] *Id.* (Rule 14(g)(3), (4)).
[79] *Id.* (Rule 14(j)(2)(A)).
[80] *Id.* (Rule 14(j)(2)(B)).
[81] *Id.* (Rule X, Clause 11(g)(1)).
[82] *Id.* (Rule X, Clause 11(g)(2)).
[83] *Id.* (Rule X, Clause 11(g)(2)(B)).
[84] *Id.* (Rule X, Clause 11(g)(2)(C)).
[85] *Id.* (Rule X, Clause 11(g)(2)(F)).
[86] *Id.* (Rule X, Clause 11(g)(2)(G)).
[87] *CAP Report*, *supra* note 48, at 27.

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What is less clear, however, is that the requirements work well in practice. We know from recent reports that neither chamber has used its public disclosure option.[88] I have yet to come across information on whether, how often, and to what effect the successive funneling rules are used to convey information within Congress. With respect to the latter, it is clear at least that any executive branch failures to deliver information to the full intelligence committees has the secondary consequence of keeping those committees from sharing information within Congress. It also stands to reason that the same political disincentives that discourage Committee members from pushing for initial disclosures may negatively impact their willingness to successively funnel whatever information they receive.

An initial question is whether there are formal changes that can be made to the rules dictating to whom disclosures must be made to enhance successive funneling's effectiveness. One such change would involve clarifying the scope of the Gang of Eight exception. Disclosure to the full intelligence committees is, after all, a prerequisite to committees' invoking their prerogative to disclose further. Requirements that regular disclosures be made to additional committees also are considered above.[89] Beyond that, it is not apparent that new rules would positively impact the factors—such as tendencies toward executive intransigence and congressional lack of will—that make current requirements less than fully effective. For example, were the public disclosure rules altered so that a committee could order public disclosure on its own, in the face of Presidential objections, democratic deliberation and its benefits might suffer rather than be helped. Such a change could upset the balance between openness' costs and benefits by making the executive branch even more reluctant than it already is to disclose information to the intelligence committees.

The most effective changes might be those that do not affect funneling requirements directly—that is, that do not directly alter rules as to who must be notified and when. Rather, the most effective changes might be those that increase Congress' political incentives to use existing requirements and the executive branch's incentives to comply with the same. The next Section addresses the relative lack of political accountability and incentives in intelligence oversight. It considers formal and informal changes to improve the situation.

C. The Public Accountability and Political Incentive Factors

1. Existing Situation and Requirements

Logic suggests, and experience bolsters the notion, that there generally is low or even negative political incentive for Congress to push the executive branch to disclose national security information. The non-public nature of much information funneling means that "Congressional efforts here remain largely hidden" and thus politically unhelpful to its participants.[90] The complexity of much national security information also diminishes its political resonance.[91] Furthermore, the charge that information disclosure will harm national security is easy to make and has substantial popular appeal, making it

[88] *See supra* notes 70, 87 - 88 and accompanying text.

[89] *See supra* Section A.4.

[90] Kaiser, *supra* note 28, at 22. *See also CAP Report*, *supra* note 48, at 28. This exacerbates the additional incentive problem that intelligence policy oversight "may have only marginal direct effects on Members' constituencies, districts, or states." Kaiser, *supra* note 28, at 22.

[91] *CAP Report*, *supra* note 48, at 28.

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politically risky to push for disclosures.[92] Indeed, the current administration frequently makes the charge that congressional hearings on national security will provide "the enemy" with valuable information.[93] Fears that the executive branch will intentionally leak national security information and blame Congress for the leak also have been known to exist on Capitol Hill.[94]

Nonetheless, there are some formal and informal factors that may enhance Congress' political incentives to conduct meaningful oversight. One set of formal requirements are the successive funneling rules described above in Section B. The possibility that a Committee majority might at some point vote to make information more widely available, even public, creates some incentive to act responsibly lest one's intransigence become widely known. Of course, these successive funneling requirements themselves run into political accountability problems. Such problems likely account for the fact that neither intelligence committee has used its formal power to publicize classified information.[95] Successive funneling rules might, however, contribute to a structure that facilitates political accountability overall. The impact of successive funneling rules, and the strength of an overall political accountability structure, might thus be heightened as other elements of the structure are enhanced.

Another relevant set of formal factors are requirements that some funneled information be in writing. Once information is in writing, it becomes harder for writers or recipients to distance themselves from it if it ever is revealed. The statutory funneling rules at present contain some in-writing requirements. For example, the intelligence agencies are required to "keep the congressional intelligence committees fully and currently informed of all . . . significant anticipated intelligence activity and any significant intelligence failure." [96] Such reports must be in writing.[97] Similarly, certain Presidential findings must be made to justify a covert action and such findings generally must be submitted in writing to the intelligence committees.[98] While delays in notice or temporarily limited notice are permitted, such delays or limitations must eventually be explained in writing.[99]

Factors less formal than statutory and committee rules can also impact political accountability. The political climate, of course, can be very significant. Indeed, the mid to late 1970s has been called a high point for congressional oversight of national security. This characterization is attributed largely to the well-known executive branch abuses, often under the guise of national security, of the late 1960s and early 1970s.[100] These events are thought to have generated an unusually high public tolerance, even appetite, for oversight of the executive branch.[101] Of course, the political climate cannot by itself ensure effective oversight. Other necessary factors include a Congress that is not paralyzed from acting by partisanship or by other political disincentives. As Walter Mondale, who as a Senator contributed substantially to the intelligence oversight of the 1970s notes, no one can force Congress to have courage.[102] Political and congressional

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[92] *See, e.g.*, KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT 6, 68, 71, 89, 140, 149-151, 160-61, 164-67, 170, 183-84, 186-87 (1996) (discussing public appeal of secrecy).

[93] *See, e.g.*, sources cited at *supra* note 1, 1060, n. 67.

[94] *CAP Report*, *supra* note 48, at 27. *Cf.* OLMSTED, *supra* note 92, at 156.

[95] *See supra* notes 70, 87 - 88 and accompanying text.

[96] 50 U.S.C.S § 413a(a)(1) (2007).

[97] 50 U.S.C.S. § 413a(b).

[98] 50 U.S.C.S. §s 413b(a)(1) (2007).

[99] 50 U.S.C.S § 413b(a)(1), (c).

[100] *See, e.g.*, OLMSTED, *supra* note 92, at 182-83; *CAP Report*, *supra* note 48, at 9-12.

[101] *See* sources cited *supra* note 100.

[102] Interview with Walter Mondale, former U.S. Vice-President, at Dorsey and Whitney in Minneapolis,

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cultures are crucial components of effective oversight. The relevant questions are what if anything might do done to improve oversight cultures and what role if any might formal rule changes play in such improvements.

2. Possible New Approaches

a. Some Additions to In-Writing Requirements and Public Disclosure Rules

Existing rules include some in-writing requirements and the possibility of eventual public disclosure. As noted, both devices have the potential to enhance accountability, although both have had limited impact thus far. There may be ways to build on these requirements to enhance their effectiveness without unduly risking increased executive branch intransigence.

Two changes to the existing devices come to mind—one building on in-writing requirements and one building on public disclosure rules. With respect to the former, the executive branch presently must put most of its obligatorily disclosed information—including its regular reports to the intelligence committees and its covert action reporting—in writing. It might be worth exploring a parallel in-writing requirement reflecting congresspersons' responses to the information. Any such requirement should be vague and undemanding so as not to be too onerous or to discourage compliance—something to the effect that: "congresspersons receiving information must, in writing, acknowledge receipt of the same. In the same document, receiving congresspersons may record any responses on their part to the information, including any responsive actions taken or follow-up discussions had." Such requirements would be subject to the same confidentiality and security procedures to which written executive branch disclosures are subject.

The accountability-enhancing effect of in-writing requirements depends on the likelihood that others will, at some point, see the written information and draw from it views as to whether the executive branch complied with its obligations, whether congresspersons pushed for such compliance and whether individual congresspersons were engaged in the relevant debates. Existing successive funneling rules contribute to these ends. Serious consideration also should be given to creating presumptive public disclosure/de-classification dates for information funneled to the intelligence committees. This is analogous to the practice within the executive branch of placing presumptive de-classification dates on some information, with the presumption subject to reversal.[103] Presumptive disclosure dates might make the possibility of eventual public disclosure much more real to participants and enhance the likelihood of compliance and engagement. At the same time, the possibility of rebutting the presumption combined with sufficiently distant dates—say, 5-10 years after initial disclosure—should alleviate reasonable concerns about national security or the integrity of executive branch discussions. Existing provisions for public disclosure upon special committee or chamber action can serve as a backup mechanism for cases where immediate public disclosure is warranted.

MN (Mar. 1, 2007) (subsequent e-mail confirmation of this statement dated June 17, 2007 on file with author).

[103] *See, e.g.*, Information Security Oversight Office, 2005 Report to the President 14 (2006), *available at* www.fas.org/sgp/isoo/**2005**rpt.pdf (describing current presumption, under executive order, that certain materials should be declassified after 25 years).

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b. Broader Changes to Committees Structure and Stature

The Congressional Research Service reports that Congress recently "has pursued . . . initiatives for changing its intelligence oversight structure and capabilities."[104] One category of changes would enhance committees' influence over appropriation decisions. For example, "[a] recent change in the House places three members of the intelligence committee on a new Select Intelligence Oversight Panel on the Appropriations Committee. The new panel, which appears unprecedented in the history of Congress, is to study and make recommendations to relevant appropriations subcommittees."[105] Another category of changes would combine the intelligence committees to create one Joint Committee with enhanced powers, influence and stature.[106] A third set of changes would "[g]rant the current select committees status as standing committees, along with indefinite tenure for their membership, to reduce turnover; increase experience, stability, and continuity; and make membership on the panel more attractive."[107] Another recommendation would expand committees' "authority, giving them power to report appropriations as well as authorizations and to hold subpoena authority on their own."[108]

Detailed analysis of committee changes not directly related to information funneling is beyond this testimony's scope. It suffices to note, however, that changes that bolster the committees' general powers, stature, influence and competence may positively impact information flow to and within the committees. By heightening committees' prestige, visibility and abilities, such changes could increase the political incentives for committees to demand information and for the executive branch to comply with such demands.[109]

c. Informal Changes: Speaking Out and Engaging the Public

Formal changes are unlikely to be very effective without some change in public and politicians' perceptions of the meaning and consequences of national security based arguments for secrecy. It would be refreshing to see congresspersons and others more vigorously tout Congress' secret-protecting infrastructure and track record and more consistently remind the public about the dangers of too much secrecy as well as too much openness and historical and current tendencies toward massive over classification.

Polling and focus group data suggest that the public generally is very supportive of open government, even on issues relating to national security, but that "attitudes shift" "when the government claims the information could help terrorists."[110] For example, "[o]ver 90% [of persons polled by Greenberg Quinlan Rosner Research in January 2002] stated that in the aftermath of 9/11 environmental right-to-know laws should be strengthened or left [sic] the same. Yet when the question was reframed as do you agree with Bush or EPA removing information from public access to protect homeland security, 67% said they agreed."[111]

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[104] Kaiser, *supra* note 28, at summary page.
[105] *Id.* at 3.
[106] *Id.* at 6-13.
[107] *Id.* at 14.
[108] *Id.*
[109] For detailed analysis of proposed changes see O'Connell, *supra* note 47, at 1671-84, 1691-99, 1710-16, 1724-27.
[110] Gary D. Bass & Sean Moulton, *The Bush Administration's Secrecy Policy: A Call to Action to Protect Democratic Values 5-7,* (OMB Watch, working paper, 2002), *http://www.ombwatch.org/rtk/secrecy.pdf.*
[111] *Id.* at 6.

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It is not remotely unreasonable, of course, for anyone to wish to block information that could assist terrorists. The problem is the ease with which such claims are made, the evidence suggesting massive abuse of such claims, and the very real risks to national security and democracy posed by too much secrecy.

Existing rules and statutes provide a framework to balance secrecy's benefits and risks through inter-branch competition and discussion. As explained throughout this testimony, these rules and statutes can be improved further. But neither the existing framework nor enhanced versions thereof will work so long as Congress fails to use it, to insist on executive branch compliance with it, and to refocus public debate by educating the public as to this framework and its safety and necessity.

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Written Testimony of Seth F. Kreimer, Kenneth W. Gemmill Professor of Law
University of Pennsylvania Law School

Hearing on Restoring the Rule of Law
United States Senate Committee on the Judiciary
Subcommittee on the Constitution
September 16, 2008

I Fraying the Rule of Law: The Last Eight Years

This Committee is well aware of the progress of the current administration toward fraying the rule of law in the United States. In my own research[1], I have encountered both refusals to abide by legal constraints and concerted efforts to avoid acknowledging these refusals. The following is not a comprehensive account of the stratagems, but a scandalized travelogue of some of the more striking gambits that have come to my attention.

A recent account quotes a CIA official on the administrators of the CIA's interrogation and detention program: "Their attitude was 'Laws? Like who the f[***] cares?'"[2] So, too, according to reports, Khaled El Masri, an innocent German citizen was kidnapped by CIA operatives was kicked and beaten and warned by an interrogator: "You are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know."[3]

These are not isolated anomalies. Military officials were informed by White House operatives that "the gloves were off", and that the Geneva Conventions did not apply to the so called "Global War On Terrorism"(or "Terror") [Hereinafter, "GWOT"].[4] National Security

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[1]Seth F. Kreimer, Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror, 6 **U. Pa. J. Const. L.** 278 (2003); Seth F. Kreimer, Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror, 7 **U. Penn J. Const. L.** 133 (2004); Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 **J. Nat'l Sec. L & Pol'y** 187 (2005); Seth F. Kreimer, Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti- Terrorism and the Strategy of Transparency, 11 **Lewis & Clark L. Rev.** 1141 (2007); Seth F. Kreimer, The Freedom of Information Act and the Ecology of Transparency 10 **U. Pa. J. Const. L.** 1011 (2008).

[2]**Jane Mayer, The Dark Side,** 275 (2008) (expurgation added).

[3]Dana Priest, Wrongful Imprisonment:Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition', **Wash. Post**, Dec. 4, 2005, at A1.

[4]Richard Serrano, Prison Interrogators' Gloves Came Off Before Abu Ghraib, **L.A. Times** June 9, 2004, at A1; Eric Schmitt & Carolyn Marshall, In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse, N.Y. Times , Mar. 19, 2006, at A1 ("Placards posted by soldiers at the detention area advised, 'NO BLOOD, NO FOUL.' The slogan, as one Defense Department official explained, reflected an adage adopted by Task Force 6-26: 'If you don't make them bleed, they can't prosecute for it.' . . . [P]risoners at Camp Nama often disappeared into a

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Agency officials were ordered by presidential finding to ignore the constraints of the Foreign Intelligence Surveillance Act. There is cold comfort to be gleaned from the fact that "Scooter" Libby is reported to have said of the CIA's abusive detentions that "ninety nine percent of what we do is legal."[5] From my research it appears that many members of the current administration viewed legal rules as obstacles to be circumvented rather than obligations to be honored; the tenor of the administration is as evident in the activities of Lurita Doan and Monica Goodling as in the opinions of Alberto Gonzales and David Addington.

The Fig Leaf of Legalism

To be sure the current administration did not turn to explicit lawlessness as a first resort. As one dissenter from the process described the modus operandi of "top officials of the administration" in dealing " with laws they didn't like", "they blew through them in secret based on flimsy legal opinions that they closely guarded so that noone could question the legal basis for the operations."[6]

These legal opinions sometimes involved fine-spun and implausible legal distinctions. Notwithstanding repeated public assurances that American forces avoided "torture," obeyed "the law," and acted "humanely" toward captured terrorist suspects, lawyers who set governing policy contrived to generate legal analyses that freed interrogators from legal constraints by insulating executive branch activities in the "GWOT" from ordinary linguistic and legal usage. In this insulated universe of meaning, waterboarding was not "torture" while hypothermia, stress positions and humiliation constituted "humane treatment."

Administration legal opinions often turned to legal manipulation to construct islands of impunity where legal obligations were said to be inapplicable. Most graphically, the current administration maneuvered detainees to the naval base at Guantanamo Bay, which was treated as a legal black hole to which neither the jurisdiction of federal courts nor the mandate of federal law reached. The administration took the position that its unilateral "determination" could avoid liability for breaches of domestic and international legal obligations, [7] and that its designation of individuals as "enemy combatants" could leave them devoid of legal rights. The current administration deployed the technique labeled "extraordinary rendition" to seize individuals suspected of hostile intent and put them in the hands of foreign surrogates who could engage in abusive interrogations in locations asserted to be beyond the reach of American law.

When other expedients did not suffice, the administration's positions often fell back on the proposition that like the English king, the President can do no wrong. Administration lawyers

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detention black hole, barred from access to lawyers or relatives. . . . 'The reality is, there were no rules there,' another Pentagon official said").

[5] **Mayer, The Dark Side,** 305.

[6] **Jack Goldsmith, The Terror Presidency** 181 (2007).

[7] Letter from John Ashcroft, Att'y Gen., to President George W. Bush (Feb. 1, 2002), reprinted in **Mark Danner, Torture and Truth: America, Abu Ghraib and the War on Terror** 92 (2004) (arguing that a presidential determination that the Genevea Convention did not apply because Afghanistan was a "failed state" would allow the abuse, while " minimizing" the "legal risks of liability, litigation, and criminal prosecution").

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dispatched inconvenient obligations under law with reference to a quasi monarchical prerogative power to "legally" ignore them as Commander in Chief.

Armed with these secret opinions, members of the current administration regularly avowed their intent to be bound by "the law," with the secret mental reservation that "the law" imposed no binding constraints. They routinely made public statements appearing to disavow the very activities that they sought secret interpretations to authorize.

Secrets, Lies, and Videotape

Crucial to this strategy was the preservation of these activities and rationales from review and critical examination. Thus, the current administration sought to avoid accountability under law for its treatment of detainees by seeking to prevent the knowledge of abuse from coming to light, and by preventing detainees from obtaining access to judicial review. The current administration regularly hid overseas detainees from International Committee of the Red Cross monitors. At Guantanamo it denied access to attorneys representing those individuals, and obviously it continues to deny access to detainees held in CIA "black sites." In the United Sates, it manipulated jurisdictional locations to deprive detainees of access to attorneys.[8]

The current administration hid its dragnet roundup of non-citizens in the aftermath of September 11 from public review and congressional oversight.[9] It sought to avoid Supreme Court review of favorable decisions in a circuit conflict regarding its secrecy by representing that the decisions had no impact; it then sought to take advantage of the rule of the unreviewed decisions.[10] It initially put roadblocks in the path of obtaining counsel, then adopted a strategy to avoid judicial review of the legality of efforts to hold immigration detainees indefinitely by mooting out habeas petitions once filed and continuing to hold detainees who had not filed habeas actions.[11]

After erroneously arresting and harshly interrogating an Egyptian airline pilot, and presenting the false accusations to a court to justify his detention, the current administration sought to avoid revelation of its blunder by sealing the record, and sought to seal subsequent

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[8] When the attorney for Jose Padilla filed a petition challenging his detention in the criminal justice system pursuant to court order in New York, the administration designated him an "enemy combatant" and moved him to a naval brig in South Carolina.. Rumsfeld v. Padilla, 542 U.S. 426, 430-431 (2004). When his counsel filed a petition for habeas corpus in South Carolina, the administration sought to avoid Supreme Court review by transferring Padilla back to criminal custody. Padilla v. Hanft, 547 U.S. 1062, 1063 (2006).

Similarly during the period of September 27, 2002 to October 7, 2002, the Department of Justice played a game of three-card monte with the attorney for Maher Arar, misleading him as to Arar's location and rushing through Arar's compelled removal to Syria for torture on the basis of classified, but inaccurate, information. Arar v. Ashcroft, 414 F. Supp. 2d 250, 254 (E.D.N.Y. 2006).

[9] *See* Kreimer, Strategy of Transparency,, 11 Lewis & Clark L. Rev. at 1148-1158.

[10] Id at 1157-58.

[11] Id. at 1152 n.4.

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litigation to vindicate the pilot's rights.[12]

When challenged on its use of the intrusive surveillance authorities granted by the "Patriot Act," the current administration began by refusing to disclose even the bare facts regarding the number of times the authorities had been utilized.[13] When it became politically advantageous, the administration declassified and announced the "fact" that Section 215 of the Act had not been used at all, and made similar representations to a court.[14] Less than a month later, the administration covertly deployed the authority it had disavowed, informing neither public nor judge.[15]

It is notorious that the administration initially claimed that detainees were treated "humanely" and disavowed "torture" or illegality with the mental reservations that hypothermia was "humane," waterboarding was not "torture," and that in the secretly promulgated view of administration attorneys nothing the president ordered could be "illegal."[16] What is somewhat less well known is that the current administration regularly deployed improper national security classifications to shield embarrassing evidence of these deceptions from Congress and the public.[17] Similarly, when videotapes of waterboarding and other "enhanced" interrogation techniques became the subject of judicial inquiry, officials destroyed those tapes, and the current

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[12]In August 2002, Judge Rakoff in In re Material Witness Warrant, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002), ordered an investigation of the case of Abdallah Higazy, an Egyptian who had been detained as a "material witness" in the aftermath of September 11. Higazy was bullied into a "confession" by FBI interrogators who threatened his family in Egypt with torture by Egyptian security forces. The "confession" was reported to Judge Rakoff as a justification for further detaining Mr. Higazy. When Mr. Higazy was definitively exonerated and one of his accusers was shown to have misrepresented crucial physical evidence, Judge Rakoff rejected the efforts of the government to keep the records of the case sealed. Id. Subsequent efforts to recover damages from the actors in the debacle ran aground on qualified immunity, Higazy v. Millennium Hotel & Resorts, CDL (N.Y.) L.L.C., 346 F. Supp. 2d 430, 452 (S.D.N.Y. 2004), although some of Mr. Higazy's claims were reinstated in Higazy v. Templeton, Docket No. 05-4148-cv, 2007 U.S. App. LEXIS 24443 (2d Cir. 2007), unredacted opinion available at http://howappealing.law.com/HigazyVsTempleton05-4148-cv_opnWithdrawn.pdf

[13]Kreimer, Strategy of Transparency at 1169-72.

[14]Id at 1172.

[15]Id at 1175.

[16] One particularly embarrassing example occurred in the Supreme Court argument of Rumsfeld v. Padilla, when an adminstration lawyer unambiguously announced that "our executive doesn't" order "mild torture" the day that the effort to conceal the abuses as Abu Ghraib fell apart on network news. See Transcript of Oral Argument at 22–23, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1027.pdf .

[17]Kreimer, Strategy of Transparency, 1204-05; id at 1217 n.320.

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administration misrepresented to the court that the absent tapes had never existed.[18]

II)Restoring the Rule of Law: The Next Administration

A. Executive Reversal and Revelation

Much of this activity came at the direction of officials at the highest levels. President Bush made explicit presidential findings authorizing kidnaping and inhumane interrogation procedures. He personally approved surveillance programs in the teeth of explicit legal obligations adopted by Congress. The office of Vice President Cheney repeatedly encouraged evasion and disregard of legal constraints. Vice President Cheney's Counsel, David Addington, is quoted as proclaiming " We're going to push and push and push until some larger force makes us stop."[19] The attitude of the remainder of the administration followed suit. One CIA official observed of the CIA's physical abuses of detainees:"The truth is that the President wanted it. So everyone else wanted to be the most aggressive. A lot of ambitious people played on Cheney and the President's fascination with this. The President *loved* it."[20]

1. Strokes of a Pen

A new administration therefore can reverse some of this damage with the proverbial stroke of a pen. It can revoke the authorities to engage in lawless detention and coercive interrogations of detainees and reaffirm the commitment of the United States to the Geneva Conventions and the rules of common decency. It can move to close CIA "black sites" and dismantle the detention facilities at Guantanamo. It can direct the release of documents which have been called for in FOIA inquiries into "GWOT" abuses, long blocked by the obstruction of the current administration, subject only to redactions clearly mandated by compelling national interests. It can proactively release the series of studies by internal commissions and Inspectors General of the illegalities of its predecessor, subject again to redaction for compelling national interest. It can withdraw the gag order that prevents John Walker Lindh from commenting on the treatment he received at the hands of American officials.[21] It can order the prosecution for contempt of Congress of officials of the prior administration who have flouted legitimate legislative subpoenas seeking to uncover illegality.

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[18]Mark Mazzetti, C.I.A. Was Urged to Keep Interrogation Videotapes, **N.Y. Times**, Dec. 8, 2007, at A1; **Mayer ,The Dark Side** 320-21.

[19]**Goldsmith, The Terror Presidency** 125.

[20] **Mayer, The Dark Side** 43 (emphasis in original).

[21] *See* Dave Lindorff, Chertoff and Torture ,**The Nation** Feburary 15, 2005(reporting on plea agreement that demanding that Lindh sign a statement swearing he had "not been intentionally mistreated" by his US captors, waiving any future right to claim mistreatment or torture, and imposing"special administrative measure," barring Lindh from talking about his experience for the duration of his sentence); Tom Junod, Innocent , **Esquire** July 1, 2006 See Plea Agreement, Lindh, available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf .

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2. Preservation and Rule of Law Audits

Equally important, a new administration can begin the effort to determine the scope of the illegality authorized by its predecessors. A new administration should immediately issue orders to prevent the destruction of documentary or electronic evidence, and should consider the establishment of targeted inquiries.

a. The "War Council"

One point of entry for these efforts focuses on the activities of the so-called "War Council"comprised of John Yoo, David Addington, Tim Flannigan Alberto Gonzales and William J."Jim" Haynes. This group, according to a series of reports, was instrumental in orchestrating disregard for controlling legal obligations. Upon entering office, the new administration should immediately issue an order to preserve all correspondence to and from these individuals which has not already been destroyed; it should move to identify electronic records that have been deleted and to reconstruct them where possible. Before accession of a new administration, relevant Committees of Congress should consider issuing orders to each of these individuals, as well as others known to be likely to have evidence of abuses, directing them to preserve documents and correspondence regarding the abuses that have been or are likely to be the subject of inquiry.

Once records are preserved, a new administration will be in a position to conduct a "rule of law audit" to evaluate what further actions should be taken to reverse the abusive authorities of its predecessor. From public records it appears that one modus operandi of the prior administration was to seek secret authorization from OLC for dubious initiatives, both in an effort to suppress disagreement within the administration and as a means of constructing defenses against future prosecution. At a minimum, competent attorneys should review every OLC opinion authored by Messrs. Yoo, Bybee and Flannigan, commencing with those which have been most highly classified. Given the practices of the prior administration these are most likely to conceal rule of law abuses. These reviews will provide one basis to identify further dubious policies and authorities that should be targeted for revocation.

More generally, the pattern of correspondence with members of the "War Council" is likely to provide a means of tracing the impact of "rule of law" violations. This tracing is in turn likely to require a full scale auditing process either by a specially detailed team from the FBI or the offices of one or more Inspectors General.

b. The Office of the Vice President

In a sobering account a year ago, it was reported that

> Iran-Contra was the subject of an informal "lessons learned" discussion two years ago among veterans of the scandal. [Elliott] Abrams led the discussion. One conclusion was that even though the program was eventually exposed, it had been possible to execute it without telling Congress. As to what the experience taught them, in terms of future covert operations, the participants found: "One, you can't trust our friends. Two, the C.I.A. has got to be totally out of it. Three, you can't trust the uniformed military, and four, it's got to be run out of the Vice-President's office"-a reference to Cheney's role, the former

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senior intelligence official said.[22]

There are indications that this strategy of using the Office of the Vice President as an "undisclosed location" from which to launch legally and morally dubious off the books initiatives has been implemented. The Vice President has unilaterally exempted himself from disclosure obligations and as well as the obligations to comply with rules concerning classified information; the current Office of Legal Counsel has declined even to evaluate the legality of that exemption.[23] It is as yet unclear how many other legal obligations the Office of the Vice President has decided to ignore. Tracing the influence of the Office of the Vice President provides another means of tracing the pattern of rule derogation in the prior administration.

Upon entering office, the new administration should immediately issue an order to preserve all correspondence to and from the Office of the Vice President which has not already been destroyed, and move to identify electronic records that have been deleted and to reconstruct them where possible. Before accession of a new administration, relevant Committees of Congress should consider issuing notices to direct preservation of documents and correspondence regarding the abuses that have been or are likely to be the subject of inquiry.

Again, tracing the influence of the Office of the Vice President is likely to be a substantial task, and one that is likely to require the services of specially detailed personnel. In this regard it may also be worth considering empaneling a special grand jury with authority to investigate illegality, and either report on or recommend prosecution. *See* In re Report & Recommendation of June 5,1972 Grand Jury , 370 F. Supp. 1219, 1224 (D.D.C. 1974); *Cf.*.Cheney v. United States Dist. Court, 542 U.S. 367, 384 (2004)(determining that executive privilege is a less powerful concern when it is invoked to block grand jury inquiry).

c. Comprehensive Rule of Law Audit

In addition to these targeted inquiries, the new administration should move toward establishing a broader structure to catalogue the rule of law failures emanating from the White House in the last eight years. Whether such in house audit is best undertaken by a borrowed task force of career civil servants, a group detailed from the Council of Inspectors General, a specially engaged outside counsel or auditing group, or an inquiry by the White House Counsel's office is a matter on which I am not sufficiently informed at this point to have an opinion.

B) Responsibility, Reparation and Renewal: Longer Term Initiatives

In addition to these unilateral and immediate actions, a series of longer run actions by both executive and legislative branches can begin to reestablish the rule of law. The objects of these initiatives should be to hold the perpetrators responsible, to repair the damage they have caused

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[22]Seymour M. Hersh, The Redirection: Is the Administration's New Policy Benefitting Our Enemies in the War on Terrorism?, **New Yorker**, Mar. 5, 2007, at 54.

[23]See,e.g. Letter of Complaint by Federation of American Scientists January 3, 2008, available at http://www.fas.org/sgp/news/2008/01/fas-opr.pdf; Michael Isikoff, Challenging Cheney,**Newsweek**, December 24, 2007, http://www.newsweek.com/id/81883/
Justin Rood, Cheney Power Grab: Says White House Rules Don't Apply to Him, June 21, 2007, **The Blotter**, http://blogs.abcnews.com/theblotter/2007/06/cheney-power-gr.html .

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and to renew the aspirations of our national order. The following list should be regarded as illustrative, rather than exhaustive.

1. Responsibility

a. Criminal Prosecution

Once a new administration has identified abuses, criminal prosecution constitutes one clear mechanism for holding responsible those who commanded or committed the abuses. It appears that the threat of possible prosecution had some moderating effect on the unilateral abuse by some participants in the current administration's activities. Observers recount that "senior FBI officials" moderated their responses to demands for "forward leaning" interventions because of concerns about potential criminal and civil liability if they were to act on overreaching legal opinions.[24] Another account reports that "after seeing midlevel colleagues convicted for following what they thought were presidential wishes in the Iran-Contra scandal, Kofer Black [of the CIA] warned his subordinates that the CIA was not in the "rid-me-of-this priest" business."[25] Actors report that the CIA required explicit presidential authorization and an OLC legal opinion to serve as a "golden shield" against future prosecution before proceeding with abusive interrogation.[26]

It may unfortunately be the case that for some activities undertaken after their issuance, these "gold shields" will be effective in negating the elements of criminal prosecution. And it is entirely possible that before leaving office the current President will issue pardons for some of the malfeasance he authorized. It is therefore imperative to explore prosecutions for efforts to shield abuses from accountability through illegal destruction of evidence or false statements[27]

This variety of investigation and prosecution should not be denigrated as a "witch hunt" or a "perjury trap." One crucial mechanism which this administration has used to avoid the force of governing rules has been secrecy and deception. Investigation and prosecution of these activities can bring to light the sordid, self-interested quality of the departures from legality and focus on the self-protective secrecy and self-dealing refusals to abide by law. Punishing such deception is

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[24] **Eric Lichtblau, Bush's Law**, 179 (2008).

[25] **Mayer, The Dark Side** 20 ; *See* id at 271 (describing "growing unease about legal exposure" as imposing some constraints on torture).

[26] **Goldsmith, The Terror Presidency** 144.

[27] *See, e.g.* 18 U.S.C. § 1505 (defining violations by one who "obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House") ;18 U.S.C. § 1515(b)(clarifying the prohibition as including "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."); United States v. Safavian, 451 F. Supp. 2d 232, 246 (D.D.C. 2006).

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a first step toward eliminating the culture of impunity. Indeed, if time is necessary for investigation, as one pair of commentators sympathetic to the current administration has pointed out in a parallel context, it would not be a constitutional violation to extend unexpired statutes of limitations for criminal statutes covering the rule of law abuses in question.[28]

The prospect of criminal prosecution may, however ,on occasion be less than an effective deterrent. The CIA's Kofer Black is also quoted as saying upon leaving a meeting in the aftermath of September 11, "We'll all probably be prosecuted," and "practically relishing the possibility, casting himself as a tough but noble hero forced to sacrifice himself for his country."[29] While it is more difficult to construct the lure of heroism in the destruction of evidence, it is important to explore other mechanisms to hold violators responsible and to repudiate primary rule violations.

b. Civil Redress

Two centuries ago, Justice John Marshall observed that "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. 137 (1803). Two decades ago, Justice Sandra O'Connor dissented in United States v. Stanley 483 U.S. 669, 710 (1987) from the denial of relief to former Sgt. James B. Stanley whom military experimenters had surreptitiously dosed with mind-altering drugs:

> No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case...The United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War [and established the principles of the Nuremberg Court]. If this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.

In response to the admonitions of Justice O'Connor and others, Congress ultimately awarded Sgt. Stanley $400,000 compensation in 1994.[30]

The abuses of the current administration have not infrequently risen to the level of war crimes. They have generated substantial litigation by their victims. But unfortunately the federal courts have been active in crafting judicial rules to insulate the perpetrators from liability. On occasion, Congress has been complicit in this effort. It is entirely appropriate for a new Congress and a new administration to intervene promptly to assure that the promise of due

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[28]Eric Posner & Adrian Vermeule, Transitional Justice as Ordinary Justice, 117 **Harv. L. Rev.**761, 766 (2004) (citing Stogner v. California, 123 S. Ct. 2446, 2453 (2003); United States ex rel. Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982); Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1928)).

[29]**The Dark Side** at 41.

[30]H.R. 808/Private Law 103–8 For the relief of James B. Stanley 108 Stat. 5066 (October 25,1994)

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process and the rule of law is not defeated by denying relief to those who have been abused.

An illustrative, but not complete list of possible initiatives follows.

State Secrets Privilege Some efforts to obtain redress have run aground on the judicially crafted "state secrets" doctrine which obstructs redress not because it is substantively unwarranted, but because adjudication of claims would pierce the veil of secrecy under which abuses were committed. Rather than simply reviewing evidence to cull validly classified material, courts which accept this privilege simply refuse to entertain actions for relief. Thus for example in El Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007), the court dismissed an action for redress by a concededly innocent German citizen who was abducted, detained and abused by the CIA not on the ground that the suit was without legal merit, but on the ground that the details of the covert abduction were "state secrets." The current administration has been profligate in its invocation of this doctrine.

Congress is currently considering legislation to constrain the exertion of this doctrine in the form of S. 2533, the "State Secrets Protection Act.". Even before this legislation is adopted, a new administration can undertake to withdraw assertions of that privilege which obstruct actions against perpetrators of abuses. An incoming administration should require an audit of the cases in which the Justice Department is asserting a "state secrets" privilege, and assess where the real public interest lies in these matters.

"Special Factors Counseling Hesitation"

A substantial number of cases have invoked exactly the doctrine that Justice O'Connor decried to refuse to adjudicate actions for redress brought by victims of the current administrations programs, however substantively meritorious. These cases maintain that "special factors counseling hesitation" preclude actions to redress abuses in the administration's initiatives, even if constitutional rights have been manifestly violated.Arar v. Ashcroft , 532 F.3d 157 (2d Cir. 2008), for example, a case brought by Maher Arar, who was deported by the administration for torture in Syria, is currently awaiting en banc reargument before the Second Circuit. Wilson v. Libby, 2008 U.S. App. LEXIS 17119 (D.C. Cir. 2008), dismissed an action by Joseph Wilson and Valerie Plame for the retaliatory actions taken against them by members of the Vice President's office; a petition for certiorari is pending. [31]

In pending cases a new administration can reverse current aggressive executive branch claims to immunity from responsibility under the rubric of "special factors counseling hesitation." It can urge the courts to recognize that the real interests of the United States encompass the repudiation of constitutional abuses and the provision of redress to their victims. In the longer run, Congress can and should make authoritatively clear that redress should be provided.

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[31]There is cause for concern, as well, in the efforts of the current administration's advocates in Iqbal v. Hasty, 490 F.3d 143, 151 (2d Cir. N.Y. 2007) *cert granted* Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) to avoid adjudication of the merits of the claims of individuals detained and abused in the post September 11 mass arrests by the administration. Likewise in Rasul v. Myers 512 F.3d 644 (D.C. Cir 2008) *petition for cert pending*, an action brought by detainees in Guantanamo to challenge their abuse, the administration invoked and a concurring judge accepted the "special factors" defense.

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Revocation of Impunity Unfortunately, past Congresses have on occasion intervened in exactly the opposite direction. In the "Detainee Treatment Act" of 2005, and the "Military Commission Act" of 2006, Congress sought to provide a variety of immunities to individuals from actions to redress abuse of detainees. Likewise, in the recent FISA Amendment Act of 2008, Congress has provided retrospective immunity to private entities who colluded in the current administration's illegal interceptions Future sessions of Congress concerned with the rule of law should review immunity provisions to determine whether and how this legal impunity should be revoked. As an alternative, if it elects to retain immunities Congress can authorize actions against the United States as defendant to provide compensation to victims of abuse. While such actions would not serve the purpose of "seeing that victims are compensated by perpetrators," they would at least provide compensation, as well as providing a forum in which the legalities of impositions by the current administration can be adjudicated.

Conditional Indemnification It may be the view of Congress, or the incoming administration in the exercise of its existing authority, that while compensation of victims is important there are reasons to provide indemnification for officials who participated in abuses, either against substantive liability or against legal expenses. Such indemnification, if it is undertaken, provides an opportunity to further the salutary effort to reveal the abuses of the prior administration. Malpractice insurers require that applicants inform them of potential legal claims as a condition for providing insurance coverage. Similarly, any indemnification program should require that applicants for indemnity come forward and identify under oath the precise nature and scope of the activities for which they seek protection. This would both indicate the scope of potential indemnities, and equally important provide information as to the scope of legally dubious practices.[32]

Congress or the executive should consider as well the option of imposing similar conditions on the ability of government officials to obtain or continue insurance against responsibility for abuses of the rule of law.[33] Insurance outside of federal oversight obviously undercuts the deterrent effect of potential legal sanctions. At a minimum, such insurance should be permitted only if potential violators are required to disclose their actions to responsible superiors.

Statutes of Limitations

At this point in time, as a result of the current administration's efforts to conceal its activities and to obstruct access to courts, the scope of the underlying abuses is entirely unclear. It is likely that these efforts would toll the running of statutes of limitations in many cases. If it is concerned about reestablishing the rule of law, however, Congress should consider explicitly adopting provisions extending or tolling civil statutes of limitations for victims of rule of law abuses to

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[32]Compare Marek M. Kaminski and Monika Nalepa, Judging Transitional Justice, A New Criterion for Evaluating Truth Revelation Procedures 50 **J. Conflict Resolution** 383 (2006) (reviewing the virtues of procedures which require those claiming immunity to verify the scope of wrongdoing under threat of criminal sanction for false testimony).

[33]*Cf.* Scott Shane, In Legal Cases, C.I.A. Officers Turn to Insurer, **N. Y.Times** A31 Jan 20,2008 ; R. Jeffrey Smith, Worried CIA Officers Buy Legal Insurance; Plans Fund Defense In Anti-Terror Cases, **Washington Post** A01 September 11, 2006.

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assure that concealment does not become a self-fulfilling prophecy of impunity.

c. Other Modes of Responsibility

i. Employment Discipline

Whether or not they are found criminally or civilly liable, rule of law violators who are currently employed by the federal government should face review for internal disciplinary sanctions. At a minimum, considerations of such violators for promotion should take into full account their failures to abide by standards of legality and integrity.

ii.Security Clearances

Beyond the imposition of internal discipline, individuals who have been the perpetrators of rule of law abuses in the current administration should not have access to continued opportunities to undercut the integrity of the United States government in the future. The incoming administration should undertake a review of the actions of current employees holding security clearances to assure that rule of law violators do not retain the opportunity to do harm, and do not reap rewards at the expense of the nation. At a minimum, individuals who are identified as rule of law violators in internal investigations or external prosecutions should be stripped of their clearances.

In addition, given the prominence of deception and dissimulation as a means of avoiding the rule of law in the previous administration, a new administration should consider a separate audit to determine which individuals invoked security classifications to conceal misdeeds, made false statements to other branches or public inconsistent with their knowledge of classified materials, or destroyed classified records. Such individuals do not warrant the confidence that accompanies high level security clearances. Rule of law violators who have left the employment of the federal government should likewise be precluded from obtaining security clearances as private contractors, and private contractors who have engaged in rule of law violations should face adverse review of their clearance status.

iii. Debarment

A refusal to abide by the rule of law is not, in my view, a prominent qualification for service to the federal government as a private contractor. In the case of individuals or institutions who have engaged in financial fraud, debarment from eligibility for federal contracts is common.[34] Conversely, an individual in government service who knows that she will be subjected to certain exclusion from the opportunities of government contracting upon departing government may be deterred from engaging in rule of law violations to a greater extent than an official who contemplates the uncertain penalties of civil or criminal litigation. The incoming administration should investigate its authority to impose debarments from federal contracting activities on those who have been determined to have participated in the flouting of the rule of law. If such authorities do not already exist, Congress should consider enacting them.

2. Reparation

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[34] See,e.g. Debarment, Suspension and Eligibility, 48 C.F.R. § 1, Pt. 9 (Defense Department); 42 U.S.C. § 1320a-7(a) and 42 C.F.R. § 1001.101 (mandatory debarment by HHS); 42 U.S.C. § 1320a-7(b) (permissive).

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a.Restoration

Some of the illegal initiatives of the previous administration have resulted in wrongs that can be undone directly. Thus individuals who have been improperly detained should be released, and individuals who have been improperly deported should be offered the option of returning to the United States[35].

We know that Yaser Hamdi after prevailing in his appeal to the Supreme Court was required to renounce his American citizenship and agree not to seek compensation as a condition of release from his incarceration as an "enemy combatant"[36]. It is unclear how many other individuals have been subject to similar "offers". At a minimum such extorted expatriations should be revisited.

So, too, individuals who have been demoted, dismissed or passed over for promotion because of their opposition to illegal initiatives should be offered the opportunity to return to government service.[37] The "rule of law audit" suggested above is likely to reveal other situations which are appropriate for restoration.

b. Recompense

Many abuses cannot be undone directly; lives disrupted by incarceration cannot be fully reconstructed, the effects on bodies and minds racked by torture cannot be erased. But the government of the United States can provide some measure of compensation and apology. Even if one were to view innocent victims of abuses as "collaterally damaged" by open and honest failures in the GWOT, it would be appropriate to consider a mechanism to compensate them, just as the September 11 Victims Compensation Fund provided recompense to those whose lives

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[35] It seems likely, given the chaotic standards chronicled by the Department of Justice Inspector General , **The September 11 Detainees: A Review of the Treatment Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks** at 14, 16, 42, 53-57 (2003) that the mass deportations in the aftermath of September 11 included more than a few individuals who should have been eligible for continued residence. Such individuals should be offered the opportunity to seek reconsideration of their deportations.

[36]Eric Lichtblau , U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant', **New York Times** A1 (September 23, 2004).

[37]*See infra* pp. 17-21. *See also, e.g.* Gail Russell Chaddock ,A Surge in Whistle-blowing ... and Reprisals **Christian Science Monitor** February 16, 2006 p.1. (Describing experience of Sgt. Samuel Provance who stated that his rank was reduced for disobeying orders not to speak about mistreatment he saw at Abu Ghraib);Brooks Egerton, Losing a Fight for Detainees; Officer Says He Leaked List of Terror Suspects in the Name of Justice; Now Convicted, He Could Face Prison Term, **Dallas Morning News** May 18, 2007, at 1A (describing prosecution, beginning in 2005, of Matthew Diaz, military lawyer who provided a list of the names of prisoners to civil rights attorneys). The Department of Defense continued its court martial proceedings against Cmdr. Diaz even after the names had been disclosed in response to FOIA litigation. Id. ("When asked why the government pressed on with its criminal case against Cmndr. Diaz, Navy spokeswoman Beth Baker said, 'I can't give you a philosophical answer.'")

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were destroyed in part by the failures of airline security.[38]

The past administration's failures, moreover, have regularly been far from open and honest. In the past the U.S. government has acknowledge and provided compensation for reprehensible overreaction in the past by compensating the victims of the internment of Japanese Americans during World War II. The current administration has on at least one occasion provided an apology and compensation to an innocent victim of its excesses.[39] The incoming administration should investigate the propriety of comparable apologies and compensation to other victims. Congress should similarly consider the establishment of a compensation fund, or commission.

3. Renewal

Responsibility and reparation will facilitate return to the rule of law . But a finalimperative calls for strengthening the ability and willingness of soldiers, career civil servants and political appointees of integrity to resist abuses. To that end, it is eminently worth investigating what structures facilitated the abuses which ones made resistance to them possible. Three suggestions are illustrative.

Sunsets and Renewal

One important aspect experience surrounding the "Patriot Act" was the functioning of the sunset provisions imposed on some of the more intrusive authorities it granted.[40] The prospect that the authorities would require renewal provided some leverage for civil servants who cautioned against abuse, warning that "In deciding whether or not to re-authorize the broadened authority, Congress will certainly examine the manner in which the FBI has exercised it."[41]

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[38]Cf. Radiation Exposure Compensation Act of 1990 , 42 U.S.C. § 2210 note and subsequent amendments.

[39]Eric Lichtblau, U.S. Will Pay $2 Million To Lawyer Wrongly Jailed, **New York Times** A18 (November 30, 2006).

[40]Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 [hereinafter, the "Patriot Act"]. Prominent controversy surrounded section 213, authorizing "sneak and peek" warrants; section 214, authorizing the issuance of pen register warrants on reduced standards of cause and connection to intelligence investigations; section 215, authorizing the issuance of secret warrants for access to "tangible things" on reduced standards of cause and connection to intelligence investigations; and section 505, which broadened authority for the FBI to issue national security letters (NSLs) without judicial authorization, obligating recipients to turn over consumer financial, telephonic, and electroniccommunication records. §§ 213–215, 115 Stat. at 285–88; § 505, 115 Stat. at 365–66.

[41]Memorandum from Gen. Counsel, Nat'l Sec. Law Unit, FBI, National Security Letter Matters 3 (Nov. 28, 2001), http://www.aclu.org/patriot_foia/FOIA/Nov2001FBImemo.pdf. The author of the memorandum has been identified as Michael Woods, who left the FBI in 2002. Barton Gellman, The FBI's Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans, **Washington Post**, Nov. 6, 2005, at A1.

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In addition to this incentive for moderation, the actual public debate surrounding the renewal of those provisions occasioned both some reassertion of congressional concern for overreaching, and equally important, the mobilization of skeptics within and outside of the administration.[42] Similarly, the requirement that intrusive extralegal surveillance authorities adopted by Presidential directive in the aftermath of September 11 be regularly re-authorized provided an occasion for a new set of lawyers of integrity to re-evaluate its violation of law.[43] One lesson from the experience of the last administration is that a requirement of periodic reauthorization is an important structural support for the rule of law.

Sunlight as a Disinfectant

It is clear that the current administration used the mechanism of covert decision-making, isolated from the usual channels of policy-making and hence from possible criticism as the means to effect some of its less savory initiatives. Secrecy and the homogeneity of insular cliques of decision makers combined with a self-reinforcing fear of short run danger to dessicate norms of legality and impair regard for the longer run national interest in retaining the ideals of America.

One recurring lesson that has emerged from the current administration is that broad consultation in policy processes is less likely to result in lawless action. The incoming administration should reverse the procedures used by the current administration to avoid consultation with a broad portfolio of analysts in the formation of policy, as well as the practice of keeping legal analysis and authorities secret from officials within the government.

A salient teaching of computer security analysis in the last decade is that the more broadly and transparently disseminated a program becomes, the less likely it is to be infected with bugs and security flaws. By analogy, the more broadly proposed legal authorities are disseminated, the less likely they are to be infected with slipshod or evasive legal analysis, and the less easily such analysis defective can be implemented. The incoming administration should revisit the rules adopted by the Bush regime which make secrecy a default, and return to rules of transparency that prevent disclosure only in the case of real danger to the national interest.[44]

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[42]Kreimer, Strategy of Transparency at 1181; Kreimer, Ecology of Transparency at 1058.

[43]*See,e.g.*, **Lichtblau, Bush's Law** at178-84 (describing 2003-2004 controversy involving Jack Goldsmith Robert Meuller and James Comey confronting Alberto Gonzales, David Addington, and Andrew Card over re-authorization of extralegal "Terrorist Surveillance Program"); **Mayer, Dark Side** 289-91 .

[44] *E.g.*, Dana Milbank & Mike Allen, Release of Documents Is Delayed, **Washington Post**, Mar. 26, 2003, at A15 (describing revocation of the requirement that material "not be classified if there is 'significant doubt'" as to its danger to national security); Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003); Memorandum from John Ashcroft, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies(Oct. 12, 2001), available at http://www.usdoj.gov/oip/foiapost/2001foiapost19 (Directing recipients of FOIA requests to explore basis for withholding); Memorandum from Laura L.S. Kimberly, Acting Dir., Info. Sec. Oversight Office, & Richard L. Huff & Daniel J. Metcalfe, Co-Dirs., Office of Info. & Privacy, Dep't of Justice to Dep'ts & Agencies (Mar. 19, 2002), available at

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Even when full transparency is inadvisable, summary reports to outside bodies can combine with internal record keeping and auditing capabilities to impose accountability for potential abuse. In general record keeping requirements, and the possibility of even partial disclosure are likely to activate norms that support the rule of law.[45] A refusal to abide by record keeping requirements, or an effort to destroy existing records is a red flag for potential failures of the rule of law. One of the lessons of the 2005 Patriot Act renewal[46], which combined enhanced public reporting of bottom line statistics with a mandate of audits by the Department of Justice Inspector General is that partial transparency combined with internal review by effective watchdogs can provide an important set of institutional checks.[47]

From Twilight to Dawn: Celebration of Integrity

The saga of the last administration's erosion of the rule of is not without glimmers of integrity; some civil servants refused to accede to lawlessness even at the risk of their careers. In considering ways to renew the rule of law and prevent future abuses, it is important to recognize that integrity. On one hand, examination of their experiences can give clues to the ways in which in which future resistance to lawlessness can be fostered, and put in clear perspective the fact that the lawlessness of the last administration was a choice rather than an ineluctable necessity. On the other hand, just as a properly functioning system should sanction misconduct in order to deter its repetition, admirable integrity should be fostered by assuring that it is rewarded. The following list is illustrative rather than exhaustive; these individuals have as yet received no appropriate rewards from their country.

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http://www.usdoj.gov/oip/foiapost/ 2002foiapost10.htm (directing officials to consider means of resisting disclosure);Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff to Heads of Executive Dep'ts & Agencies (Mar. 19, 2002), available at http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm (highlighting the Kimberly/Huff/Metcalfe memo).

[45] *Cf.* Daniel C. Esty, Environmental Protection in the Information Age, 79 **N.Y.U. L. Rev.** 115, (2004); Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 **Geo. L.J.** 257 (2001); William M. Sage, Regulating Through Information: Disclosure Laws and American Health Care, 99 **Colum. L. Rev.** 1701 (1999); Michael P. Vandenbergh, Order Without Social Norms: How Personal Norm Activation Can Protect the Environment, 99 **Nw. U. L. Rev.** 1101, 1144-45 (2005) Mary Graham, Information as Risk Regulation: Lessons from Experience , (Regulatory Policy Program Working Paper No. RPP-2001-04, 2001), available at www.ksg.harvard.edu/cbg/research/rpp/RPP-2001-04.pdf.

[46]USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177 (2006).

[47] *See* Kreimer, Strategy of Transparency at 1182-85. For a broader argument for the use of internal auditing mechanisms see Mariano-Florentino Cuellar, Auditing Executive Discretion, 82 **Notre Dame L. Rev.**. 227, 258-66 (2006).

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1.In the aftermath of September 11, INS Commissioner James Ziglar refused to acquiesce in wide ranging house to house sweeps for Muslim extremists. "The INS won't be involved," he is quoted as saying, "We do have this thing called the Constitution."[48] James Ziglar resigned a year later.

2. In December 2001, Jennifer Radack an attorney at the Department of Justice's Professional Responsibility Advisory Office advised the administration that John Walker Lindh could not be interrogated without respecting his constitutional rights. Her advice was ignored. In June 2002 when the administration publicly claimed that his rights had been respected, and attempted to destroy evidence of the prior advice, Ms. Radack leaked the information to the media. She was dismissed and subjected to a series of investigations and efforts to ruin her legal career.[49]

3. In March of 2002, Department of Justice Inspector General Glenn Fine initiated an investigation into the treatment of individuals detained in the roundups following September 11. The scathing report was issued a little of a year later.[50] The Department of Justice Inspector General's office continued to investigate GWOT abuses fairly and intensively over the next six years.[51] Its institutional integrity made the office a leading choice for legislation seeking to impose controls on GWOT abuses within the Department of Justice. Mr. Fine remains in is post as Inspector General.

4. In the fall of 2002 FBI Agent James T. Clemente sought to prevent illegal and abusive interrogation of prisoners at Guantanamo, filing critiques with his superiors and confronting

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[48]**Lichtblau, Bush's Law** 6; See id at 47-48 (detailing Ziglar's refusal to acquiesce in illegal detention).

[49]Jesselyn Radack, Whistleblowing in Washington, Reform Judaism Spring 2006, http://reformjudaismmag.org/Articles/index.cfm?id=1104 (describing decision to leak e-mails); *see* Radack v. U.S. Dep't of Justice, 402 F. Supp. 2d 99 (D.D.C. 2005); Michael Isikoff, The Lindh Case E-Mails: The Justice Department's Own Lawyers Have Raised QuestionsAbout the Government's Case Against the American Taliban, **Newsweek** June 24, 2002, at 8 (describing the e-mails).

[50]**Office of the Inspector General, U.S. Dept. Of Justice, The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges in Connection with the Investigation of the September 11 Attacks**, at 14 (2003),

[51]*E.g.* **Office of the Inspector General, U.S. Dept. Of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York** (2003); **Office of the Inspector General, U.S. Dept. Of Justice, Report to Congress on the Implementation of Section 1001 of the USA Patriot Act** (Mar. 2006); **Office of the Inspector General, U.S. Dept. Of Justice, Report to Congress on the Implementation of Section 1001 of the USA Patriot Act** (Mar. 2007); **Office of the Inspector General, U.S. Dept of Justice, A Review of the Federal Bureau of Investigation's Use of National Security Letters** (Mar. 2007).

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army interrogators in Guantanamo.[52] Agent Clemente is still employed with the FBI.

5. In late December 2002 and early 2003, David Brant, the head of the Navy's Criminal Investigation Division refused to participate in prisoner abuse at Guantanamo, commenting later that "We were going to do what [only] what was morally, ethically and legally permissible." He approached Navy General counsel Alberto Mora to complain unlawful abuse by other interrogators, using information had supplied in part by Michael Gelles, a NCIS psychologist who had penetrated a hard drive of the logs of Army interrogators. Mora repeatedly confronted his administration superiors, and ultimately moderated the abuse. Brant left government service in 2006; Mora and Gelles departed the same year. [53]

6. In the fall of 2003 Air Force Reserve Colonel Steven M. Kleinman refused an order to deploy techniques designed to recreate illegal abuse outlawed by the Geneva Conventions against detainees in Iraq.[54]

7.In December 2003 Navy JAG Lt. Commander Charles Swift refused directions to coerce Salim Hamdan, whom he was appointed to represent, into pleading guilty to violations of the law of war.[55] Commander Swift's tenacious advocacy ultimately resulted in the landmark decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Commander Swift was passed over for promotion and forced to leave the Navy shortly thereafter.

8. In January 2004, after Specialist Joseph Darby, revolted by the abuse he had observed on a video disc, submitted a complaint and the CD of Abu Ghraib pictures to a military investigator. Sgt. Darby has left the military, and he is reported to have been unable to return home for fear of retaliation.[56]

9. In March 2004 Major General Antonio Taguba was detailed to investigate the abuses at Abu Ghraib; he carried out his task with integrity, knowing that he had put his career at risk, filing a report detailing the which set forth both the "sadistic, blatant, and wanton" prisoner abuse by

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[52] **Mayer, The Dark Side** 204.

[53] *See* **Mayer, The Dark Side** 212-237, Jane Mayer, The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted, **New Yorker**, Feb. 27, 2006, at 32 ; Memorandum from Alberto J. Mora to Inspector General, Dep't of the Navy 9 (2004), available http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf

[54] **Mayer, The Dark Side** 246-48.

[55] *See* Testimony of Charles Swift, before the Senate Judicary Committee June 15, 2005 http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4361

[56] *See* CBS News, Exposing the Truth of Abu Ghraib June 24,2007 http://www.cbsnews.com/stories/2006/12/07/60minutes/printable2238188.shtml

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guards and apparent collusion and acquiescence by superiors.[57] In addition to Specialist Darby, General Taguba identified Master-at-Arms First Class William J. Kimbro who "refused to participate in improper interrogations despite significant pressure from the MI personnel at Abu Ghraib", and First Lieutenant David O. Sutton, who " took immediate action and stopped an abuse, then reported the incident to the chain of command.[58] General Taguba was asked to retire in 2006.[59]

11. In March 2004, Deputy Attorney General James B Comey famously confronted Alberto Gonzales and Andrew Card at the bedside of Attorney General Ashcroft over Mr. Comey's refusal to reauthorize the illegal Terrorist Surveillance Program.[60] He was instrumental in encouraging OLC head Jack Goldsmith to revoke the infamous Yoo/Bybee "torture memo," at what Mr. Comey and Mr. Goldsmith regarded as possible personal physical risk.[61] In April 2005 Mr. Comey left the Justice Department.

12. In May of 2004, as the Abu Ghraib story broke, transparency activists officially requested that William Leonard, Director of the Information Security Oversight Office investigate the classification of the Taguba report. Mr. Leonard, took the request seriously. According to one report, he "made a personal visit to the Defense Department to ask why [the report] had been classified," commenting, "On the surface, they gave the appearance that the classification was used to conceal violations of law which is specifically prohibited." In July 2004, Mr. Leonard publicly challenged the classification of portions of the Working Group report
authorizing coercive interrogation. Both reports were officially declassified, and military officials were admonished to eschew the use of classification to conceal violations of law.[62] Mr. Leonard retired in January 2008.

13. In September 2005, Army Captain Ian Fishback, after seeking for 17 months to report abuses of detainees in Iraq through his chain of command publicly spoke out about the abuse in a letter to Congress in support of anti-torture legislation. Captain Fishback commented "If we abandon

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[57] **Antonio M. Taguba, U.S. Dept of Def. Article 15-6 Investigation of the 800th Military Police Brigade** (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf

[58] *Id.; See* **Seymour M. Hersh, Chain of Command** 37(2004) (Describing MP captain who refused to accede to the the demands of military intelligence officers to engage in abusive interrogtion in the fall of 2003).

[59] Seymour M. Hersh, The General's Report, **New Yorker**, June 25, 2007, at 58

[60] *See* **Testimony of James B. Comey** May 15, 2007 before Senate Judiciary Committee.

[61] *See* **Mayer, The Dark Side**, 289-94, see also id 309-12.

[62] Kreimer, Strategy of Transparency at 1204-05.

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our ideals in the face of adversity and aggression then those ideals were never really in our possession."[63] Reports suggest that Capt. Fishback has been targeted for retaliation.

14. In the spring of 2006 CIA Deputy Inspector General Mary McCarthy who had filed reports decrying illegal interrogation techniques was impelled to turn to the press when she "was startled to hear what she considered an outright falsehood" in CIA presentations to Congress denying the use of abusive techniques[64]. She was dismissed from the CIA.

15. In June 2007 Reserve Lt. Colonel Stephen Abraham felt compelled to come forward to give evidence of the "fundamentally flawed" and unfair military tribunal process in which he had participated, evidence which was instrumental in inducing the Supreme Court to review the process.[65]

16. In spring 2008, Air Force Colonel Morris Davis, who served as Chief Prosecutor for the Office of Military Commissions resigned after being pressured to proceed with politically motivated prosecutions of Guantanamo detainees using the results of torture, and publicly repudiated the tribunals. [66]

A serious "rule of law audit" by the incoming administration will doubtless uncover many other examples. Once a fuller picture emerges of the individuals and institutions who have functioned with integrity under pressure, it will be important to begin to draw institutional lessons. As an initial step, however, individuals who are still members of the federal service should be given favorable consideration in promotion. For those who are no longer with the federal government, it seems advisable both to seek their input in future efforts to restore the rule of law, and to officially recognize their prior service. If the past administration can give the Medal of Freedom to officials who undercut the rule of law, the next administration can honor those who upheld it.

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[63]See Eric Schmitt, Officer Criticizes Detainee Abuse Inquiry **N.Y. Times** September 28, 2005, at A10; letter available at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/27/AR2005092701527.html .

[64]R. Jeffrey Smith, Fired Officer Believed CIA Lied to Congress; Friends Say McCarthy Learned of Denials About Detainees' Treatment, **Washington Post**, May 14, 2006, at A1.

[65]Reply to Opposition to Petition for Rehearing, at i, Declaration of Stephen Abraham, Al Odah v. United States, No. 06-1196 (U.S. June 22, 2007), available at http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf; William Glaberson, Military Insider Becomes Critic of Hearings at Guantanamo, **N.Y. Times**, July 23, 2007, at A1.

[66] William Glaberson, Ex-prosecutor Testifies on Guantánamo Politics, **International Herald Tribune** April 30, 2008 at 4.

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September 11, 2008

STATEMENT OF ALAN B. MORRISON
VISITING PROFESSOR, WASHINGTON COLLEGE OF LAW
AMERICAN UNIVERSITY

BEFORE THE SUCOMMITTEE ON THE CONSTITUTION OF
THE COMMITTEE ON THE JUDICARY
UNITED STATES SENATE

HEARING OF SEPTEMBER 16, 2008
ON
RESTORING THE RULE OF LAW

I appreciate the opportunity to submit these pre-hearing comments on the subject of "Restoring the Rule of Law" with particular focus on the United States Department of Justice. By way of brief background, I served as an Assistant United States Attorney in the Southern District of New York (1968-1972), and since that time I have litigated hundreds of cases in which the other side was represented by the Department of Justice, mainly with the Public Citizen Litigation Group, that I co-founded with Ralph Nader in 1972. I have also been a law professor, mainly on a part time basis, at Harvard, Stanford, New York University, and Hawaii Law Schools, where I have taught ethics and administrative law, among other subjects.

The first and foremost concern of both the incoming Administration and this Committee should be to insure that the next Attorney General is a superb lawyer who has the stature and frame of mind to be independent of the President. There is an argument that the President needs to have an Attorney General in whom he has complete trust, which often is code for someone whom the President knows well and who will follow the President's wishes. Whatever may be said for that model of Attorney General at some times in our history, given the last eight years, independence from the President should be

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the highest priority. This does not mean that the Attorney General must be of the opposite party or should be a critic of the President, but the Attorney General must be someone who understands that his or her highest duty is to the laws of the United States, including the Constitution, and that his or her client is the United States, not the person who happens to be occupying 1600 Pennsylvania Avenue at the time.

The Senate, and particularly this Committee, must play a significant part in ensuring that the next Attorney General heads a true "Justice" Department. The first and most important step that all Senators should take is NOT to take a position, for or against, any nominee before the hearings even begin. With no disrespect to any senator, past or present, but, for example, if a senior member of the Committee, who is not a member of the President's party, announces, before the nominee has been asked a single question, that the senator knows and supports him, it is very hard for others to bring the appropriate level of skepticism to the confirmation process. Moreover, advance endorsements also make it easier for a nominee to decline to answer questions, or give evasive answers, knowing that at least some Senators have already committed to voting for him or her. The temptation to support the nominee of a new President, especially one of the same political party, is hard to resist, but essential if the confirmation hearings for the next Attorney General are to be meaningful.

I have reviewed the testimony of Frederick A.O. Schwarz, Jr. of the Brennan Center given to the House Judiciary Committee on July 25, 2008, supporting the creation of an independent commission, in the Executive Branch, to investigate the many and well-documented (and often even admitted) violations of federal statutes and the Constitution by the prior Administration. I agree with the approach that he has proposed,

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and I offer only a few brief comments to underscore certain points and to make a few additional suggestions.

First, the commission must not be a congressional body, although Congress should direct its creation and assure that it has adequate funding and full access to information, including classified information, through subpoenas enforceable by the commission itself, if necessary. Members of Congress do not have the time and in some cases the expertise to undertake the kind of investigation that is needed. In addition, by placing the body within the Executive Branch, it will easier to deal with claims of national security and executive privilege, much as the 9/11 Commission was able to do. Moreover, while such a commission should have public hearings, most of its work should be done outside the glare of television cameras, which will be easier to do as an executive branch entity. Finally, although I am a strong supporter of the Federal Advisory Committee Act, the commission should be subject only to a few of its provisions, mainly those that do not establish a presumption of openness for all its deliberations. The final report must be made public, and the evidence that it gathers should be preserved for posterity, but all of it need not, and probably should not, be made public as soon as it is gathered or even when the final report is issued.

Second, "accountability" is a word with many different meanings, and to the extent that one goal of the commission is to determine whether serious criminal acts were covered up or simply not prosecuted by the prior Administration, I support that meaning of accountability. Thus, the commission should be directed to report any such violations to the new Attorney General promptly, and they should then be fully investigated by the Justice Department in accordance with standard prosecutorial procedures. But some

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people use accountability to mean that an assessment of personal blame should be attributed to individuals who committed acts that are inconsistent with the law. I fear that such a blame-assessing function would be very divisive, might be unfair to some named individuals, and would not help restore the proper constitutional balance. Although the commission should definitely express its views on whether violations of law have occurred and by what means, its mission should not be to name names as an alternative to bringing criminals to justice.

Third, there are a number of lawsuits in which persons who almost certainly were victims of torture and other illegal conduct have sued the United States and/or high officials, and in almost every case, claims of state secrets have been accepted by the courts and the claims were dismissed. The misuse of the state secrets privilege is already the subject of other proposed legislation, and it need not be a focus of the commission. But the commission should review the cases in which torture and other illegal conduct was alleged, identify the victims (including persons who are still being held as enemy combatants), and make recommendations for legislation as to what types of compensation, if any, and to what categories of persons it should be paid by the United States, as a form of damages and/or official apology and an effort to right past wrongs by our Government, even if the prior Administration chose to defend this conduct on grounds unrelated to the legal merits of what was done. Our Government has apologized and compensated to a small degree the Japanese who were interned during World War II; we can do something similar to those who were illegally detained and most badly mistreated by the prior Administration. The commission should be free to recommend no

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scheme of compensation, but it should be directed to deal with the issue and not avoid the question entirely.

Fourth, in my view, the most significant reason why legislative attempts to remedy what the current Administration has done have not been successful and/or will prove inadequate in the future is because many of the details of what was done have not been revealed to most (if not all) Members of Congress, let alone the public. If the Executive Branch keeps secret from lawmakers the specifics of what it did and how it did it, lawmakers are writing in the dark and are likely to be leaving gaping loopholes through which this or another Administration can go, and thereby evade the intent of the law, even as it complies with the law literally. Again, this does not mean that every detail should be made public, but it does mean that enough must be known by the commission and at least a significant number of Members of Congress in both Houses (and not limited to those on the Intelligence Committees) to be able to legislate intelligently.

In that connection one area that ought to concern all Americans has receive very little attention: what happened to all of the emails, voice mails, and telephone calls that were intercepted in the name of national security? Under the Federal Records Act, once records – and all of the intercepts that were examined for their contents are records under that Act – are under the control of a federal agency (including the CIA & the NSA), those records are supposed to kept and not destroyed, except in accordance with schedules or other approvals granted by the National Archives and Records Administration. Similarly, the Federal Privacy Act significantly limits the dissemination of records within the Executive Branch that identify individuals, but there is no public information about whether the intercepting agencies "shared" these records with other agencies, and, if so,

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with which ones and on what terms and conditions. This is an area where the public surely does have a right to know what has been done with these intercepted records, and Congress may well have to step in and legislate, once the facts are known.

There are, I am sure, many other tasks that Congress, a new Attorney General or such a commission could undertake. My statement should not be interpreted to mean that I do, or do not, support them. I have chosen to limit this statement to a few of what I consider the most important ways in which Congress should act to Restore the Rule of Law, in the hope that, by focusing my attention, I can catch the attention of the Subcommittee.

Thank you.

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Statement of Ralph Nader
September 16, 2008
Before the Constitution Subcommittee
of the Senate Judiciary Committee
on
"Restoring the Rule of Law"

Mr. Chairman and members of the Constitution Subcommittee of the Senate Judiciary Committee, thank you for the opportunity to submit testimony on the important and fundamental topic of "Restoring the Rule of Law" to the workings of the Executive Branch. I ask that this statement be made part of the printed hearing record and I commend you for taking the initiative to explore what steps the next President and the next Congress must take to repair the massive damage that President George W. Bush has done to the rule of law and our democracy.

When the President beats the drums of war, the dictatorial side of American politics begins to rear its ugly head. Forget democratic processes, Congressional and judicial restraints, media challenges, and the facts. All of that goes out the door. Dissenting Americans may hold rallies in the streets, but their voices are drowned out by the President speaking from the bully pulpit.

The invasion and occupation of Iraq, and the resulting quagmire, is Bush's most egregious foreign policy folly, but reflects a broader dynamic. Remember retired General Wesley Clark's stinging indictment of the administration: "President Bush plays politics with national security. Cowboy talk. The administration is a threat to domestic liberty."

President George W. Bush often uses the words and terms, "freedom," "liberty," and "our way of life" to mask his unbridled and largely unchallenged jingoism. The politics of fear sells. Cold war politics sold. The war on terrorism sells. But it's a very expensive sale for the American people. Even with the Soviet Union long gone, America's military budget amounts to half the operating federal budget. While vast resources and specialized skills are sucked into developing and producing redundant and exotic weapons of mass destruction, America's economy suffers and its infrastructure crumbles.

As the majority of workers fall behind, Bush has appointed himself ruler of Baghdad and, with the complicity of a fawning Congress, is draining billions of dollars away from rebuilding America's public works—schools, clinics, transit systems, and the rest of our crumbling

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infrastructure. How does Bush sell America on this diversion of funds and focus?

With the politics of fear at his back, President Bush and company openly tout the state of permanent war. There are no limits to their hubris. The same Bush regime that applies rigid cost-benefit analysis to deny overdue government health and safety standards for American consumers, workers, and the environment sends astronomical budgets to Congress for the war on stateless terrorism. Bush's own Office of Management and Budget throws its hands up and observes that the usual controls and restraints are nowhere in sight. The Government Accountability Office (GAO) deems the Pentagon budget to be unauditable. To appropriate runaway spending in the name of homeland security, the powers-that-be need only scream one word: Terrorism!

If you ask Bush Administration officials how much this effort will cost, they recite a convenient mantra: "whatever it takes to protect the American people." In fact, trillions of dollars annually would not suffice to fully secure our ports, endless border crossings by trucks and other vehicles, the rail system, petrochemical and nuclear plants, drinking water systems, shipments of toxic gases, dams, airports and airplanes, and so forth. So "whatever it takes" is actually a prescription for unlimited spending. Much of the war on terrorism involves domestic guards and snoops. The word "terrorism," endlessly repeated by the President and his associates, takes on an Orwellian quality as a mind-closer, a silencer, an invitation to Big Brother and Bigger Government to run roughshod over a free people.

A country with numerous and highly complex vulnerable targets cannot be fully secured against determined, suicidal, well-financed and equipped attackers. That obviously doesn't mean we shouldn't take prudent measures to reduce risks, but our allocation of funds must be made realistically, and we shouldn't just throwing money at the problem. And, our policies and expenditures must address the climate in which terrorism flourishes.

Then there's the great unmentionable. If you listen to President Bush, Vice President Cheney, and the other members of their cabal, well-financed suicidal al Qaeda cells are all over the country. If so, why haven't any of them struck since September 11? No politician dares to raise this issue, though it's on the minds of many puzzled Americans. As General Douglas McArthur advised in 1957, and General Wesley Clark did much more recently, it is legitimate to ask whether our government has exaggerated the risks facing us, especially when such exaggeration serves

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political purposes—stifling dissent, sending government largesse to corporate friends, deflecting attention from pressing domestic needs, and in concentrating more unaccountable power in the White House to pursue wars that provide a recruitment ground for more stateless terrorists.

George W. Bush willingly moves us toward a garrison state, through the politics of fear. We're experiencing a wave of militarism resulting in invasive domestic intelligence gathering and disinvestment in civilian economies. The tone of the President has become increasingly imperial and even un-American. As he once told his National Security Council, "I do not need to explain why I say things. That's the interesting thing about being the President . . . I don't feel like I owe anybody an explanation." The president has implied that he occupies his current role by virtue of divine providence. His messianic complex makes him as closed-minded as any president in history. Not only is he immune from self-doubt, but he fails to listen to the citizenry prior to making momentous decisions. In the months leading up to the invasion of Iraq on March 20, 2003, Bush didn't meet with a single major citizens' group opposed to the war. In the weeks leading up to the war, thirteen organizations— including clergy, veterans, former intelligence officials, labor, business, students—representing millions of Americans wrote Bush to request a meeting. He declined to meet with a single delegation of these patriotic Americans and didn't even answer their letters.

Bush's authoritarian tendencies preceded the march to Baghdad. First, he demanded an unconstitutional grant of authority from Congress in the form of an open-ended war resolution. Our King George doesn't lose sleep over constitutional nuance, especially when members of Congress willingly yield their authority to make war to an eager president. Next, Bush incessantly focused the public on the evils of Saddam Hussein (a U.S. ally from 1979–1990), specifically how his weapons of mass destruction and ties to al Queda posed a mortal threat to America. The Administration's voice was so loud and authoritative, and the media so compliant, that all other voices—of challenge, correction, and dissent—were overwhelmed. And so Bush plunged the nation into war based on fabrications and deceptions, notwithstanding notes of caution and disagreement from inside the Pentagon, the CIA, and the State Department. This was a war launched by chicken hawks, counter to the best judgment of battle-tested army officers inside and outside the government.

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In retrospect, it is clear that there were no weapons of mass destruction except those possessed by the invading countries. It also seems clear that Saddam Hussein was a tottering dictator "supported" by a dilapidated army unwilling to fight for him and surrounded by far more powerful hostile nations (Israel, Iran, and Turkey). The notion that this man posed a mortal threat to the strongest nation in the world fails the laugh test. Bush's dishonest and disastrous maneuvers to take our country to war meets the threshold for invoking impeachment proceedings under Article II, Section 4 of the Constitution.

Some brave Americans did speak out against the war, or at least expressed grave reservations. The media were mostly cheerleaders—uncritical of the leader, dismissive of dissenters, indifferent to their obligation to search for truth and hold officialdom's feet to the fire.

The legal profession, except for a handful of law professors and law school deans and Michael S. Greco, a past President of the American Bar Association, provided very little organized resistance to the Bush war. The situation was even worse within government.

The system of checks and balances requires three vigilant branches, but Congress has disgraced itself from virtually the beginning of the Bush administration, assisting an extraordinary shift of power to the executive branch. In October 2001, a panicked Congress passed the Patriot Act, without proper Congressional hearings, giving the Bush administration unprecedented powers over individuals suspected (and in some cases not even suspected) of crimes. Subsequently, Congress gave the President a virtual blank check to wage a costly war.

In these respects, and others, the war on terrorism has important parallels to the Cold War. Domestically, the latter was characterized by relentless focus on a bipolar world largely dictated by the iron triangle of giant defense companies, Congress, and the military leadership, mutually reinforced with campaign contributions, lucrative contracts, new weaponry, and bureaucratic positions. A foreign policy responsive to the iron triangle produced some perverse results. The United States overthrew any number of governments viewed as too congenial to similar reforms that our own ancestors fought for—land reform, workers rights, and neutrality toward foreign countries. We replaced such governments with brutal puppet regimes. We also used our armed forces to protect the interests of the oil, timber, mining, and agribusiness industries.

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Indeed, such policies long preceded the Cold War. No one articulated it more clearly or candidly than Marine General Smedley Butler, whose provocative eyewitness accounts rarely made their way into our history books:

> I spent 33 years in the Marines, most of my time being a high-class muscle man for big business, for Wall Street and the bankers. In short, I was a racketeer for Capitalism. I helped make Mexico, especially Tampico, safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefit of Wall Street. The record of racketeering is long. I helped purify Nicaragua for the international banking house of Brown Brothers in 1909–1912. I brought light to the Dominican Republic for American Sugar interests in 1916. In China I helped to see to it that Standard Oil went its way unmolested.

"War is a racket," Butler wrote, noting that it tends to enrich a select few. Not the ones on the front lines. "How many of the war millionaires shouldered a rifle?" he asked rhetorically. "How many of them dug a trench?"

Butler devoted a chapter of his long-ignored book, *War Is a Racket*, to naming corporate profiteers. He also recounted the propaganda used to shame young men into joining the armed forces, noting that war propagandists stopped at nothing: "even God was brought into it." The net result? "Newly placed gravestones. Mangled bodies. Shattered minds. Broken hearts and homes. - Economic instability."

Does this all sound familiar? The September 11 attack gave rise to a corporate profiteering spree, including a demand for subsidies, bailouts, waivers from regulators, tort immunity, and other evasions of responsibility. Before the bodies were even recovered from the ruins of the World Trade Center, the Wall Street Journal was editorializing that its corporate patrons should seize the moment.

Foreign policy amounts to more than national defense, and national defense amounts to more than a mega-business opportunity for weapons and other contractors. All too often, corporate sales priorities have driven defense priorities, leading to militarization of foreign policy.

Consider the 1990's "peace and prosperity" decade, possibly the greatest blown opportunity of the twentieth century. In 1990, the Soviet Union collapsed in a bloodless implosion. Suddenly, we faced the prospect of an enormous "peace dividend," an opportunity for massive savings or newly directed expenditures since the main reason for our exorbitant military budget had

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disappeared. Not so fast, said the military-industrial complex, there must be another major enemy out there—maybe Communist China, or a resurgent Russia, or some emerging nation developing nuclear weapons. We allegedly needed to prepare for the unknown, hence went full-speed ahead with tens of billions for missile defense technology, considered unworkable by leading physicists.

In the battle for budget allocations, what chance did the "repair America" brigades have against the military-industrial complex? More B-2 bombers or repaired schools? F-22s or expansion of modern health clinics? More nuclear submarines or upgraded drinking water systems? We know who won those battles. And after 9/11, it was no contest.

As the perceived threat shifted from the Soviet Union to stateless terrorism, the weapons systems in the pipeline from the Cold War days moved toward procurement. On top of that is the chemical, biological, surveillance, detection, and intelligence budgets to deal with the al Qaeda menace. Everything is added, almost nothing displaced. We are constantly told by politicians and the anti-terrorist industry that 9/11 "changed everything."

This sentiment suggests the lack of proportionality of our new permanent war. It's also a sentiment that must make Osama bin Laden ecstatic. Bin Laden wanted to strike fear in America. He did so, and then watched as the first response to this fear was a sweeping crackdown on people with a Muslim or Arab name or visage. Thousands were detained or arrested or jailed on the flimsiest of suspicions, opening the Bush administration up to the charge of hypocrisy when we challenge Islamic nations about due process violations. All of this created more contempt for America among young people throughout the Middle East, no doubt helping the recruiting efforts of our enemies.

Bin Laden must have delighted in attempting to push America toward becoming a police state and sowing discord among us. He must have been thrilled by red and orange alerts, inconvenience at airports, and all kinds of excessive expenditures damaging our economy. And bin Laden must have taken perverse delight in press reports that Bush believes he was put on this earth by God to win the war on terrorism. If he wished to inspire a clash of civilizations, he apparently found a willing collaborator in Bush, who invaded Iraq, prompting Bush's retired anti-terrorism expert Richard A. Clarke to write in his book, *Against All Enemies*, that by invading and occupying Iraq, "We delivered to al Qaeda the greatest recruitment propaganda imaginable..."

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Bin Laden must have been very pleased to hear the news about Bush's war of "shock and awe".

As all this suggests, America's response to 9/11 was not only disproportionate but also counterproductive. A Washington think-tank fellow said something sensible: "When you are fighting terrorism, you want to do it in a way that does not produce more of it." Are we doing that? Terrorism takes many forms, as in the Sudan, as in the Rwanda rampage that claimed 800,000 lives, the state terrorism of dictators, the added terrorism of hunger, disease, sex slavery, and man-made environmental disasters. With no major state enemy left, what can we do to prevent and diminish these various forms of terrorism, as well as deter more suicidal attacks from fundamentalists? Perhaps we need to redefine national security, redirect our mission, reconsider our relations with other countries.

All in all, the failures of Congress and the judiciary to reign in an out-of-control Executive Branch significantly contributed to the erosion of the "rule of law." And, working to restore the "rule of law" will require Congress to embrace its duties as a co-equal branch of government.

Throughout our nation's history, we have witnessed sacrifices in civil liberties that went too far. We should not get swept away by rhetoric and exaggerations suggesting that the current threat is greater than those we faced before -- rhetoric routinely employed throughout history to justify curtailment of civil liberties.

The "war on terrorism" does present one new aspect. Unlike all of the nation's previous wars (with the partial exception of the Cold War), it is "limitless in duration and place," which has major ramifications for our civil liberties. In the past, the arguably extra-constitutional powers assumed by government in war-time (such as the suspension of habeas corpus during the Civil War and the internment of the Japanese during World War II) were understood as temporary measures, with a return to the status quo ante expected as soon as hostilities ceased. The same cannot be said about our current concern with terrorism.

In the absence of a time when we clearly revert from war back to peace and reclaim our usual civil liberties, we need to be particularly careful about the "temporary" surrender of these rights. Inertia is a potent force and we run the risk of forfeiting liberties we never reclaim, especially when fighting a war that may never end. This may be a good reason to drop the nomenclature "war on terrorism." It's certainly good reason to sunset laws that compromise civil liberties.

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Here, as so often, we can learn from the founders. The nation's first law that dangerously curtailed civil liberties, the infamous Sedition Act in late 1799, lasted only a few years. Contrary to the conventional wisdom, it was not repealed by Thomas Jefferson's Democrat-Republican Party after he and it came to power in 1801. They didn't have to take action: the act was, by its own terms, to expire after two years unless reauthorized.

In a similar vein, Congress should attach to each law that materially diminishes our freedoms an automatic expiration in two or four years unless, after the designated period, Congress determines that the act: 1) achieved enough in terms of security to justify its diminution of our freedom, and 2) remains necessary. Similarly, civil liberties-diminishing executive orders should automatically expire unless renewed by the president or through legislative enactment. Holding Congress accountable for the ongoing suspension of civil liberties is indispensable for preventing abuses.

Yale Law professor Bruce Ackerman recently devoted a book to essentially a single proposition: the need for a mechanism to ensure that, following any major terrorist attack, responsive measures that limit civil liberties be temporary. (Ackerman terms his proposal an "emergency Constitution," but it is actually a statutory approach requiring no constitutional amendments.) Ackerman proposes many specifics - for example, that all emergency powers subside after two months, and every reauthorization require a higher degree of congressional support (60% the first time, 70% the next time, and so forth), but the specifics are less important than the insight that animates it: liberties taken in times of crisis will not necessarily be returned after the crisis subsides. Government officials may be sanguine about retaining powers seized during a national emergency, and, regrettably, the American people may become accustomed to diminished liberty.

Courts provide a degree of protection, but Ackerman emphasizes the courts' dangerous tendency to lump all wars together and allow precedents derived from earlier wars to dictate decisions in very different circumstances. Thus emergency measures enacted for a major threatening war like World War II are invoked as justification for sweeping governmental powers during far more limited engagements. Not all wars are created equal, and Ackerman argues that the war on terrorism does not pose a threat to America's existence like the Civil War. The biggest

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difference between the battle against terrorism and other major engagements is not the nature of the threat as much as its duration (although, again, the Cold War suggests that this, too, is not unprecedented). Ackerman rightly emphasizes this point. Because the present state of hostilities could last decades, it is imperative that we not casually accept all curtailments of liberty enacted in its name.

As the experience with the U.S.A. Patriot Act suggests, an attack on the United States sets in motion irresistible pressure for immediate action. The U.S.A. Patriot Act permits federal agents to search our homes and businesses without even notifying us, simply by asking a court for a warrant -- a court that almost never says no. It permits the government to find out from libraries and bookstores what we've been reading and prohibits the librarian or store owner from telling us about the snooping. The Act permits government to listen in on conversations between lawyers and their clients in federal prisons, and to access our computer records, e-mails, medical files, and financial information on what is essentially an enforcement whim. It eviscerates the great constitutional restraint called "probable cause." Without probable cause, government agents can covertly attend and monitor public meetings, including at places of worship.

The enhanced government powers were not narrowly tailored to prevention of terrorist attacks. Rather, as Professors Laurence Tribe and Patrick Gudridge observed, under the guise of preventing another 9/11, Congress took action affecting "the most commonplace bureaucratic and policing decisions . . . not only at obvious focal points of precaution like airports but also at other, seemingly unconnected institutions such as public libraries," expanding government power "in the everyday settings of general police procedures and criminal prosecutions of defendants charged with strictly domestic crimes." We witnessed, in their apt phrase, the "bleeding of emergency into non-emergency, of extraordinary into ordinary."

Note that Bruce Ackerman's "emergency Constitution" does not prevent the President and Congress from responding fully to the initial attack and doing whatever is necessary to ward off subsequent attacks. To the contrary, it clarifies and codifies the emergency powers needed to achieve these goals. But, critically, it also clarifies and codifies that such a response will not permanently curtail civil liberties.

During periods of relative calm, it is hard to realize what may transpire when times cease to

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be calm. We need to remember that President Roosevelt herded the Japanese Americans into camps during World War II. Ackerman rightly asks us to consider whether we can be certain that millions of Arab Americans won't be interned if Muslim extremists strike us again. Of course, any preexisting restraints may be swept aside in the post-attack environment, but that is no reason not to do everything we can to put the breaks on future over-reaction now, while things are relatively calm. Ackerman reminds us that we needn't choose between giving presidents the authority to handle emergencies and safeguarding civil liberties during normal periods. We can and must do both.

Three days after the terrorist attacks on September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), permitting the President to "use all necessary and appropriate forces against those nations, organizations or persons he determined planned, authorized, committed or aided the terrorist attacks of 9/11, or harbored such organizations, or persons." At that point, the Bush administration and Congress did not know which nations played a role in assisting those who attacked us. The U.S. government just wanted to do whatever was necessary to punish the perpetrators of the attacks.

The most open-ended terms in AUMF, "appropriate" and "aided," present an obvious risk. What about nations that may have provided minimal aid to bin Laden? At one point or another, at least a dozen nations may have given safe haven to him or members of his organization - out of indifference, inertia, or domestic political calculation, not to help him launch an assault on America. Such assistance may be something for us to protest and actively discourage in the future, and there are numerous diplomatic and economic means for doing so, but AUMF appears to authorize the President to wage all-out war against any such nations if he elastically interprets the phrase "aided the terrorist attacks of 9/11."

We needn't speculate that a president might interpret the authorization elastically. Under the guise of using necessary and appropriate force against persons and organizations that may have played some role in the attack, the Bush administration engaged in extensive eavesdropping on telephone calls by and to American citizens. Such surveillance may be necessary to help capture terrorists or thwart specific attacks, but the Foreign Intelligence Surveillance Act (FISA) already exists for that purpose and FISA courts have been overwhelmingly compliant with requests for

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warrants to wiretap. Under the guise of AUMF's authorization of "necessary and appropriate force" to fight those involved in the 9/11 attack, the administration ignored FISA's requirement of a warrant, which is a felony under FISA's terms.

Can AUMF reasonably be read to trump FISA? Conservative columnist George Will notes that "[n]one of the 518 legislators who voted for the AUMF has said that he or she then thought that it contained the permissiveness the administration now discerns in it." The argument that it nevertheless trumps FISA, observes Will, is "risible coming from [an] administration" that purports to demand strict construction of statutes to ensure conformity to legislative intent.

The Bush Administration also cited a second legal basis for the eavesdropping program: the President's inherent war-making authority under Article II of the Constitution. On this interpretation, surveillance required no Congressional authorization.

The dangers of this monarchical doctrine, and its disregard for separation of powers, are too obvious to belabor. Congress should not assist the executive in a power-grab by providing additional war-making weapons that amount to a blank check. Admittedly, it is hard to thwart a president hell-bent on expanding executive powers and willing to mangle the Constitution in the process. George Will jokingly proposes that when Congress passes laws authorizing executive power, it should "stipulate all the statutes and constitutional understandings that it does not intend the act to repeal or supersede." A more realistic approach is for Congress to accompany its grant of power with a straightforward stipulation that it is "subject to the limitations of existing law." Moreover, Congress should accompany such legislation with a definitive procedure for consultation on whatever war-related powers the executive chooses to exercise. In fact, Congress should never authorize the president to use all "necessary and appropriate force" without a declaration of war.

The notion that the Administration was listening to whatever conversations it wanted without any need to show any basis for suspicion, and would happily have done so indefinitely (the American people and most members of Congress were unaware of the surveillance program until it leaked), because years earlier Congress authorized use of "necessary and appropriate force" against those who assisted a terrorist attack - this notion vividly illustrates the dangers of an open-ended authorization of force. Permitting the Executive Branch exclusive power to define its

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own authority virtually guarantees the supplanting of the rule of law by the rule of men. That this may happen in practice, with the executive branch ignoring or circumventing legal restraints, is no excuse for Congress to create the monster itself.

Vice President Cheney suggested that surveillance is solely a means of keeping tabs on known terrorists, not a matter of eavesdropping on ordinary Americans for no reason. This view would allow the government to employ surveillance against anyone about whom it has some suspicion, however remote. A more alarming peril is that surveillance will be used as part of a campaign to discredit, harass or intimidate political opponents. This possibility is just the kind of abuse the founding fathers saw the Fourth Amendment as safeguarding against.

The 1763 British case of Wilkes v. Wood is worth noting. John Wilkes was a popular member of Parliament who authored an anonymous pamphlet attacking the King. The ministry proceeded to break into Wilkes' house and seize his private papers. It also rounded up many of his friends as well as the publishers and printers of the offending pamphlet. The Fourth Amendment's protection against unreasonable searches and seizures represented a response to such politically-motivated abuse of power.

If the founders saw the need for protection against this sort of thing, history vindicated their judgment. Richard Nixon notoriously ordered illegal wire-tapping of political groups and persons whom he considered hostile, and his administration wasn't the first. It was a Democratic attorney general under Democratic presidents who engaged in illegal surveillance of Dr. Martin Luther King. Of course, Nixon, John and Robert Kennedy, and J. Edgar Hoover did not see themselves as engaged in unjustified, undemocratic behavior. Rather, people in power tend to rationalize such misconduct, convincing themselves that their opponents are actually disloyal and dangerous to America. In other words, the risk is not that an administration will decide it wants to hear innocent conversations between citizens, but rather the conversations of certain political adversaries. On the flimsiest or most attenuated evidence, officials may convince themselves that such persons present a threat to the nation.

Moreover, as the framers well understood, the power to search, seize, and harass tends to be exercised by government officials below the public's radar. Legal scholar John Hart Ely notes that the Fourth Amendment was motivated by "a fear of official discretion," a recognition that in

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exercising powers over individuals based on suspicion, "law enforcement officials will necessarily have a good deal of low visibility discretion."

This observation suggests the fallacy of those who minimize concern about civil liberties and offer reassurance that only phone calls involving terrorists will be monitored. That might be the case if all relevant decisions were made by accountable officials, but the reality on the ground is often different. Some of the worst abuses of civil liberties will inevitably result from the clandestine actions of unaccountable, lower-level officials. They mustn't be supplied with the means unnecessarily.

Nor must we acquiesce in the intuition of many innocent laypeople, stoked by politicians' rhetoric, that those who obey the law have nothing to fear. Again, as the founders well understood, the world isn't neatly divided between innocent citizens and Osama bin Laden, with the government interested in using surveillance solely to disrupt the latter. In our much messier world, vigilance against governmental abuse should not be swept aside by naïve or disingenuous rhetoric.

In the discourse on the tradeoff between freedom and security, "patriotism" has been hijacked by those most willing to sacrifice civil liberties. Samuel Johnson famously considered patriotism "the last refuge of a scoundrel" but his biographer Boswell, who passed along that judgment, added that Johnson "did not mean a real and generous love of our country, but that pretended patriotism which so many, in all ages and countries, have made a cloak of self-interest." If patriotism is the love of country, then making one's country more lovely is the mark of a true patriot. Blind obedience fails to help a country fulfill its promise.

When Congress moved hastily in the aftermath of the 9/11 attacks to take measures enhancing security, without carefully considering the dangers of over-reacting and over-curtailing civil liberties, it cleverly titled its legislation the "U.S.A. Patriot Act." Talk about seizing the rhetorical high ground! But Senator Feingold, the sole Senator to oppose the Act (because he saw certain provisions, among others, as needlessly authorizing the invasion of innocent citizens' privacy), was no less patriotic than his peers. To the contrary, Senator Feingold acted in a great American tradition.

Thomas Jefferson was a far-sighted founder who understood the value of political dissent.

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While sharing his fellow founders' instinctive aversion to political parties (he allegedly remarked that if "I could not go to heaven but with a party, I would not go there at all"), he nevertheless inspired and led the first opposition party. That party came to power in 1800 in large part because Jefferson appreciated that criticism of the government must be tolerated - indeed, welcomed. The Sedition Act, employed by the Adams administration to punish dissent, reminds us that war fever tends to produce a crackdown on freedom. But it also reminds us that the framers, subject to the same frailties as their successors, were wise enough to provide protection against those frailties. Jefferson and his political allies opposed the Act because it ran afoul of the spirit and letter of the Constitution.

The affronts to the rule of law can come in a variety of forms. Congress allowed President Bush to mislead Congress and to engage in an undeclared war. In a September 3, 2007 oped which appeared in the Los Angeles Times, Mario M. Cuomo, the former governor of New York wrote:

> The war happened because when Bush first indicated his intention to go to war against Iraq, Congress refused to insist on enforcement of Article I, Section 8 of the Constitution. For more than 200 years, this article has spelled out that Congress -- not the president -- shall have "the power to declare war." Because the Constitution cannot be amended by persistent evasion, this constitutional mandate was not erased by the actions of timid Congresses since World War II that allowed eager presidents to start wars in Vietnam and elsewhere without a "declaration" by Congress.
>
> Nor were the feeble, post-factum congressional resolutions of support of the Iraq invasion -- in 2001 and 2002 -- adequate substitutes for the formal declaration of war demanded by the founding fathers.

The Bush Administration sanctioned warrantless wiretapping, and supported wide-ranging violations of privacy. The use of torture, unconstitutional detention policies, suspension of habeas corpus, and immunity for illegal wiretapping by telephone companies, have all brought shame on our country.

And, the Bush Administration's questionable claims of executive privilege and the presumption that excessive government secrecy is almost always justifiable and beneficial undermine our country's moral authority to promote democracy. In testimony in July of this year before the Judiciary Committee of the House of Representatives, former Member of Congress

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Bob Barr said that the "state secret privilege" should "be treated as qualified, not absolute." He added, "Congress could assist the judiciary by holding hearings and drafting legislation clarifying the authority of judges, procedures to be used to adjudicate executive claims of state secrecy, and sanctions to be imposed for the executive branch's refusal to comply." This small, but consequential suggestion, if followed, would do much to avoid the misdeeds that can proliferate when transparency is obscured.

The Bush Administration's attempt to increase the power of the Executive Branch at the expense of Congress through signing statements even prompted the reserved American Bar Association to adopt a resolution opposing this overreaching abuse. The resolution states:

> That the American Bar Association opposes as contrary to the rule of law and our Constitutional system of separation of powers, the misuse of presidential signing statements by claiming the authority or stating the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress...

Much of what has been done by the Bush Administration to undermine the rule of law can best be remedied by Congressional action. The next President can, however, start to immediately right the egregious wrongs of the Bush Administration by issuing appropriate Executive Orders to clarify government policies on issues such as torture and abuses of civil liberties.

Let me conclude by saying Congress has been far too docile in dealing with the Bush Administration's corruption of the rule of law. Indeed, Congress has also been derelict in its duties by resisting consideration of impeachment proceedings.

Prominent Constitutional law experts believe President Bush has engaged in at least five categories of repeated, defiant "high crimes and misdemeanors", which separately or together would allow Congress to subject the President to impeachment under Article II, Section 4 of the Constitution. The sworn oath of members of Congress is to uphold the Constitution. Failure of the members of Congress to pursue impeachment of President Bush is an affront to the founding fathers, the Constitution, and the people of the United States.

In July of this year Elizabeth Holtzman, a former Member of Congress, testified before the House Judiciary Committee. In her testimony she made a compelling case for impeachment. She said:

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But sad as the responsibility to deal with impeachment is, it cannot be shrugged off. The framers put the power to hold presidents accountable in your hands. Our framers knew that unlimited power presented the greatest danger to our liberties, and that is why they added the power of impeachment to the constitution. They envisioned that there would be presidents who would seriously abuse the power of their office and put themselves above the rule of law. And they knew there had to be a way to protect against them, aside from waiting for them to leave office.

Her advice to the Committee on the Judiciary of the House of Representatives merits consideration by the House of Representatives, even at this late date. Ms. Holtzman said:

> I understand the great time constraints and the virtual impossibility of completing a full-blown impeachment inquiry before this session of Congress is over. Nonetheless, there are compelling, pragmatic reasons--as well as a constitutional imperative--to commence an inquiry now, and pursue it in a meaningful and, constructive way over the few remaining months.
>
> Even if an impeachment inquiry is not completed or does not result in an impeachment vote in the House or the Committee, it still should be undertaken. It is warranted and since impeachment inquiries cannot be evaded by citing executive privilege, initiating an inquiry now would accomplish several valuable purposes:
>
> a) It would send a clear message to the American people and future presidents that the actions engaged in by top Administration officials are serious enough on their face to warrant an impeachment inquiry. It would create a precedent whereby executive privilege does not effectively vitiate a president's accountability to Congress, as this Administration has sought to do. This would create a deterrent to future administrations. So would the historic nature of impeachment. Opening an impeachment inquiry would put this Administration in a very small category along with only three others in US history that have been the subject of such an inquiry.
>
> b) Because there is no executive privilege in an impeachment inquiry, [pursuing] one would allow the Committee to obtain additional material on presidential and vice presidential conduct which the Administration has until now refused to provide. That material would disclose the details about Administration actions that are currently secret. Those details would better inform Congress about what the appropriate response to this Administration's actions should be. They would also better inform it about how to avert abuses of power by future presidents. That in itself would be an important outcome of new disclosures. Alternatively, if the Administration still refuses to provide the information and documents requested as part of an impeachment inquiry, that refusal would itself be an impeachable offense under the precedent established in the Nixon proceedings, with the bi-partisan adoption of the third article of impeachment holding that the refusal to respond to

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committee subpoenas in an impeachment proceeding was an impeachable offense; and

c) It would allow a serious, sober and respectful discussion, in the appropriate and constitutionally mandated forum, of whether or not specific Administration officials committed impeachable offenses. The discussion would include a full and fair airing of evidence and argument on both sides, both allegations and defenses. As I understand it, such a discussion cannot be fully and satisfactorily conducted under House rules without a real impeachment inquiry.

One of the best ways for Congress to prevent future administrations from trampling the Constitution and the rule of law is to use the impeachment powers when necessary. The Bush Administration's criminal war of aggression in Iraq, in violation of our constitution, statutes and treaties, the arrests of thousands of individuals in the United States and their imprisonment without charges, the spying on Americans without judicial warrant, systematic torture, and the unprecedented use of defiant signing statements should prompt Congress to act immediately after the Presidential elections, when it has more than seventy-five days before the inauguration of the next President.

Let us hope that we have all learned lessons from the overreaching of the Bush Administration that will serve to prevent future destructions of the rule of law – the essence of a just and orderly society.

Thank you.

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Testimony of
Linda Gustitus, President, and Rev. Richard Killmer, Executive Director,
National Religious Campaign Against Torture,
Before the
Senate Judiciary Committee
Subcommittee on The Constitution
Hearing on Restoring the Rule of Law
September 16, 2008

Mr. Chairman, Members of the Subcommittee, thank you for this opportunity to submit testimony on behalf of the National Religious Campaign Against Torture (NRCAT). One of the most important tasks at hand for the new President and Congress following the November election is to demonstrate dramatically, effectively, and immediately to the American people and the world at large that the United States reaffirms its commitment to the rule of law, to our international treaty obligations, and to our most basic moral principles. Our testimony to you today concerns the issue of torture, more specifically, the policy and practices of torture and cruel, inhuman or degrading treatment by the United States with respect to detainees in its counter-terrorism efforts since 9-11.

Let us first introduce our organization. The National Religious Campaign Against Torture is a coalition of religious organizations joined together to ensure that the United States does not engage in torture or cruel, inhuman or degrading treatment of anyone, without exception. Since its formation in January 2006, over 230 religious organizations have joined NRCAT, including representatives from the Catholic, Protestant, Orthodox Christian, evangelical Christian, Buddhist, Hindu, Quaker, Unitarian, Jewish, Muslim, and Sikh communities. NRCAT member organizations

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include denominations and faith groups, national religious organizations, regional religious organizations, and congregations.

NRCAT's goal is to stop -- without exception -- all U.S.-sponsored torture and cruel, inhuman and degrading treatment of detainees. To accomplish this goal we seek to:

- end the CIA "enhanced interrogation techniques" program;
- close secret prisons;
- allow the International Committee of the Red Cross timely access to all detainees;
- end the use of rendition for torture;
- prohibit the use of evidence obtained by torture;
- investigate and make public the full account of the use of torture and cruel, inhuman or degrading treatment by the United States.

We believe that torture violates the basic dignity of the human person that all religions, in their highest ideals, hold dear; that it degrades everyone involved -- policy-makers, perpetrators, and victims; and that it contradicts our nation's most cherished values. We believe that nothing less than the soul of our nation is at stake in our decisions and actions with respect to the use of torture.

As you already know, the universally recognized definition of torture is in the United Nations Convention Against Torture and Cruel, Inhuman or Degrading Treatment adopted by the U.N. General Assembly in 1984, signed by the United States in 1988 and

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ratified by the United States in 1994. It defines torture as any act by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Torture and ill treatment are also prohibited by the Geneva Conventions -- the treaties that set international standards for humanitarian concerns. In fact, torture has special status in international law. Like genocide and slavery, under the principle of *jus cogens,* the prohibition against torture is binding on all countries -- whether or not they ratify the conventions -- and the prohibition cannot be overruled by any other law, custom or circumstance. Under international law every act of torture is a crime -- there are no exceptions.

Yet human rights organizations have documented as of 2006 hundreds of cases in which U.S. military and civilian personnel are credibly alleged to have abused, tortured, or killed detainees in the war against terrorism. In at least eight of these cases, it is likely the detainees were literally tortured to death. And these are just the cases that the human rights community knows about. There are undoubtedly many others.

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We have also heard numerous detailed accounts of torture from persons who have been released from U.S. detention facilities and from attorneys for persons still detained -- Maher Arar, Khalid el Masri, and Murat Kurnaz, to name a few. And the CIA itself has publicly admitted to at least three cases where it used waterboarding -- a well-known form of torture going back to the Spanish Inquisition and for which we have prosecuted both Japanese and our own soldiers in years past. We also know of numerous cases in which the CIA has used stress positions, sleep deprivation, exposure to severe cold temperatures, slapping, and refusal of pain medication on detainees.

There is no question but that the use of torture and cruel, inhuman or degrading treatment-- President Bush and Administration officials call it "enhanced interrogation techniques" -- has been and apparently continues to be an approved policy by the United States.

The purpose of our testimony here today, however, is not to prove that torture has been a policy of the United States. There are other persons and organizations more expert than ours to provide that information. We refer you, for one, to the recently published book by Jane Mayer, "The Dark Side" -- which is an excellent exposition on the subject. And we are confident you know much of this already. We are here, today, instead, to speak about what steps we think the next President and the next Congress should take to reverse this heinous policy. We have several recommendations.

First, we believe it is imperative for the next President -- as quickly as possible upon taking office -- to issue an Executive Order banning torture and cruel, inhuman or

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degrading treatment and terminating any program or policy that would suggest otherwise. Specifically, NRCAT has joined with two other nonprofit organizations, the Center for Victims of Torture (CVT) and Evangelicals for Human Rights (EHR) in drafting six principles that we believe should be embodied in such an Executive Order. We call it the "Declaration of Principles for a Presidential Executive Order On Prisoner Treatment, Torture and Cruelty."

The Declaration, a copy of which we have attached to our statement, has been endorsed by hundreds of distinguished leaders in the fields of national security, foreign policy, and faith. A list of those endorsers is also attached to our statement. We have also received thousands of endorsements from individuals and organizations across the country and are in the process of securing more. Mr. Chairman, we believe the issuance of an Executive Order by the next President banning torture and cruel, inhuman or degrading treatment and undoing all the elements through which these practices have been carried out is the single most important step our government can take to definitively and transparently change our policy on torture. Anyone interested in joining us in this effort by endorsing the Declaration can go to our website, www.tortureisamoralissue.org.

Second, we believe it is critical for Congress to establish a Select Committee to investigate our country's torture policy and practices these past seven years. The United States' decision to engage in torture and cruel, inhuman or degrading treatment and our country's actions based on that decision are not only a dramatic departure from our history and our values, but also violate U.S and international law. The American people

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need to know -- and deserve to know -- how, when, and why this happened, the scope of the wrongdoing, the number of people involved -- both victim and perpetrator, and who is responsible and accountable for what happened. Uncovering and making public this information is the only hope we have to make sure that we never again allow the use of torture or cruel, inhuman or degrading treatment on behalf of the United States. Without such an investigation, historians will be left to guess at the complete story. There will be no accountability and little likelihood for lessons learned and reform. We believe a Select Committee is the best way to carry out this investigation, because it is the most immediate, has enforceable subpoena authority, and directly engages the Members of Congress who are the ones -- at the end of the day -- who must make the decisions on any proposed legislation that may result from the investigation. We, along with several human rights organizations, sent a letter several months ago to the Democratic and Republican leadership of the House and Senate urging the creation of such a Select Committee, and a copy of that letter is attached to this statement.

Third, Mr. Chairman, we strongly support legislation that would address the key elements of the torture program. This includes legislation that would:

- close all secret prisons and give the International Committee of the Red Cross timely access to all detainees;
- require the Central Intelligence Agency to use the same standards for interrogation that are used by the military, resulting in one clear standard for interrogations all agencies of the federal government;

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- prohibit the transfer of any detainee to any country that is likely to use torture or for the purpose of subjecting the detainee to torture or cruel, inhuman or degrading treatment; and
- provide an ironclad prohibition on the use of evidence obtained by torture in any hearing conducted by any agency of the federal government for any purpose.

Mr. Chairman, Members of the Committee, the National Religious Campaign Against Torture believes strongly that the United States should do everything it can -- within the law and within the moral foundation of this country -- to defeat terrorism. We support that mission wholeheartedly. We do not believe, as Vice President Cheney said shortly after 9/11 that we need to go to the "dark side" to do it. The United States has from its inception tried to live up to the vision of its role in this world as the "shining city on the hill." Our light has been dimmed by the destructive, counterproductive, immoral policy of torture. We need to clearly, strongly, irreversibly and emphatically end torture and thoroughly investigate and make public what we have done. Your hearing today is a very important effort toward doing that, and we thank you for the opportunity to contribute our views.

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Statement of Meredith Fuchs
General Counsel, National Security Archive
To the Constitution Subcommittee of the
Senate Judiciary Committee on
"Restoring the Rule of Law"
September 16, 2008

Chairman Feingold, Ranking Member Brownback, and members of the subcommittee, I submit this statement on behalf of the National Security Archive (the "Archive"), a non-profit research institute and leading user of declassified records released under the Freedom of Information Act (FOIA) and other record disclosure programs. We publish a wide range of document sets, books, articles, and electronic briefing books, all of which are based on released government records. In 1999, the Archive won the prestigious George Polk journalism award for "piercing self-serving veils of government secrecy" and, in 2005, an Emmy award for outstanding news research.

In the Archive's almost 25 years using the nation's laws to obtain records from which to analyze government policy, the Archive has seen the ebb and flow of secrecy through administrations from both parties during times of crisis and of relative calm.

Over the last eight years, access to the records that document this nation's decisions and policies has been systematically shut down. Our society, which prided itself for the transparency and accountability of our government, has been transformed into a fortress of secrets. At one time the September 11, 2001 attacks on the nation were a ready excuse for refusing to answer questions or share information, but as national security secrecy has been repeatedly used as an excuse to avoid inquiry concerning controversial government policies and practices, it has become apparent that the true rationale for much of the secrecy is to avoid dissent and evade accountability.

Piercing through the administration's extreme secrecy has been challenging because of the executive branch's robust assertion of its powers and the legislative branch's unwillingness to confront those assertions. The public has seen the established protections against government abuse and overreaching systematically dismantled, leaving members of the public in some instances unable to seek compensation for alleged wrongs at the hands of the government, and in many instances unable to discern whether the nation's leaders are properly representing the public's interest.

The Freedom of Information Act, which is the public's tool to ask the government about what it is doing, has been reinterpreted and chipped away by the current administration. The Presidential Records Act (PRA), which is supposed to provide an orderly system to balance the executive's needs and privileges with the public's ultimate interest in presidential records, has been undermined and circumvented by new glosses on established principles and woefully inadequate recordkeeping practices. And, the executive order on national security classification has been used as a shield against

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disclosure of information even when the information is not appropriate for classification or when the classification can harm the public interest.

Through these secrecy policies, the executive branch of government has evaded the type of scrutiny envisioned by the Constitution's system of checks and balances and necessary to any democracy. Programs for domestic surveillance, detention, enhanced interrogation, and extraordinary rendition all were developed and operated in secret and – according to some of the public information – illegally. As details began to leak out about these controversial programs, the public, media, congressional, and, in some cases, judicial responses, demonstrated why scrutiny is essential to prevent overreaching and abuse by the executive branch.

The new administration and the new Congress that will be elected by the American people in November have an opportunity to examine the recent history, correct the abuses of the past, and put in place new rules that will ensure transparency and protect the public from unrestrained, unaccountable leaders. In doing so, the government can redefine its relationship to the governed and restore trust to the American people and the world.

Chipping Away at the People's Tool for Obtaining Information: The Freedom of Information Act

In passing the OPEN Government Act of 2007, Congress explained:

> Congress finds that (1) the Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that (A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed; (B) such consent is not meaningful unless it is informed consent; and (C) as Justice Black noted in his concurring opinion in Barr *v. Matteo* (360 U.S. 564 (1959)), "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of the government service rendered by all elective or appointed public officials or employees.[1]

Despite this strong endorsement by Congress for a vital access to government information law, the FOIA has been battered over the last eight years. There are four critical turning points that have significantly eroded the effectiveness of the Freedom of Information Act.

- On October 12, 2001, Attorney General John Ashcroft issued a Freedom of Information Act Memorandum that reversed the existing presumption in favor of disclosure of records under FOIA when there is no foreseeable harm in the

[1] The Openness Promotes Effectiveness in our National Government Act of 2007, Sec. 2 (Findings).

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release.[2] The Ashcroft memorandum led to a significant increase in the use of the discretionary FOIA exemptions, including exemptions 2 (agency internal rules and practices), 5 (deliberative process and other evidentiary privileges), 6 and 7 (c) (privacy), as a basis for withholding requested records.

- On March 19, 2002, White House Chief of Staff Andrew Card issued a memorandum concerning protection of sensitive but unclassified ("SBU") information that led to an explosion of new information control markings that interfered with information sharing, harmed public release of information, and hindered public safety and security. Executive branch estimates in 2007 concluded that over 131 information control labeling processes had been developed within federal agencies.[3] These labels proliferated despite findings by the National Commission on Terrorist Attacks Against the United States (the "9/11 Commission"), Congress, and the executive branch that information controls are an impediment to information sharing to the detriment of our security.

- On May 9, 2008, the President issued an executive memorandum[4] establishing a controlled unclassified information framework ("CUI" or "CUI Framework") that failed to confront the explosion of information control labeling and also purported to extend CUI label protection against disclosure of records requested under FOIA.[5]

- During the last eight years, four intelligence agencies have asked for and received new operational file exclusions from FOIA for significant portions of their records.[6]

The combined impact of these policies, and others, has been to transform the FOIA from a disclosure statute into a withholding statute. Although the President issued an executive order on "Improving Agency Disclosure of Information" in December 2005,[7] that order has done little to improve the pervasive backlogs in pending FOIA requests.[8] Further, when Congress sought to step in by passing the OPEN Government Act of 2007, the executive's first move regarding that new law was to seek a post-hoc

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[2] Available at http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.
[3] *See* http://www.fas.org/irp/congress/2007_hr/042607mcnamara.pdf (statement of Ambassador Ted McNamara, Program Manager, Information Sharing Environment) (Apr. 26, 2007).
[4] *Memorandum for the Heads of Executive Departments and Agencies on the Sharing of Controlled Unclassified Information* (May 9, 2008), available at http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html.
[5] *Id.* at § 13.
[6] *See* 50 U.S.C.A. 432 (National Geospatial Intelligence Agency), 432a (National Reconnaissance Office), 432b (National Security Agency), 432c (Defense Intelligence Agency).
[7] *Available at* http://www.whitehouse.gov/news/releases/2005/12/20051214-4.html.
[8] *See* National Security Archive, *Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver* (Mar. 16, 2008) (finding that the number of pending FOIA requests government-wide was only 2% lower at the end of FY 2007 than it was when the Executive Order was issued), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm.

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deletion of the provision establishing the Office of Government Information Services to mediate FOIA disputes by slipping a revocation of the provision into a budget proposal.[9]

The new President should immediately issue a memorandum to the executive branch directing revocation of the Ashcroft memorandum and issuance of a new FOIA policy memorandum. The president's memorandum should include a clear policy statement favoring disclosure of government records to the public, a call to agencies to use technology to engage with and inform the public, a commitment to creating a more collaborative and less adversarial relationship with the public on issues involving access to information, and direct an effort to transform the Freedom of Information Act process into one that serves the public. In order to solve the intractable problem of backlogs and delays in the release of information, Congress should enact legislation that would create a process to analyze and solve the problem of excessive delay in release of information under FOIA, such as the Faster FOIA Act of 2007 (H.R. 541, introduced by Rep. Brad Sherman in January 2007.

The new President should immediately amend the CUI Framework memorandum to prohibit reliance on control labels in making FOIA determinations, direct agencies to reduce use of information control markings, and introduce a presumption that information not be labeled. The new CUI memorandum should include a positive statement recognizing that information-sharing and transparency improve security and make clear that the CUI Framework's uniform system is intended to increase disclosure. Further, Congress should enact legislation that would reduce the use of information control labels on records and establish a process that would lead to controls, incentives, and oversight to prevent the explosion of such labels and over-labeling of records in the future, such as the Improving Public Access to Documents Act (H.R., 6193, introduced by Rep. Jane Harman in June 2008) and the Reducing Information Control Designations Act (H.R. 6576, introduced, by Rep. Henry Waxman in July 2008).

Congress should conduct oversight hearings on the use of operational file exclusions by intelligence agencies. Those hearings should consider the impact of the exclusions on public disclosure of information and the need for legislation to adjust the scope of such exclusions from FOIA.

Exerting Excessive Control Over Public Records: The Presidential Records Act

The records of former Presidents are some of the most important records for the public to understand our nation's history and role in the world. An accurate and complete historical record of presidential decision-making is vital to our free democratic society. In a statement that is now inscribed at the entrance to his Presidential Library, President Harry Truman said: "The papers of the Presidents are among the most valuable sources of

[9] *See* Rebecca Carr, Leahy *and Cornyn Oppose White House Moving FOIA Ombudsman*, Austin-American Statesman, (Jan. 24, 2008), http://www.statesman.com/blogs/content/shared-blogs/washington/secrecy/entries/2008/01/24/leahy_and_cornyn_oppose_white.html.

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material for history. They ought to be preserved and they ought to be used."[10] To ensure an accurate documentary history, the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207, makes clear that records of the president belong to the public.

The current administration, however, has systematically undermined the PRA.

- In 2001 President Bush issued an executive order (EO 13233) that severely compromised the public's interest in historical presidential records. That order purported to create new constitutional privileges to prevent disclosure and to grant authority to block release of records to individuals who never served in an elected office, including the heirs and children of former presidents. It also created a new vice presidential privilege. The Bush order attempted to override the orderly process established by the PRA and regulations of the National Archives and Records Administration (NARA) and created excessive delays that a court subsequently ruled illegal.

- White House officials' use of BlackBerries and e-mail accounts issued by the Republican National Committee, causing potentially millions of presidential records to be sent and received outside of official govenrment systems.[11] Most of these records have not been preserved.

- The White House has lost as many as 5 million presidential and federal record e-mails sent and received on White House computers between March 2003 and October 2005.[12] These may include e-mails from the Office of Management and Budget, the United States Trade Representative, the Council on Environmental Quality, and others, including the Office of the Vice President (OVP) and the National Security Council.

- The Office of the Vice President routinely, and sometimes improperly, marked records as classified, which will reduce the likelihood that they will ever be released or released in a timely manner under the disclosure laws.[13]

- The Administration has transformed agencies and records that would ordinarily be subject to disclosure laws into non-agencies and non-federal records that are no longer subject to requests the FOIA. For example, the White House Office of

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[10] Whistle Stop: The Harry S. Truman Library Institute Newsletter, Vol. 3, No. 2, Spring, 1975, at 1 (emphasis added) (quoted in *Nixon v. Administrator*, 408 F. Supp. at 349).

[11] Tom Hamburger, *GOP-issued laptops now a White House Headache,* Los Angeles Times, Apr. 9, 2007, http://www.latimes.com/news/nationworld/world/la-na-laptops9apr09,0,4563806.story?coll=la-home-headlines.

[12] CREW, *Without a Trace: The Missing White House E-mails and the Violations of the Presidential Records Act*](Apr. 12, 2007), http://www.citizensforethics.org/node/27607; *see also* National Security Archive, *White House Admits No Backups Tapes for E-mail Before October 2003* (Jan. 16, 2008), http://www.gwu.edu/~nsarchiv/news/20080116/index.htm.

[13] Michael Isikoff, *Challenging Cheney: A National Archives Official Reveals What the Veep Wanted to Keep Classified—and How He Tried to Challenge the Rules*, Newsweek, Dec. 24, 2007, http://www.newsweek.com/id/81883/output/print

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Administration has long been acknowledged as a federal agency subject to the FOIA. It has processed FOIA requests for many years, has published its own FOIA regulations since 1980, had—until recently—an FOIA website, and submitted annual FOIA reports to Congress. In response to a FOIA suite for records about the White House e-mail system, the Office of Administration changed its tune and argued that it was not even an "agency" under the terms of the FOIA, so the suit should be dismissed.[14] A similar tactic has been attempted with respect to categories of records. In response to suits brought by the *Washington Post* and CREW, the administration has taken the position that Secret Service visitor logs, which are created and maintained by the Secret Service and have traditionally been considered agency records, instead should be considered presidential records.[15]

Policies and procedures for the maintenance, preservation, and public access to presidential records should not be set by each administration and subject to the whims of the president in office at the time. The PRA, as implemented by NARA, already establishes most of the necessary framework to protect the president's interest, the former president's interest, and the public's interest.

The next president should swiftly revoke E.O. 13233 and restore integrity, transparency, and accountability to the preservation and disclosure of historical presidential records. Upon this revocation, existing NARA regulations governing the release of presidential records will remain in effect and provide procedures for management of presidential records and appropriate notification of former presidents before records are made public. These regulations, 36 CFR 1270, provide procedures for the incumbent president to dispose of records after obtaining the views of the Archivist. They offer an outgoing president the opportunity to restrict certain types of records from disclosure for 12 years. Importantly, they provide for notice to a former president before records are disclosed and procedures for a former president to assert claims that the records are privileges and should not be disclosed.

Congress should enact amendments to the PRA that provide for contemporaneous oversight of presidential recordkeeping. Each of the four most recent presidencies has experienced recordkeeping controversies. It is apparent from these events that greater guidance on records management should be provided to the White House. H.R. 5811, introduced by Rep. Henry Waxman in April 2008 is a starting point for possible new legislation to protect presidential records and improve presidential recordkeeping.

Using National Security to Shroud Controversial Policies and Practices: The Executive Order on Classification

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[14] "CREW Files Opposition Brief in Office of Administration Suit," September 4, 2007, available at http://www.citizensforethics.org/node/30038.

[15] Michael Abramowitz, "Secret Services Logs of White House Visitors are Records, Judge Rules," *Washington Post*, December 18, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121701397.html.

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Since the terrorist attacks of September 11, 2001, the Bush Administration has implemented numerous controversial policies that threaten core constitutional values. When these policies have been attacked, the executive branch has insisted that they remain shrouded from review by the mantle of national security secrecy.

The central vehicle by which executive branch maintains such secrecy is through a security classification system that is defined in an executive order issued by the President. Without question, classification of national security information is a critical tool at the disposal of the Government to protect our nation. Yet, numerous stories have emerged in recent years that suggest that classification has been used not just to deny sensitive information to our adversaries, but instead to stifle dissent and avoid accountability.

Indeed, rampant overclassification has been acknowledged by officials from throughout the military and intelligence agencies. The unnecessary secrecy interferes with information sharing and undermines the integrity of the very system we depend upon to ensure that our nation's adversaries cannot use national security-related information to harm us.

The Bush executive order on classification, EO 13292 (amending EO 12958), eliminated numerous provisions and presumptions that were intended to discourage unnecessary classification. Further, classification was used repeatedly throughout the last eight years to improperly render records secret, such as the now-infamous March 14, 2003, John Yoo memorandum issued concerning interrogation of enemy combatants. That memorandum was so poorly reasoned that the Department of Justice had to advise the Department of Defense to cease it reliance on the legal reasoning a scant nine months after the opinion had been issued. Importantly, it did not contain any information that would aid enemy combatants.

Further, the pace of declassified has slowed precipitously during the current administration, from a high of 204 million pages of historical records in 1998, to a low of 28 million pages in 2004 and 37.2 million in 2007. At the same time, in 2006 my organization along with author Matthew Aid uncovered massive reclassification of historical records pulled from the shelves of the National Archives and Records Administration.

It is essential for accountability that government officials know that decisionmaking that may be secret for a period will eventually be subject to analysis and review. Government activities in the national security and foreign relations areas are of tremendous interest to the public both in terms of ensuring our actual security and because the records that chronicle the actions of government officials and document our national experience provide the transparency necessary for a healthy and vital democracy. Keeping historical information secret does not serve any useful goal for the nation. It costs money, dilutes attention that should be put on protecting still sensitive information, and undermines historical analysis and public accountability.

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The new President should immediately issue a presidential directive to the Executive Branch that tasks the Information Security Oversight Office with chairing an interagency taskforce to revise within six months the framework for designating information that requires classification in the interest of national security (Executive Order 12958, as amended). This directive should:

- Clearly repudiate the deliberate abuses of the classification system that have occurred in recent years.

- Call for increased individual and organizational accountability with respect to the use of classification.

- Direct that the new executive order on classification:
    - Include standards that must be satisfied for classification as well as prohibitions and limitations against abuse;
    - Require agencies to consider the damage to national security and to the public interest of classifying information;
    - Establish processes for the dissemination of substantive information to state and local authorities and, ultimately, the American people;
    - Direct classifiers to use the lowest appropriate classification level and the shortest appropriate duration for classification; and
    - Set up mechanisms for oversight within each agency, including independent declassification advisory boards, systems to track classification decisions, regular auditing, training and remedies for improper classification decisions.

- Direct consultation with the public in the development of the new executive order, as took place in the prior administration.

The Executive Branch should work with Congress to pursue passage of an omnibus Historical Records Act. A Historical Records Act that would curtail excessive classification in the first place, facilitate the declassification of historically significant information in a timely manner, bring greater consistency and efficiency to the declassification process, consider the significant public interest in declassification of historical records, and reduce the burden and delay entailed in the current declassification process.

* * * * * * *

Thank you for your consideration of these issues.

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Americans for Less Secrecy, More Democracy

Written Testimony of Patrice McDermott
to the Senate Judiciary Committee, Subcommittee on The Constitution
for the Hearing, "Restoring the Rule of Law,"
September 16, 2008

Thank you, Chairman Feingold and Members of the Subcommittee, for the opportunity to submit written testimony for the record. This hearing is critically important in establishing what needs to be done by both the next President and the next Congress to restore the damage done in the last seven years to the rule of law.

I am submitting this testimony on behalf of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. The more than 70 partners in this coalition believe that a transparent and open government is essential to, and a concomitant of, the rule of law and the trust of the American public. Every year we issue a Secrecy Report Card, based on measurable indicators that can be used as benchmarks to evaluate openness and secrecy in government in the United States. A copy of our 2008 Report Card[1] is appended to this testimony.

What role will access to government information play in a new administration? Will we have more of the same – secrecy, lack of accountability, expansive claims of executive privilege and state secrets, proliferation of "sensitive but unclassified" markings, destruction of electronic records (including e-mail), denials, stonewalling and backlogs of Freedom of Information Act (FOIA) requests, and, in general, a need-to-know culture? Or can we create the kind of government that James Madison envisioned when he said, that "a people who mean to be their own governors must arm themselves with the power which knowledge gives.[2]

The March 2008 Sunshine Week poll[3] found that three-quarters of American adults view the federal government as secretive, and nearly nine in 10 say it's important to know presidential and congressional candidates' positions on open government when deciding for whom to vote. The survey showed a significant increase over the past three years in the percentage of Americans who believe the federal government is very or somewhat secretive, from 62 percent of those surveyed in 2006 to 74 percent in 2008. This is terrible news for our country and our system of government. In exit polls during the 2006 Congressional elections, similarly, more than 40% of voters indicated that corruption and scandals in government were very important in their voting decisions. Sunshine on the workings of government is the first step toward winning back public trust.

Clearly, we cannot continue down the path on which we have been. Many of the pieces are in place for

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[1] http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf
2 *Letter to W. T. Barry, August 4, 1822 (Madison, James. 1865. Letters and Other Writings of James Madison, Published by order of Congress. 4 volumes. Edited by Philip R. Fendall. Philadelphia: Lippincott., III, page 276*
[3] http://www.sunshineweek.org/sunshineweek/secrecypoll08

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the next administration to change the direction in which we have been heading. What is required is a demonstrated commitment to use them for the benefit of the public and, ultimately, of government itself.

The next administration, working with Congress, has great opportunities to restore the public trust in government and in the rule of law, and in the ability of the public to participate meaningfully in governance.

Make openness the default standard for government information

> "Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own rights, distrustful of those who manage them, and – eventually – incapable of determining their own destinies."

The author of that statement was Richard M. Nixon in March 1972, in his "Statement on Establishing a New System of Classification and Declassification of Government Documents Relating to National Security." President Nixon had it right.

In recent years, there has been much discussion about the public's lack of trust in government. Much of this distrust is attributed to a lack of knowledge and understanding of the inner workings of government, both in the legislative and civil service arenas. The failure of government to provide readily available, accurate government information and its failure to engage citizens in the development of public policy feed a growing cynicism and destroy trust.

The new President has an immediate opportunity to define the relationship between his administration and the public by issuing a Presidential memorandum on day one of his administration that makes clear that government information belongs to the public and that leads federal agencies to harness technology and personnel skills to ensure that government records that belong to the public are open and accessible.

This is not a drastic new step. The framework for openness is there – in statute and in regulation. Achieving more openness and transparency is a goal that transcends party lines and will allow the next President to demonstrate his commitment to the change that the electorate has indicated it wants. The new President has to immediately set the tone, make a commitment to transparency a keystone of his appointments, and task high level officials in the administration with responsibility for the implementation of the openness mandate executive-branch-wide.

Our society and democratic form of government are based on an informed public. Our laws provide structures to guarantee the public's right to know what its government is doing. Over the last eight years, however, the executive branch has been transformed into a government that withholds information unless members of the public demonstrate a "legitimate" need to know. Keeping information secret has become the default position throughout much of the federal government. This trend has been apparent in responses to Freedom of Information Act requests and in the proliferation of markings, such as "Sensitive But Unclassified," to control access to unclassified information.

The default bureaucratic position is to not take risks. Unfortunately, the message that has been given to officials in our government is that openness is risky. This is not only a dangerous mindset in an open society, but also stands in the way of a safer and more secure homeland. We are all agreed that there is

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information that does need to be protected for some period of time. The tension, though, is not between openness and security; it is between information control for bureaucratic turf, power, and more than occasionally political reasons and the reality that empowering the public makes us safer. Secrecy does not make for a more secure society; it makes for a more vulnerable society and less accountable governments.

Unclassified Information Removed After September 11th

One of the first steps the President should take is to direct agency heads to review unclassified information removed after the events of September 11th and the guidelines that agencies prepared to inform decisions about what has been allowed to be put online in the intervening seven years. As these documents, databases and other information were unclassified, the criteria and guidance should be made public and subject to review and comment. The President should make clear that the benefit to the public of disclosure should be heavily weighted in considerations of disclosure and dissemination. If the security costs of disseminating the information do not heavily outweigh the societal benefits of dissemination, the information should be disclosed and made available online.

Sensitive But Unclassified Markings

Three years ago, in our 2005 Secrecy Report Card,[4] we identified 50 types of restrictions on unclassified information, implemented through laws, regulations or mere assertions by government officials, that information should not be released to the public. These designations fall entirely outside the national security classification system, which is governed by executive order, and they are subject to none of its constraints or timelines. GAO, in a 2006 report[5], identified 56 designations. In our 2007 Secrecy Report Card, we noted that 81% of the over 107 unique markings identified (but not shared publicly) by the Information Sharing Environment Program Office at the Office of the Director of National Intelligence that agencies place on "sensitive but unclassified" information (now called by "Controlled Unclassified Information" by the executive branch) are based not on statute or approved regulations, but are the product of department and agency policies. As noted by the Information Sharing Environment Program Office, these policies were created "without attention to the overall Federal environment of CUI information sharing and protection."[6]

Most of the agencies GAO reviewed have no policies for determining who and how many employees should have authority to make sensitive but unclassified designations, providing them training on how to make these designations, or performing periodic reviews to determine how well their practices are working. They seem to be applied with little thought and, according to a 2005 New York Times story,[7] employees could visit the agency's Web site and easily print out a bright-yellow "sensitive security information" cover sheet.

Also, clearly not all of the categories listed by the agencies in GAO's report should be included as "sensitive but unclassified" designations. Exemptions created by the Freedom of Information Act (other than by what are called (b)(3) statutes) and the Privacy Act) do not logically constitute what we understand as SBU-like

4 http://www.openthegovernment.org/otg/SRC2007.pdf

5 GAO: March 2006: Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information: GAO-06-385 http://www.gao.gov/new.items/d06385.pdf

6 "Background on the Controlled Unclassified Information Framework" May 20, 2008. http://www.fas.org/sgp/cui/background.pdf

7 http://www.nytimes.com/2005/07/03/politics/03secrecy.html

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designations (i.e., as generally having little grounding in statute and as limiting access to otherwise public information). Nevertheless, the agencies apparently think of them in this way. It is important to note that the new Controlled Unclassified Information (CUI) Framework recently announced will apply only to agency-generated markings. It will not apply to statutorily-created restrictions, including (b)(3) exemptions to the Freedom of Information Act – which are also proliferating.

The White House issued a Memorandum[8] to all heads of Executive departments and agencies in May 2008, the intent of which is to contain and constrain the proliferation of unclassified control markings – within the Information Sharing Environment.[9] The goal is to standardize practices to facilitate and enhance the sharing of what is now called Controlled Unclassified Information, but only with and among those who are already sending and receiving it.

The White House Memorandum makes only a minimal nod toward public access and no acknowledgment of the benefits of openness to our society and to our safety. The memorandum does nothing to rein in the use of these markings; in fact, the memo allows agency's to continue to make control determinations as a matter of department policy—meaning that the public is given no notice or chance to comment on the proposal. Further, under the President's proposed framework, control designations could easily be treated as simply another level of classification — reducing the public's access to critical information.

The President should direct NARA to implement the framework for imposing order on the proliferation of "Sensitive But Unclassified" type markings in a manner that minimizes the number, restrictions, and duration of such marks and maximizes public access to information.

Congress also should build on the provisions contained in HR 6576 and ensure that the public's right to know and its crucial role in protecting our health, safety and security are given the weight they deserve and that these control markings are severely limited.

Classification

The 1995 Executive Order on national security classification included an admonition that "[i]f there is significant doubt about the need to classify information, it shall not be classified." Executive Order 12,958, Sections 1.2(b). Similarly, the Order provided that "significant doubt" about the appropriate level of classification should result in classification at the lower level. *Id.,* Section 1.3(c). The new Order (E.O. 13292, issued in 2003) eliminates both of these provisions and does not say anything about whether doubts should be resolved in favor or against classification.

E.O 13292 makes it possible to reclassify previously declassified information. The 1995 Order prohibited reclassification once information has been properly declassified. Executive Order 13,292 permits reclassification if "the information may be reasonably recovered," the information satisfies the standards for classification, the reclassification is personally authorized, in writing, by an agency head or deputy agency head, and the reclassification action is reported promptly to the Director ISOO. Executive Order 13,292, Section 1.7(c). This born-again classification needs to be severely limited and the Information Security Oversight Office (ISOO) needs to be given greater authority to challenge it.

Congress should also consider its role in the classification and declassification of national security

8 http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html

9 A term codified in Intelligence Reform and Terrorism Prevention Act of 2004 to indicate the intelligence, law enforcement, defense, homeland security, and foreign affairs communities.

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information, which it has almost entirely ceded to the Executive Branch.

Signing Statements
The new President should also work to restore public faith in the workings of the administration by reversing the practices of using signing statements as line item vetoes and instructions to agencies to ignore or reinterpret congressional mandates. Based on the best available numbers, President G. W. Bush issued 157 signing statements, challenging over 1000 provisions of laws (as of July 1, 2008). In the 211 years of our Republic to 2000, Presidents had issued fewer than 600 signing statements that took issue with the bills they signed. Among recent Presidents, President Reagan issued 71 statements challenging provisions of the laws before him, and President George Herbert Walker Bush issued 146. President Clinton issued 105.

Make the current structures for accountability and transparency work for the public

The key step in restoring public trust is making available all the information the public needs to hold its government accountable. There are a number of steps the new Administration can take to further government transparency. Some of these steps can be implemented immediately while some will take a commitment of time and resources. Some of them are pretty mundane but are the cornerstones of accountable government.

Records – Particularly E-Records – Management

If records that belong to the public are to be open and accessible, they must be preserved appropriately and managed. Requiring agency heads to make management of government records, regardless of form, format, or mode of creation an agency priority is the fundamental step that the new President must take. The President must understand and must clearly communicate to his staff and to all executive branch employees that all documents, including electronic communications, that are created or handled as part of the work of government are federal records. He must clearly communicate to his staff, all civil servants, and all contractors that conducting government business on a non-government account or computer does not miraculously turn the documents into non-records. The President and Vice-President and their advisors are obligated to preserve all their records under the Presidential Records Act. The President sets the example for the entire executive branch and must honor the law protecting the people's information.

Congress must also take steps to ensure that the National Archives and Records Administration (NARA) meets its statutory obligations to ensure proper records management, including e-records management, in the agencies. NARA has failed miserably in this regard. In 1982, the Committee on the Records of Government proclaimed that "the United States is in danger of losing its memory."[10] They were talking about paper records. Our memory is at much greater risk now of losing – and having lost -- that information necessary for accountability. The vast majority – if not all – of our documentary and information history has been and is being created electronically but not necessarily well-managed and preserved electronically. Those of us outside government understand that the common policy is to only preserve the final policy document, for instance. That is important, but not sufficient. Some of us who have been around for more than a few years remember the days of carbon copies and complete paper files. In the government, the paper copies were annotated and initialed by those who saw and commented on them. It was not just the final version of the policy or memo that was filed away, but a

10 Committee on the Records of the Government 1985:9, 86-87.

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documentary history of that policy's development.

Across the federal government, we do not know with any certainty that all of the documents and information that we need to write our history, to understand policy development and implementation, to trace who knew what, read and edited what document, are being preserved.

The various reasons given for not preserving it all are ones that we have heard before – the volume is too great; we don't have the resources to manage all this; it is not of importance to the leadership of our agency. Another reason is that Congress has been lax in holding agencies accountable and for ensuring that records management is seen as part of the mission-critical components of every department and agency. While Congress is rightfully alarmed at the loss of documents and information through a system breach, it and the Executive Branch have turned a blind eye to their loss through indifference. The end result is the same except with indifference – or intentional failure to preserve – we will not necessarily know what has been taken from us and will not be able to restore our history to its previous status.

FOIA

Records management is, of course, also essential to the effective working of the Freedom of Information Act (FOIA). Preservation is the essential minimum. The existence of records, however, is no guarantee that agency will disclose them pursuant to a FOIA request, even when disclosure is discretionary (not precluded by one the nine exemptions to the Act or the many exemptions created by other statutes). The 1993 Attorney General Memorandum on FOIA said

> The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure. ... In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

The George W. Bush administration rescinded the 1993 Attorney General Memorandum on FOIA, but did not return to a "substantial legal basis"(as the basis on which it would defend agencies' withholding of records). Rather the Memorandum issued by Attorney General Ashcroft told agencies,

> When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

Against this background, the new President can take immediate action to change course in the executive branch with respect to the Freedom of Information Act. It is traditional for a new administration to define its own FOIA policy. The new President should issue a Memorandum on government openness, including FOIA, with an accompanying AG memo. The new president should direct all agencies to comply with both the letter and the spirit of the law that establishes transparency as an essential feature of our democracy.

He should also remind agencies that the commitment to openness requires more than merely

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responding to requests from the public. Agencies have obligations under the 1996 E-FOIA Amendments to post FOIA-related materials online. The new President must remind agency heads that each agency has a responsibility beyond this (and other statutory requirements) to distribute information on its own initiative, and to enhance public access through the use of electronic information systems.

E-Government

Finally, the new President should direct federal government agencies to move rapidly to providing all new government information (documents, data, etc.) in open, structured, machine-readable formats that will permit the public – nonprofits, companies, individuals – and other government entities to grab the information, reuse it, and combine it with other information. There are numbers of sites based on such reuse and combinations ("mashups"), but to date they have all required cleaning up and reformatting government data. Whether the state of government information is deliberate (to make it hard to find and use) or a failure of imagination and/or resources, it is past time for the federal government to join the 21st century. This does not in any way absolve agencies of *their* responsibilities to ensure that government information is open, accessible, and usable.

The issues explored in this hearing are core to the work of OpenTheGovernment.org. The coalition is committed to rolling back the unnecessary and excessive secrecy that has come to prevail in our federal government and to working with Congress and the new Administration to help restore public trust in government through openness and accountability.

Thank you, again, for this opportunity to submit testimony.

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About Us

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. Our coalition transcends partisan lines and includes progressives, libertarians, and conservatives.

OpenTheGovernment.org Statement of Values

To protect the safety and well-being of our families, homes, and communities; to hold our government accountable; and to defend the freedoms upon which our democracy depends; we, the undersigned individuals and organizations, believe the public has a right to information held by our government.

The American way of life demands that government operate in the open to be responsive to the public, to foster trust and confidence in government, and to encourage public participation in civic and government institutions.

The public's right to know promotes equal and equitable access to government, encourages integrity in official conduct, and prevents undisclosed and undue influence from special interests.

OpenTheGovernment.org seeks to advance the public's right to know and to reduce secrecy in government.

We invite both organizations and individuals to sign. **To add your organization or name, please email us at info at openthegovernment.org**

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Statement of
Deborah N. Pearlstein

Prepared Testimony to the
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
September 16, 2008

Restoring the Rule of Law

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Deborah N. Pearlstein
Prepared Testimony to the
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
September 16, 2008

Restoring the Rule of Law

Chairman Feingold, Ranking Minority Member Brownback, members of the Subcommittee, thank you for giving me the opportunity to testify. The question this hearing poses is of critical importance: What steps should the next President and Congress take to repair the damage that this President has done to the rule of law in the pursuit of U.S. national security? I have testified and written elsewhere about the Bush Administration's deeply troubling record of detainee treatment since 2001, a record that has had devastating consequences both for our nation's efforts to protect and enforce some of our most important laws, and for our national security.[1] In this testimony, I shall first explain why I believe not only adherence to, but reliance on, the rule of law is so essential to the success of U.S. counterterrorism policy. I then offer a list of specific steps I believe the U.S. Government should take to begin to correct key failures and ill-effects of U.S. intelligence and detention operations since the attacks of September 11.

The Rule of Law and National Security

In the years since the September 11 attacks, it has often seemed that this Administration has viewed the task of counterterrorism as if it were no more than a function of balancing rights and security, where less of the first would guarantee more of the second. The Administration's prolonged equivocating about the legality of cruel treatment, its insistence on broad-scale, indefinite detention, its embrace in 2001 of a novel form of military commission trial – all are examples of this philosophy in action.

But if any lesson has emerged from the past seven years, it is that this facile equation of rights and security is wrong. As the 9/11 Commission Report itself made clear, the fundamental freedoms of our open society were not the primary or even secondary reason the terrorists succeeded on September 11. Societies decreasingly concerned with human rights like Russia have not necessarily been increasingly well protected from terrorism. The most important actions Congress has taken to protect against catastrophic attacks – like legislation expanding U.S. involvement in international cooperative efforts to inventory, secure, and track the disposition of fissile materials –

[1] My previous testimony on this matter, written and oral, was provided on July 15, 2008, to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in connection with its hearing "Administration Lawyers and Administration Interrogation Rules," and is available at http://judiciary.house.gov/hearings/hear_071508.html. *See also* Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006); HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

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have involved no compromise of human rights.[2] And the most rights-damaging actions we have taken as a nation have had an overwhelmingly negative effect on our security.[3]

Rather than asking what rights can be limited in the interest of security, wise counterterrorism policy should begin with far more basic questions: what specifically is the threat of terrorism; what is a realistic national goal to work toward in addressing it; what is our strategy for reaching that goal; and only then - what tools are necessary to make that strategy a success? To be sure, these questions of threat assessment, objective setting, strategy and tactics are questions in the first instance not for lawyers, but for experts in psychology, history, technology, religion, organizational design and decision-making, policing, and national security. What *lawyers* can perhaps offer at this stage is some guidance about the role law can play in aiding this task of government – in particular the detention and interrogation operations likely to accompany it.

Our society has long thought the rule of law a good idea for reasons that are centrally relevant to the detention and intelligence collection missions. (To be clear, the expression "rule of law" does not refer, in particular, to a list of rules to be followed. It means a set of ideas: people will be governed by publicly known rules that are set in advance, that are applied equally in all cases, and that bind both private individuals and the agents of government.[4]) The law can create incentives and expectations that shape institutional cultures – a function that was eliminated to disastrous results when the current Administration decided to lift Geneva Convention rules for our troops with no clear replacement doctrine.[5] The law can construct decision-making structures that take advantage of the expertise of security professionals – a possibility short-circuited when civilian leaders in the Pentagon cut uniformed JAG officers out of the loop in designing military commission trials.[6] The law can provide a vehicle for building and maintaining more reliable working relationships with international partners – relationships that have suffered serious damage as a result of American failure to abide by even our most profound commitments to international human rights.[7] Finally, and not least, it sets limits

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[2] *See, e.g.*, Department of State Authorities Act of 2006, Pub. L. No. 109-472, Sec. 10 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ472.109.pdf (authorizing foreign assistance to support nuclear non-proliferation detection and interdiction activities).

[3] Deborah Pearlstein, Testimony to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part IV (July 15, 2008), at pp. 7-11 (sources cited).

[4] *See* Richard H. Fallon, *The Rule of Law in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7-9 (1997).

[5] I describe the evolution of these policies (based largely on the Pentagon's own investigations) and the effects they had on operations in the field in detail in my article, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).

[6] *See* Jane Mayer, *Annals of the Pentagon: The Memo*, THE NEW YORKER, Feb. 27, 2006, available at http://www.newyorker.com/fact/content/articles/060227fa_fact.

[7] *See, e.g.,* Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 ("Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said."). *See also* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, ISC 160/2007, *available at* http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

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on behavior and ensures accountability – which, when removed in 2002, led to the human rights and security catastrophe known as Abu Ghraib.[8]

This list of law's virtues is, of course, only the way law functions ideally; the law itself must be clearly conceived and reliably enforced. But in considering the lessons of the past several years, it becomes apparent that the success of U.S. counterterrorism depends upon law to fulfill these roles. Protecting the rule of law must be considered an essential component of counterterrorism strategy going forward.

Recommended Actions

Given the extent to which U.S. counterterrorism goals depend upon the maintenance of a vital rule-of-law system, among the first counterterrorism priorities for an incoming Administration should be a package of corrections to address the detention and interrogation policies of the past seven years. To be clear, the list of corrective recommendations below should not be mistaken for an answer to the real policy challenges that remain about how best to protect the United States from terrorism. A new law and security policy agenda is inadequate if it does no more than identify what has not worked and correct our most recent mistakes. But a corrective package is necessary to help restore our allies' faith in our commitment to the laws against torture and cruelty; clarify for our troops and agents in the field what kind of detainee treatment is lawful and effective; reinforce government structures that check and constrain executive power; and provide a full and public accounting of what happened so that it may be clear to all that the United States continues to take its rule-of-law obligations seriously.

(1) Establish a single, government-wide standard of detainee treatment.

Since the President's veto earlier this year of the Intelligence Authorization Bill that would have effectively banned the CIA's use of waterboarding and other cruel and torturous interrogation techniques already forbidden by the Army Field Manual,[9] the guidance governing intelligence interrogation is again unclear for our agents in the field who just want to know the rules of the road. While the Defense Department now appears to be training to, and enforcing, the strictures of the U.S. Army Field Manual on Intelligence Interrogation (which is itself broadly in compliance with U.S. and

[8] *See, e.g.*, News Transcript, Dep't of Defense, Coalition Provisional Authority Briefing (May 10, 2004), available at http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html (Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged "The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency, that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos."); *Guantanamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40 (polling a bipartisan group of leading foreign policy experts and finding 87% believed the U.S. detention system had hurt more than helped in the fight against Al Qaeda) ("Nothing has hurt America's image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.").

[9] Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, Sec. 327.

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international laws governing detainee treatment),[10] there is no indication that the CIA or other intelligence agencies are bound by the same restrictions. Continued equivocation on this issue is an ongoing strain on international counterterrorism cooperation, as noted above. Worse, in an environment in which effective security demands more, not less, interoperability between and among defense and intelligence agencies, conflicting guidance on such critical matters is bound to produce more, not less, confusion in the field.[11] Such confusion can only serve to undermine U.S. intelligence collection missions. And it continues to leave military and intelligence officials in the field every day holding the bag for decisions that properly belong in leadership's control.

The laws governing the treatment of U.S.-held detainees – rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation – should be standardized by Congress government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States' behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective.

(2) Exclude from any legal proceeding under color of U.S. law information obtained by torture, or cruel, inhuman or degrading treatment.

Rules of evidence for military commission proceedings now underway at Guantanamo Bay contemplate the admissibility of statements made under cruelty and coercion, sending the message that acts of cruelty, when they happen, need not result in adverse consequences. As it stands, Congress' most recent action on the question of the utility of information obtained under torture or cruel treatment was in the Military Commissions Act of 2006 (MCA), in which it authorized the admissibility in commission proceedings of statements obtained by cruel, inhuman or degrading treatment, as long as the statements were obtained before 2005, and "the totality of the circumstances renders the statement[s] reliable and possessing sufficient probative value" and their introduction serves the "best interest of justice." The MCA ostensibly excludes evidence "obtained by use of torture," but it does not specify which interrogation methods constitute torture – a term the administration has defined to near non-existence in the past.[12]

In addition to undermining the legitimacy of these particular trial proceedings, and raising significant questions about the reliability of the evidence on which military commission convictions may be sought, such rules send precisely the wrong message to those who would engage in torture and cruelty on the United States' behalf – namely, that if U.S. agents or officials engage in torture or cruelty, the fruits of that conduct, however

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[10] U.S. ARMY FIELD MANUAL 2-22.3 HUMAN INTELLIGENCE COLLECTOR OPERATIONS (September 2006), available at http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

[11] *See, e.g.*, Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).

[12] Military Commissions Act of 2006, 10 U.S.C. § 948r (b-d); 10 U.S.C. § 949a (b)(2)(C) (further providing that "[a] statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title").

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unreliable, may subsequently be used in the service of our own system of justice. It is the opposite of a rule of deterrence.

No trial under color of U.S. law, whether by court martial, military commission or in civilian criminal courts, should admit evidence obtained by torture, or cruel, inhuman or degrading treatment. Anglo-American jurisprudence has rejected the use of such evidence for more than three centuries for reasons that remain valid today: it is unreliable, it is inhuman, and it degrades all who participate in the process. As the Supreme Court put it in one of its many decisions prohibiting the use of coerced testimony in any criminal trial:

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[13]

We cannot effectively claim to be a nation that does not torture, and yet allow such evidence in our courts. As trials involving such evidence are today under way today at Guantanamo Bay, it is imperative these rules be clarified with haste.

(3) Establish an independent commission to investigate U.S. detention and interrogation operations.

It is now apparent that there have been widespread violations by U.S. agents of some of our most important provisions of law – laws prohibiting torture and cruelty.[14] Failure to fully take stock of these violations, and to take meaningful corrective action, calls into question our commitment to the rule of law, as well as our ability to constrain government power, deter harmful behavior, and afford some measure of recognition to those who have been wronged. Indeed, even the problem of ambiguity for agents in the field is compounded by the reality that key information regarding the scope and nature of internal guidance governing U.S. detention and interrogation operations remains shrouded in secrecy.

While there is no question that some information can and should be appropriately classified, there can be no legitimate security justification for continuing the wholesale

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[13] Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

[14] *See, e.g.*, N.Y. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006), http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf; HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

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classification of investigations such as that by the CIA Inspector General into detainee torture and abuse.[15] It will never be clear what kind of remedial action is wise or necessary without full information about the scope of U.S. conduct. Nor do I believe we will be successful in persuading our allies – or our own troops – of the seriousness with which we take these matters without a full, public accounting of what actually happened.

The Pentagon and others may rightly point out the several investigations into such matters already conducted – and indeed, some of these have been most useful. But as I reported in 2004, and continue to believe today, the investigations to date have suffered from a range of flaws, including narrowly circumscribed investigative charges (for example, focusing only on a single unit, rather than a series of complex interactions among units); a failure to investigate all relevant agencies and personnel (for example, CIA was often excluded or was uncooperative in DOD-led investigations); cumulative reporting (one investigation relying on a prior investigation's findings without independent verification); contradictory conclusions; questionable use of classified label to withhold information; a failure to address senior military and civilian command responsibility; and an incomplete game plan for corrective action.[16] None of the major investigations to date has been able to provide a comprehensive picture across agencies and up and down the chain of command about the scope of the abuses that took place, why they happened, and how best to ensure they will not happen again.

As a wide range of political leaders from both parties have sought now for years, I believe Congress should establish by legislation an independent, non-partisan commission to determine all the facts and circumstances surrounding violations of law committed in the course of U.S. detention and interrogation operations. The commission should be led by recognized experts in military and intelligence operations, as well as in relevant U.S. and international law. It should be constituted with expert staff, subpoena power, and the power to take testimony under oath. It must be fundamentally independent of the executive branch, with commission members selected jointly by appropriate congressional and executive officials. It must have access to classified information from all relevant agencies and all levels of authority, civilian and military. It must have the authority to offer whistleblower protection to anyone with relevant knowledge who may fear retribution for testifying truthfully. It must establish the facts independent of any other investigation. Critically, it should, within the reasonable constraints of specific national security interests, be open to the public.

The model for the kind of commission I am proposing may be found in, for example, the National Commission on Terrorist Attacks Upon the United States, established by Congress in the wake of September 11. That commission featured most of these characteristics, and produced a widely cited, highly useful report on the failures of

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[15] *See* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 288-89 (2008) (describing some of the content of the 2004 CIA Inspector General report).

[16] *See* HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH: INVESTIGATING U.S. ABUSES IN THE "WAR ON TERROR" (September 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf.

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government policy and practice leading up to those attacks, and on the needed reforms going forward. The model should not be, I believe, a body on the order of South Africa's Truth and Reconciliation Commission, as some have suggested. While that body performed a great service in documenting many of the human rights violations that occurred during the regime of apartheid, it also promised amnesty from prosecution for all those who participated. An effective investigative commission need not, I believe, promise amnesty in exchange for truthful testimony. Particularly if the commission mandate is accompanied by provisions for strict and justiciable limits on the permissible scope of executive privilege, and clear mechanisms for the enforcement of subpoenas and contempt citations, it should need no further incentive to compel truthful disclosure.

There may be those who object to the commission idea as insufficiently punitive, or a poor substitute for the criminal prosecution of individual wrongdoers. To be clear, the commission would not be established to serve as a substitute for criminal prosecution where the facts and law warrant such prosecution in an individual case. But criminal prosecution itself is fraught with challenges that make it unlikely alone to effectively constrain power, deter misconduct, and clarify treatment standards under current law. Criminal prosecution takes place in an adversarial setting; its goal is to establish in a particular limited set of circumstances whether one individual violated a particular legal standard. In this function alone, it can be tremendously valuable. But an individual trial is not designed to, and often does not, shed light on what may ultimately be systemic failures. It does not produce recommendations for future action. And it does not identify failures of policy and judgment that, while perhaps not criminal in nature, are just as critical to identify for the purpose of recognizing past failings and re-establishing our international reputation as a champion of human rights.

(4) Close detention facilities at the U.S. Naval Base at Guantanamo Bay.

Given the near-universal consensus surrounding the failure of detention operations at Guantanamo Bay to justify their extraordinary cost in terms of both human rights and national security,[17] the key question for any incoming administration is not whether to close Guantanamo Bay, but how. The first answer is negative guidance: we must not let the hard case of Guantanamo make bad law for all future counterterrorism detention operations. That is, the failures of the current Administration – ignoring our obligations under the Geneva Convention to afford all detainees Article 5 hearings upon capture, subjecting at least some fraction of detainees to torture and cruelty, transferring the detainees thousands of miles away from any area of active hostilities – have badly limited the lawful policy options available to resolve these cases.[18] The taint of torture on

[17] Both presidential candidates have called for the closure of Guantanamo as a detention facility. *See* DEMOCRATIC NATIONAL COMMITTEE, REPORT OF THE PLATFORM COMMITTEE, RESTORING AMERICA'S PROMISE 55 (2008), available at http://www.demconvention.com/assets/downloads/2008-Democratic-Platform-by-Cmte-08-13-08.pdf; John McCain, Speech on Foreign Policy to the Council on Foreign Relations (March 2008), available at http://www.cfr.org/publication/15834/.

[18] *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 52-56 (2003), *available at* http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (summarizing status of Guantanamo detainees); *see also, e.g.*, Neil A. Lewis & David Johnston, *New F.B.I. Files*

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some evidence may make it impossible to successfully prosecute some Guantanamo detainees who might otherwise have been lawfully detained pursuant to criminal sanction. The initial disregard for Geneva Convention obligations may make it impossible to continue to detain those who may otherwise lawfully have been held until the conclusion of the ongoing conflict in Afghanistan. Assuming an incoming Administration adheres to U.S. and international law currently on the books, these options would be available for counterterrorism detention efforts going forward.

There are thus two separate policy problems the next Administration and Congress must distinguish, and face in turn: (1) How best to resolve the cases of the Guantanamo detainees, and (2) What kind of counterterrorism authorities are necessary to detain individuals who may be seized going forward. In enabling the Guantanamo facility's closure, only the first question must be answered. In contrast, well-intentioned proposals for legislation that would, in the interest of trying to rein in executive abuses at Guantanamo, affirmatively authorize further indefinite detention of "enemy combatants," defined far more broadly than and independent of our international treaty obligations, let the policy disaster that is Guantanamo set the standard for U.S. detention policy going forward. We must try to limit the damage Guantanamo has done; we need not add to it.[19]

A more complete answer to the "how" question requires distinguishing the three, broad types of detainees who remain at Guantanamo today. First are those who have committed an unlawful act and may be subject to prosecution. These detainees should be promptly subject to federal criminal prosecution or court martial. The current military commissions are, I believe, hopelessly viewed as illegitimate by our allies and those whose views we would hope to sway. Although it is possible to constitute lawful military commission proceedings by, for example, amending the existing Military Commissions Act,[20] I believe any effort to repair the current commissions will take more time than is necessary, prolonging the damage done by the current situation, while remaining unlikely to succeed in overcoming the perception of illegitimacy. While any court (civilian or martial) will face the special challenges associated with security prosecutions, including the protection of classified information, our existing trial institutions are both accustomed and suited to resolving such challenges based on existing rules case by case.[21]

A second set of detainees includes those who have been cleared for release but who have no place suitable to go (because, for example, they face torture in their home country or because their home country refuses their return). These detainees pose fundamentally a diplomatic problem. The existing law is clear on our obligation not to

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Describe Abuse of Iraq Inmates, N.Y. TIMES, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subjected to temperatures freezing or "well over 100 degrees").

[19] I have written elsewhere about the adverse security consequences of pursuing preventive detention operations outside the Geneva Convention regime. *See* Deborah Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT'L L. (forthcoming Winter 2008).

[20] Among other required amendments would be those to correct the evidentiary issue highlighted above.

[21] For more on how federal courts have long successfully addressed these challenges, see Richard B. Zabel and James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008), available at http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

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return them to places they are likely to be tortured;[22] we and our allies must thus find a suitable alternative home. While I do not wish to undersell the difficulty of resolving these cases by calling the disposition of these detainees a diplomatic problem, it may be reasonable to expect any new Administration may have some more success – and must press actively and immediately – to seek international cooperation on these cases. The more aggressively the next Administration works to take a series of real, unilateral steps to restore our credibility on matters of the rule of law, and reestablish our interest in and respect for international partnerships, the more success I believe it reasonable to expect such efforts will find. Excepting any court order that finally determines the status of one or more of these detainees – any such order must be observed immediately – detainees awaiting release while final transfer arrangements are made may be housed for a limited period of time in a military facility in the continental United States.

A final category comprises those who have not demonstrably committed any wrongful act but who have asserted their membership in Al Qaeda or otherwise stated their intention to do harm to the United States. These may include men seized far from any traditional field of active combat, men who are at best only arguably involved in an armed conflict within the meaning of international law, and some who may only arguably be covered by the 2001 congressional Authorization for the Use of Military Force. The U.S. Supreme Court ruling in *Boumediene v. Bush* makes clear that all Guantanamo detainees, including this set, have a constitutional right to petition U.S. courts for a writ of habeas corpus.[23] Unless circumstances change, these cases will be ongoing when the next administration takes office. The next administration should immediately conduct its own, independent review of all available evidence, and release its conclusions about individuals in this category publicly and in as much detail as possible without compromising appropriately classified information. Those who can be prosecuted should be, and those who should be released must be. For those administration counsel believe may be appropriately detained under U.S. and/or international law *as it existed* when the detainee was seized, it should present its best legal arguments as to the basis and scope of their detention. Because there was substantial domestic and international law governing the authority and limits on detention of this nature on the books when these detainees were arrested, and because our courts are constitutionally charged and institutionally trained to interpret that law as it applies case by case, I believe remaining questions about the procedural and substantive rights of these detainees may be best and most swiftly resolved in the federal courts. While there may be an appropriate role for Congress in designing any new detention authority going forward, any such law can have no bearing on the rights of the Guantanamo detainees as they existed upon initial arrest.

Conclusion

While no set of corrective actions can fully repair the damage done by the record of torture and abuse the United States has accumulated over the past six years, we may

[22] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, entered into force June 26, 1987, Art. 3.
[23] 553 U.S. ___ (2008).

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undertake a set of actions that demonstrate a willingness to have our ongoing conduct conform to the promise of our laws. These measures, as part of a broader package of corrective steps, may begin to serve the interests in preserving legality and promoting security for all Americans. As ever, I am grateful for this Subcommittee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

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"RESTORING THE RULE OF LAW"

**HEARING BEFORE THE
CONSTITUTION SUBCOMMITTEE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**Statement of
John W. Whitehead
President of The Rutherford Institute**

September 16, 2008

Senator Feingold, Ranking Member Brownback and Members of the Constitution Subcommittee, on behalf of The Rutherford Institute,[1] I thank you for the opportunity to testify on "Restoring the Rule of Law."

Never before in American history has there been a more pressing need to abide by the rule of law, respect the separation of powers, and check governmental power and abuse. This is especially critical now, as the effects of the U.S. government's ongoing war on terror continue to be felt at home and abroad. As constitutional attorney Bruce Fein, who served as Associate Deputy Attorney General under President Ronald Reagan, recognized: "the Founding Fathers understood that freedom was the rule, and government intervention to protect security and safety was the exception. There had to be a standard of need or urgency required in order to encroach on freedoms. The United States, post 9/11, has flipped that customary burden of proof."[2]

The Rule of Law: Its Place in Our History

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[1] The Rutherford Institute, a nonprofit legal and educational organization whose international headquarters are located in Charlottesville, Virginia, was established in 1982 by constitutional attorney John W. Whitehead. The Rutherford Institute is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people. The Rutherford Institute is a prominent leader in the national dialogue on civil liberties and human rights and is a forthright champion of the United States Constitution.

[2] Bruce Fein, "Are Civil Liberties at Risk in the War on Terror?", *Cato Policy Report* (September/October 2007), http://www.cato.org/pubs/policy_report/v29n5/cpr29n5-4.html.

The origin of American law and constitutionalism was succinctly stated by Thomas Paine in 1776: "In America the law is King. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other."[3]

In the United States, the Constitution represents the law of our land and as such reigns supreme. The Constitution grants the government certain enumerated powers. When the government oversteps its constitutional authority, it operates outside the boundaries of the law and, therefore, outside the "rule of law."

The defining feature of the system of government in America is that it deliberately divides power and authority between three branches of government. Commonly referred to as the separation of powers, this means that the President, the courts, and Congress each share one third of the role of government. The importance of this division of powers cannot be overstated. It ensures that power does not become localized exclusively in a single branch of government and thereby prevents our country from becoming an authoritarian regime. As Thomas Jefferson, political philosopher and principal author of the Declaration of Independence, wrote: "An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others."[4]

The doctrine of separation of powers is a fundamental aspect of the rule of law and is deeply embedded in American culture and government. The Framers were deeply devoted to securing a government committed to equal distribution of power. Fresh in their minds was the oppressive colonial rule of the British Empire. They understood well that if power was not shared and checked, a dictatorship would arise; in response, they conceived a system with three coequal branches of government.

Although the U.S. Constitution does not expressly mention the phrase "separation of powers," the document conspicuously reveals its influence. Article I establishes the legislative branch of government, housed in the U.S. Congress. Congress is to act as the voice of citizens, and primary among its duties is to make laws. Article II provides that the President shall act as the leader of the executive branch of government, which has the responsibility and duty to execute laws promulgated by Congress. And finally, Article III establishes the judicial branch of government, which is responsible for making sure that no law passed by Congress or act taken by the executive branch violates the Constitution or laws of the United States.

In short, there are three separate but equal branches of government that carry responsibility to oversee one another. In other words, the American form of government includes a mechanism

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[3] Thomas Paine, *Common Sense* (1776), Rt. Hon. Lord Bingham of Cornhill, House of Lords, Sixth Sir David Williams Lecture (Nov. 16, 2006), http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php.
[4] Thomas Jefferson, *Notes on the State of Virginia* 129 (J Randolph 1853) (1781).

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known as "checks and balances." This is perhaps one of the most innovative ideas of the Framers: the power of each branch to check the others was intended to ensure freedom and prevent tyranny. Just as importantly, it prevents one branch of government from dominating the others.

This system of checks and balances can be witnessed in the interplay between the three branches. For instance, although the President has the power to appoint judges, Congress must approve his appointments. Similarly, even though Congress passes laws, the President has the power to veto them (although such vetoes can later be overridden by Congress). The courts are not excluded from this system. The judicial branch checks both Congress and the President by striking down any law or action that is in violation of the Constitution. However, if the President or Congress disagrees with a judicial decision, they may attempt to amend the Constitution.

By way of illustration, imagine a weighing scale. The objective of the Constitution is to have a perfectly balanced scale. When one side acquires more weight (power), the other side decreases in weight proportionately, resulting in an unbalanced scale—or, in recent years, an unbalanced government, as it has manifested itself.

For example, if the President is allowed unfettered discretion to set her own rules, bound neither by the Constitution nor the other branches of government, she is "above the law" and assumes the role of dictator, able to act in whatever way she pleases. She thus becomes the law[5] – precisely what the Framers intended to prevent when they drafted the Constitution. The U.S. Supreme Court recently reinforced this bedrock principle. Speaking through (now former) Justice Sandra Day O'Connor, the Court restated the premise that:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").[6]

This interpretation of the Constitution is consistent with early documents. For instance, the Declaration of Independence was a scathing indictment of a monarchy the Framers believed too powerful. Consequently, one of the chief concerns of the Framers when they created a constitutional system that included a separation of powers was to significantly limit the power of the President. In fact, many Americans of those early days feared the very existence of a chief

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[5] John W.Whitehead, *The Imperial President and the Breakdown of the Rule of Law* (Jan. 2, 2006), http://www.rutherford.org/articles_db/commentary.asp?record_id=380.
[6] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), citing *Home Building & Loan Assn. v Blaisdell*, 290 U.S. 398, 426 (1934).

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executive. The executive branch was only created after the Articles of Confederation were changed and the Framers determined that a President was a necessary evil to balance out their proposed form of government. Even then, the office of President was given an extremely limited role.

Presidential Dissolution of the Rule of Law

Although George W. Bush is not the only President to award himself powers never contemplated by the Framers, during his two terms in office, he has managed to subvert the Constitution at almost every turn. In the process, he has assembled an assorted and impressive range of powers and has greatly increased the authority of the executive branch and the reach of the federal government—a legacy that future Presidents will most likely draw upon.

Claiming to possess the 'inherent' authority to suspend laws as he conducts his apparently endless war on terrorism, President Bush has assumed significantly greater powers in the wake of the 9/11 attacks. Over the course of the past seven years, Bush has expanded presidential power to allow government agents to, *inter alia*, open the private mail of American citizens, assume control of the federal government and declare martial law, as well as to secretly listen in on the telephone calls of American citizens and read our e-mails. Bush has also declared that if he disagrees with a law passed by Congress, he can disregard it. The Bush Administration has repeatedly placed itself above the rule of law in order to justify warrantless wiretapping, the detainment and torture of individuals captured in the war on terror, excessive government secrecy, and claims to executive privilege, among other egregious acts.

This increase in presidential power has been largely carried out under the Bush Administration by way of presidential directives, executive orders and stealth provisions used as a means to lay claim to a host of unprecedented powers. Executive orders remain extant and can be used by future Presidents. While executive orders can be challenged by lawsuits and repealed or modified by Congress or by a new executive order, seldom has any of this been done.

As noted above, George W. Bush's routine efforts to circumvent the rule of law have been conveniently carried out under the guise of waging a never-ending war on terrorism. In fact, this President has laid claim to an expansive range of wartime powers – more than any other before him. Indeed, under a strict reading of the Constitution, President Bush has clearly exceeded the power bestowed upon his office.

Generally, history has demonstrated that presidential powers have a constant ebb and flow. A President's powers typically increase significantly during times of war and decrease thereafter. This pattern has had significant consequences throughout American history. For example, during the presidency of John Adams, James Madison came out of retirement in response to what he perceived to be an unconstitutional abuse of power. At issue were the Alien and Sedition Acts, which significantly curtailed the rights of foreigners and the press during a time of national crisis. Later, it was Lyndon Johnson who expanded the role and powers of the President. To escalate the war in Vietnam, Johnson assumed major war-making powers with little regard for

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the views of Congress, the judiciary or the general public. He dispersed U.S. forces throughout Vietnam well before Congress had even drafted the Gulf of Tonkin Resolution of 1964, which gave the President the power to resolve the conflict by any means necessary. Likewise, in 1990, George H. W. Bush sent 550,000 soldiers to the perimeter of Kuwait before agreeing to a "discussion" with Congress about the decision to wage war.

Despite the precedent to the contrary established over time, the Framers did not give the President a wide array of unilateral foreign policy powers. On the contrary, such powers have historically been claimed by the executive branch. As constitutional historian W. Taylor Reveley III notes: "If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-power practice since 1789, he would marvel at how much Presidents have spun out of so little."[7]

While the Constitution reveals a clear tension between the legislative and executive branches regarding wartime powers, an objective reading demonstrates that Congress must, at the very least, be involved in wartime decisions made by a President. The Constitution is clear in its division of wartime responsibilities between the President and Congress. For instance, the President is charged with receiving diplomatic representatives of other nations, appointing (with the approval of the Senate) U.S. diplomats, negotiating treaties (subject to the ratification of the Senate), and serving as the commander-in-chief of the armed forces. Congress, on the other hand, is charged with the authority to declare war, raise military forces, provide funds for the military, and ratify or reject treaties. Thus, a reasoned review of the way in which wartime powers are to be distributed between Congress and the President reveals a bifurcation: the President is to be a liaison, spokesperson, and foremost diplomat, while Congress is to declare, and by extension wage, war.

The structure of the Constitution fails to support George Bush's contention that the President has unfettered—or even more than slightly limited inherent—wartime powers. The language of the Constitution makes the President commander-in-chief of the military. However, it does not allow him to bypass domestic and foreign law, as this administration has.

Remedies for Restoring the Rule of Law

The American system of government cannot survive unless those elected understand their proper role and the role of the Constitution. However, Congress and the courts – particularly since 9/11 – have repeatedly surrendered their responsibilities as separate and independent branches of government. Both must reclaim their roles and their constitutional duty to act as the full equals of the executive branch. Above all, they must resist the temptation to defer to the President every time he invokes the recurring mantra of the war on terror, something both branches have singularly failed to do thus far during the Bush Administration.

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[7] W. Taylor Reveley III, *War Powers of the President and Congress* 29 (University Press of Virginia, 1981).

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It remains to be seen whether the next occupant of the Oval Office will restore our constitutional government. Will that person place the executive branch back on an equal footing with the other branches of government, relinquishing the powers that President Bush has amassed and in so doing restore the separation of powers? Presidents and rulers do not easily relinquish power.

The nature of governments is that they overreach. While government assaults on our civil liberties and the freedoms guaranteed by the Constitution have become far more invidious and blatant in the years following the 2001 terrorist attacks, what James Madison termed 'experiments on our liberties' began long before that – as early as the embryonic American republic, in fact. Indeed, the American government has been at war with the Bill of Rights virtually since its conception.

As the various branches of government overstep their authority, it is ultimately up to the people to hold them in check. Congress, as our appointed representative, is the first line of defense. In this regard, Congress has failed in its duty to hold the government—viz, the executive branch—in check. The Framers had the foresight to provide us with the structure and the necessary tools to maintain equilibrium among the three branches of government, in particular between the executive and legislative branches. If we have failed to do so, it has not been due to a lack of legislative resources, but to Congress' tendency to play party politics rather than deal head-on with the issues before its members. Thus, if there is any hope for restoring the rule of law, it must begin with Congress.

Congressional oversight. Unprecedented abuse of presidential powers presents a clear and present danger to our country. Each branch of government profits from scrutiny and questioning by the other branches. Because time is of the essence, the necessarily slow-moving judiciary impels Congress to take the lead as the only branch able to hold the executive directly accountable. The rule of law cannot be restored without open and transparent government. Thus, it falls to Congress to check the executive branch when it overreaches its authority. At the least, Congress should immediately move to rescind all executive orders that undermine the rule of law, first by resolution and then by the passage of legislation. Congress should also immediately declare that signing statements such as those used by the Bush Administration to circumvent the law are to be regarded as nothing more than executive commentary and not, as has been the case, as policy.

No single legislative act will substitute for constant vigilance by our congressional leaders. Toward this end, the President should be required to face direct and public questioning from members of Congress on a regular basis,[8] not unlike the practice employed weekly in the British House of Commons, wherein the Prime Minister is called upon to respond to questions from Members of Parliament on any issue. This would serve to hold the President and government to account in a visible way, while acting as a constant reminder that the President is both a citizen

[8] David Folkenflik, *McCain Proposes Q&A Sessions with Congress, All Things Considered*, July 25, 2008, http://www.npr.org/templates/story/story.php?storyId=92918928.

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and a temporary occupant of office. At a minimum, the President should meet with congressional leadership from key committees on a regular basis. The executive branch must not be permitted to exercise arbitrary authority under the pretext of national security, as has been the Bush Administration's practice. It is especially important that congressional leaders be fully briefed on matters of national security: government by stealth is incompatible with the rule of law.

Constitutional literacy. If and when a weak Congress fails to uphold the balance of powers necessary to maintaining the republic, it then falls to the American people to hold their elected representatives accountable through protest, petition, and in the final instance at the ballot box. In order for this to be an effective safeguard, however, Americans must have a clear understanding of their history, the workings of their government, and a thorough knowledge of the Constitution.

Unfortunately, many Americans are increasingly apathetic about the state of this nation. Ignorant of their freedoms and uncertain about their ability to effect change in their communities, as well as their local, state, and federal governments, they are unable to mobilize as an effective political force. Equally alarming is the degree to which government officials, including elected public officials, fail to take to heart their oath to uphold and protect the Constitution. If those taking such an oath have only vague ideas about what the Constitution actually requires, such a pledge amounts to nothing more than an empty promise to serve.

Studies consistently show that American citizens lack even rudimentary knowledge about the Constitution. For example, only one in four Americans can name more than one of the freedoms guaranteed by the First Amendment, although more than half can name at least two members of the popular *Simpsons* cartoon family.[9] According to a study conducted in 2006 by the McCormick Tribune Freedom Museum, only one of the 1,000 people surveyed could name all five First Amendment freedoms.[10] On the other hand, 38 percent of those surveyed believed that the First Amendment protected their right to avoid self-incrimination.[11] According to another 2007 survey, 25 percent of the 1,003 respondents questioned believed that the First Amendment "goes too far in the rights it guarantees."[12] As a 2003 *CBS News* article observed: "In daily life, it's a lack of understanding about government that prompts people to call Congress when they want the dog catcher, or to complain to a local council member about a federal tax change. Over time, it can add up to disenfranchised and apathetic citizens."[13]

While the American revolutionary spirit that beat back the over-bearing British Empire and gave us the Constitution and the Bill of Rights has not died out altogether, ignorance about rights may

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[9] Associated Press, *More Know Simpsons than Constitution*, March 1, 2006, http://www.msnbc.msn.com/id/11611015/.
[10] *Ibid.*
[11] *Ibid.*
[12] http://www.firstamendmentcenter.org/news.aspx?id=19031.
[13] CBS News, *Ignorance of History Is No Joke*, July 3, 2003, http://www.cbsnews.com/stories/2003/07/03/politics/main561525.shtml.

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well be Americans' ultimate shortcoming. For this reason, constitutional literacy on the part of the American people, whether or not they are public servants, must be an integral part of the remedy if we are to restore the rule of law in this country. Senator Robert C. Byrd (D-W.Va.), who has been a staunch advocate of constitutional literacy, included a rider in the 2005 Appropriations Bill designating September 17th as 'Constitution Day.' The bill requires the head of each federal agency and department to provide new employees with educational materials on the United States Constitution as part of their orientation and to provide every employee with such materials on September 17th of each year. The law also requires that every public school hold appropriate educational programs in observance of Constitution Day. Congress should ensure that the next President actively complies with this federal legislation and ensure that his administration understands basic constitutional precepts. In this respect, there is no dearth of information about the United States Constitution.[14]

Speak truth to power. It is understandable that many Americans feel overwhelmed, powerless, and discouraged in the face of the government's expansive powers, seemingly endless resources, and military might. Even so, that is no excuse for standing silently on the sidelines. American citizens remain our final hope for freedom. As I explain in *The Change Manifesto*,[15] there are things that every American can do to resist authoritarianism and seek corrective measures, and there is no better time to act than the present. Fear, apathy, and escapism will not carry the day. It is within our power to attempt (in a nonviolent way) to make a difference. To this end, Americans must be willing, if need be, to dissent and in so doing speak truth to power. Such citizen participation has often been discouraged, either directly or indirectly, by the Bush Administration. However, Congress should encourage such efforts by way of resolution and/or legislation where necessary.

Conclusion

We are not helpless. We have a rich history. We often forget, as we have become complacent and apathetic, that America was born from the seeds of revolution. The freedoms which we often take for granted did not come about through happenstance. They were hard won through the determination, suffering, and sacrifice of thousands of patriotic Americans who not only believed in the cause of liberty, but who acted on that belief.

Americans fought the War of Independence to escape being governed or ruled by a monarch who was immune from their influence or control. To them, this status quo was nothing short of tyranny. Yet the colonists stood their ground. They knew they had rights. After those rights had been repeatedly violated, they decided to resist. That resistance came at a high price, but early

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[14] See, for example, The National Archives site: http://www.archives.gov/national-archives-experience/charters/constitution.html; The National Constitution Center site: http://www.constitutioncenter.org/explore/TheU.S.Constitution/index.shtml; The National Center for Constitutional Studies site: http://www.nccs.net/index.html.

[15] John W. Whitehead, *The Change Manifesto: Join the Block by Block Movement to Remake America* (Sourcebooks, 2008).

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Americans knew that if they did not stand up against oppression and injustice, tyranny would triumph.

How best to stop tyranny from triumphing was the central question informing the Constitution and the Bill of Rights. The colonists knew that winning the War of Independence was only the first step in fighting tyranny. They needed a written constitution and a clear statement of rights to protect them, and future generations of Americans, from the government. Their response was the Constitution and the Bill of Rights, which, along with the fortitude to stand up for what one believes, are the necessary tools by which we can maintain our freedoms against the present government onslaught.

The Constitution provides us with the blueprint for maintaining a balanced republic, and it must always be the starting point. However, each of us, from public officials to citizens, has an affirmative duty to hold our government accountable. It is here that the media has a vital role to play. With its ability to monitor government activity and report to the people, the media serves a crucial role as watchdog in helping to safeguard against abuses of power. Unfortunately, White House briefings and presidential news conferences have become increasingly scripted, ritualized, and lacking in substance.[16] Yet these and other evasive tactics do not absolve the members of the Fourth Estate from doing their jobs, just as entertainment distractions, a dismal economy, and threats of terrorist attack should not keep us from playing our part, as citizens and as public officials.

We must remember that despite the incredible powers the President has claimed, the U.S. Supreme Court has the power to overrule the Chief Executive. And Congress, if it exercises constitutional oversight, can limit both presidential actions and Supreme Court decisions. However, in the end, it is still the people who hold the ultimate power, and with it the concomitant responsibility, to maintain our freedoms. We can afford to remain silent no longer.

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[16] Jack Shafer, *Screw You, Mr. President: Helen Thomas used to ask questions in press briefings. Now she makes speeches*, Slate.com, March 12, 2003, http://www.slate.com/id/2080034/.

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Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change

Prepared Testimony to the Subcommittee on the Constitution Committee on the Judiciary United States Senate September 16, 2008

"Restoring the Rule of Law" Hearing

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Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change*

Introduction

When terrorists attacked the United States on September 11, 2001, they killed thousands of innocent civilians and targeted symbols of our economic and military power. However, we must not let those attacks challenge the values this nation was founded on, which we hold dear. The next President (and next Congress) will have an opportunity to restore the United States' commitment to these values – fairness, liberty, the idea of basic inalienable rights, and the rule of law – in the national security arena. Among other areas of national security policy, a new President will need to undertake serious repair work to U.S. detention policy. Such repair work is ultimately necessary not only as a matter of principle but also to strengthen our security. This Statement of Principles represents a consensus among its signatories regarding the most effective way to reform the current broken system of detention.

Across the political spectrum, there is a growing consensus that the existing system of detention of terrorism suspects without trial through the network of facilities in Guantanamo, Bagram, and beyond is an unsustainable liability for the United States that must be changed. The current policies undermine the rule of law and our national security. The last seven years have seen a steady erosion of the rule of law in the United States through an overly expansive and disingenuous reading of the laws of war, the denial of ordinary legal process, the violation of the most basic rights, and reliance on unreliable evidence (including secret and coerced evidence). The current detention policies also point to the inherent fallibility of "preventive" determinations that are based on assessment of future dangerousness (as opposed to past criminal conduct).[1] Indeed, while the administration once claimed the Guantanamo detainees were "the worst of the worst," it subsequently cleared the way for release of more than 400 of them, indicating that a large number of the detainees were not so dangerous after all.

Because it is viewed as unprincipled, unreliable, and illegitimate, the existing detention system threatens our national security.[2] It creates resentment and potential grounds for

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*Reporter: Catherine Powell, Associate Professor of Law, Fordham Law School; Senior Fellow, Center for American Progress.

[1] Empirical studies demonstrate that "preventive" detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people). *See, e.g.*, Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 385-386 (1990) ("The high level of false positives demonstrates that the ability to predict future crimes - and especially violent crimes - is so poor that such predictions will be wrong in the vast majority of cases. Therefore, judges should not use them as an independent justification for major deprivations of liberty such as detention").

[2] Because the current system threatens our national security, we strongly oppose any effort to extend the status quo by establishing (1) a comprehensive system of long-term "preventive"

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recruitment of future terrorists, undermines our relationships with foreign allies, and emboldens terrorists as "combatants" in a "war on terror" (rather than delegitimizing them as criminals in the ordinary criminal justice system).[3] Moreover, the current system of long term (and, essentially, indefinite) detention diverts resources and attention away from other, more effective means of combating terrorism. Reflecting what has now become a broad consensus around the need to use the full range of instruments of state power to combat terrorism, the bi-partisan 9/11 Commission pointed out that "long-term success [in efforts to pursue al Qaeda] demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense."[4] Thus, in addition to revamping the existing detention program to bring it within the rule of law, the next President should utilize this broad array of tools to subdue terrorism.

In this Statement, we propose a set of principles that should guide any new detention policy. We then provide concrete policy recommendations for the next administration.

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detention without trial for suspected terrorists, and (2) a specialized national security court to make "preventive" detention determinations and ultimately to try terrorism suspects. Despite dressed up procedures, these proposals would make some of the most notorious aspects of the current failed system permanent. Perhaps most fundamental is the fact that the supporters of these proposals typically fail to make clear who can be detained, much less how such individuals, once designated, can prove they are no longer a threat. Without a reasonably precise definition, not only is arbitrary and indefinite detention possible, it is nearly inevitable. Moreover, many of the proponents of a renewed preventive detention regime explicitly underscore the primacy of interrogation with respect to detainees' otherwise-recognized rights. A detention system that permits ongoing interrogation inevitably treats individuals as means to an end, regardless of the danger they individually pose, thereby creating perverse incentives to prolonged, incommunicado, arbitrary (and indefinite) detention, minimized procedural protections, and coercive interrogation.

[3] In this regard, consider the widely-acknowledged shortcomings of the British experience with the IRA. *See, e.g.*, MICHAEL FREEMAN, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 69 (2003) ("The physical brutality of the army and the police in conducting searches and raids as well as the alleged inhumane treatment of prisoners greatly increased support of the IRA in Catholic communities").

[4] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363-64 (2004), http://www.9-11commission.gov/report/911Report.pdf.

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Statement of Principles: Credible Justice and National Security

The hard lessons of the last seven years teach that the next administration must adopt a true blueprint of reform. Our national security turns in large part on the promulgation of *credible justice*. Any new detention policy must thus operate according to four basic principles:

(a) Any new policy must observe the rule of law,[5] including constitutional and statutory bounds, human rights, and international humanitarian law. End-runs around the Constitution and basic rights for the sake of expediency or fear are ultimately counterproductive.

(b) Detention without trial is an extraordinary measure in our society in which "liberty is the norm."[6] The very notion of "preventive detention" runs fundamentally counter to our most cherished traditions of American justice by imprisoning people for what they *might* do in the future, not for acts they have actually committed.

(c) Every person—including those suspected of terrorism—deserves individualized process that provides a meaningful opportunity to confront the charges against him or her. No person should be treated as a means to an end, and interrogation alone should never suffice to justify detention.

(d) Credibility turns on transparency. Secrecy not only provides a breeding ground for abuses, but it also erodes public trust in government policies in the U.S. and abroad.

A Blueprint for Change: Key Policy Fixes

A program of credible justice leads to the following concrete policy recommendations for a new President:

1. Close Guantanamo: Upon taking office, a new President should immediately announce a firm timetable for closure of the detention center at Guantanamo. The process of closing Guantanamo should include a policy of reviewing each detainee case to categorize and pursue the following:[7]

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[5] Conceptually, the term "rule of law" refers to more than just a list of rules of law to be followed. It refers to the idea that law "must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it." Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997). According to this idea, law applies equally in all cases and binds both private parties and government agents. No one is above the law.

[6] United States v. Salerno, 481 U.S. 739, 755 (1987) (Rehnquist, C.J., with White, Blackmun, Powell, O'Connor, and Scalia, JJ.).

[7] These recommendations draw on three excellent reports: KEN GUDE, HOW TO CLOSE GUANTÁNAMO, CENTER FOR AMERICAN PROGRESS (June 2008),

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a. a **first group** of detainees who are presumed to have committed crimes against the U.S. and should be **brought to U.S. soil for prosecution** in regular federal courts or in military courts (via courts martial proceeding) for crimes committed;

b. a **second group** of detainees who should be **transferred for prosecution in their home country or a third country**, in accordance with any applicable extradition principles, if they cannot be properly tried for crimes against the U.S.;

c. a **third group** of detainees who have not committed crimes against the U.S. and should be **repatriated to their home country for release**, in accordance with U.S. obligations under international human rights and humanitarian law;

d. a **fourth group** of detainees who have not committed crimes against the U.S., but must be **resettled in third countries**, rather than returned to their home country, where they face a risk of torture or other forms of persecution.

2. Scrap the Existing Military Commissions and Reject Specialized Terror Courts: The next President should dismantle the flawed Military Commissions and reject any effort to establish similarly flawed, specialized national security (or terror) courts. Using established U.S. courts to try terrorists will get trials moving more swiftly and would be an important step in restoring confidence in the American system of justice.

3. Look Beyond Guantanamo: Beyond Guantanamo, there are an estimated 25,000 "post 9/11 detainees" being held by the United States or on behalf of the United States worldwide.[8] Given its *sui generis* status, Guantanamo should not be the baseline or model upon which our broader detention program is built.[9] "We must not let the hard case of Guantanamo make bad law for all future counterterrorism detention operations."[10]

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http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf; HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION, http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf (August 2008); and SARAH E. MENDELSON, CLOSING GUANTÁNAMO: FROM BUMPER STICKER TO BLUEPRINT, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, http://www.csis.org/media/csis/pubs/080715_draft_csis_wg_gtmo.pdf (July 13, 2008).

[8] Amos N. Guiora and Daniel C. Barr, *Where Should the U.S. Try Terrorism Cases? U.S. Should Establish Domestic Terror Courts to Try Cases*, SALT LAKE TRIB. (June 20, 2008).

[9] Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, at 116 (forthcoming Creighton Law Review) (draft on file with the authors) (July 13, 2008) ("The Guantanamo dilemma … is the result of a series of now years-old, but unprecedented decisions by the United States to deny the [basic rights of the] Guantanamo detainees ").

[10] *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 110th Cong. (Sept. 16, 2008) (statement of Deborah N. Pearlstein).

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4. Apply a Zero Tolerance Rule Regarding Torture and Cruelty: Both as a matter of principle and national security, a new President must adhere to treaties that the U.S. negotiated and ratified prohibiting torture and cruel treatment under any circumstances.[11] Since the September 11th terror attacks, the U.S. has gone from a policy of zero tolerance to a policy of zero accountability on torture,[12] which has led to widespread international condemnation. Thus, in parts of the world, photos of abuse from Abu Ghraib rival the Statue of Liberty as emblems of our great country and provide potential fodder for terrorist recruits. Yet, "[o]ur country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights."[13] The next President must reassert that all acts of torture are criminal offenses[14] and that no official of the government – whether federal, state or local, civilian, military, or CIA – is authorized to commit or to instruct anyone else to commit torture.[15] Nor may

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[11] See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, as modified by 24 I.L.M. 535 (1985) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture") [hereinafter Convention Against Torture], and Common Article 3, common to all four Geneva Conventions. In addition to being wrong as a matter of principle and creating resentment, torture can produce unreliable information. See John McCain, Torture's Terrible Toll, Newsweek, Nov. 21, 2005, at 34, available at http://www.newsweek.com/id/51200 (describing his own experience of giving false information under torture); Lt. Gen. Jeff Kimmons, Army Deputy Chief of Staff for Intelligence, Def. Dep't News Briefing on Detainee Policy (Sept. 6, 2006), available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601442.html ("No good intelligence is going to come from abusive practices.").

[12] Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J 1145, 1147-48 (2006).

[13] *Id.* at 1148 (quoting Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing on the Initial Report of the United States of America to the UN Committee Against Torture, Washington, D.C. (Oct. 15, 1999), http://www.state.gov/www/policy_ remarks/1999/991015_koh_rpt_torture.html).

[14] Convention Against Torture art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law").

[15] *Id.* art. 1, 2(3).

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any official tolerate, condone, acquiesce or consent to torture or cruel treatment in any form.[16]

5. Close Secret Prisons Once and For All: When President Bush announced he was transferring over a dozen detainees from secret prisons run by the CIA overseas to Guantanamo, he failed to end the program of incommunicado CIA detention entirely. Despite U.S. criticism of disappearances by other governments, the Bush Administration's practice of disappearing individuals violates the most basic legal norms in the treatment of prisoners. A new President must end the practice of holding ghost detainees and should allow a neutral body, such as the International Committee of the Red Cross, access to all detainees.

6. Apply the Rule of Law: Bringing the U.S. detention program firmly within the rule of law would better serve the nation's interests going forward, because it would produce more accurate outcomes (regarding who should be detained) and restore our international credibility. Just as an extensive range of tools – diplomatic, military, economic, and otherwise – exists to combat terrorism, so too a broad array of possible legal regimes exists for detention of terrorists and terrorist suspects. These legal regimes exist both within international law (i.e., international criminal law, humanitarian law, and human rights law) and domestic law (i.e., domestic criminal law, immigration law, and related government powers). Rather than view detainees as falling in a legal black hole – within the gaps between and among these legal regimes – as the current administration has done, a new President should regard these multiple potentially relevant bodies of law as providing a useful spectrum "of different policy options in responding to different degrees [and types] of terrorist threat."[17] In particular, the next administration should restore rule of law in the following three areas:

    a. United States Constitution: A new administration should heed the constitutional principles that generally limit the deprivation of liberty as punishment for a crime, as opposed to as punishment purely for perceived dangerousness.[18] Preventive confinement has historically been limited to six categories: mental health (civil commitment);[19] public health (quarantine);[20] juvenile jurisdiction;[21]

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[16] *Id.* art. 1 (prohibiting torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Convention Against Torture art. 16; Common Article 3, Geneva Conventions.

[17] Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, at 103.

[18] Foucha v. Louisiana, 504 U.S. 71, 72 (1992). Moreover, although not memorialized in the Bill of Rights, the Supreme Court recognizes that "the presumption of innocence is 'constitutionally rooted,' that it is 'axiomatic and elementary, and that its enforcement lies at the foundation of the administration of our criminal law.'" Miller & Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. at 414-15.

[19] *See* Addington v. Texas, 441 U.S. 418 (1979).

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pre-trial confinement in criminal proceedings;[22] immigration;[23] and wartime detention consistent with the traditional laws of armed conflict.

b. U.S. Criminal Justice System: The criminal justice system has demonstrated that it has the capacity to detain terrorism suspects pending trial on charges pursuant to a variety of both terrorism-related statutes and more general statutes.[24] Moreover, the Classified Information Protection Act (CIPA), 18 USC app 3 §§1 et seq. and the Foreign Intelligence Surveillance Act (FISA), 50 USC §§ 1801 et seq. have been used effectively to protect the government's interest in avoiding the disclosure of national security information.[25]

c. International Legal Regimes: A new administration should apply an internationally accepted and accurate understanding of international law, rather than the inaccurate, minority view of international law advanced by the Bush administration's Office of Legal Counsel, particularly with regard to detention policy, torture, and rendition. As with U.S. domestic law, obeying the rule of international law (which the U.S. has been a leader in establishing and developing) is critical as a matter of principle, our national interest (for example, in fair treatment of captured U.S. soldiers), and international stability. The two primary international law regimes that regulate detention policy are international humanitarian law (IHL) and international human rights law. IHL recognizes the possibility of detention under particular circumstances during armed conflict until the end of hostilities to prevent individuals from rejoining the battle on behalf of the enemy.[26] It also requires, at a minimum, humane treatment and

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[20] *See* O'Connor v. Donaldson, 422 U.S. 563 (1975) (Burger, J., concurring).

[21] *See* Schall v. Martin, 467 U.S. 253 (1984).

[22] *See* United States v. Salerno, 481 U.S. 739 (1987); Bell v. Wolfish, 441 U.S. 520 (1979).

[23] *See* Zadvydas v. Davis, 533 U.S. 678 (2001).

[24] Through an analysis of 120 international terrorism cases pursued in federal courts over the last fifteen years, a study conducted by two former prosecutors, Richard Zabel and James Benjamin, demonstrates that our civilian criminal justice system has the capacity and flexibility to detain and punish terrorists without resorting to a system of detention without trial (beyond the regular pre-trial detention that is circumscribed by criminal law). Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (May 2008), http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (compiled on behalf of Human Rights First).

[25] *See id.* at 77-90.

[26] Under the Third Geneva Convention, "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." Geneva Convention (III) Relative to the

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other baseline protections.[27] However, the current administration's attempt to either assume IHL does not apply or, alternatively, stretch IHL to justify indefinite detention for interrogation of acts of terrorism that long have been considered a matter of domestic criminal jurisdiction is inconsistent with longstanding U.S. respect for the letter and spirit of IHL, is illegitimate in the eyes of the international community, and vastly increases the likelihood that individuals will be improperly detained.[28] International human rights law also regulates detention, as it applies in times of war[29] (as well as times of peace) and can only be derogated from under narrow circumstances.[30] Moreover, U.S. treaty

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Treatment of Prisoners of War, Art. 118, Aug. 12, 1949, (1955) 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities").

[27] While the current administration spent most of the past seven years denying IHL protection, the Supreme Court has ruled that the baseline protections of Common Article 3 applied to the conflict between the U.S. and al Qaeda. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[28] Importantly, the Hamdi Court noted, "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 521.

[29] *See* Kadic v. Karadzic, 70 F.3d 232, 242-45 (2d Cir. 1995) (applying both IHL and international human rights law in resolving plaintiffs' claims); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) ("the protection offered by human rights conventions does not cease in case of armed conflict"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) ("[T]he protection of the [ICCPR] does not cease in times of war"); and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, O.A.S. OEA/Ser.L/V/II.116, doc. 5 rev. ¶ 42, 1 corr. (Oct. 22, 2002) ("[T]he international human rights commitments of states apply at all times, whether in situations of peace or situations of war"). *See also* MICHAEL BOTHE, KARL JOSEPH PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 619 (1982) ("[I]t cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international conflicts"); and Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266 (2000) (noting that international human rights law applies to fill the void where the specialized law of war is silent).

[30] *See* International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The U.S. has not officially derogated from any rights since the September 11 attacks. Article 4 only permits derogation from particular rights, *id.* art. 4(2), and only in times of public emergency "which threaten[] the life of the nation and the existence of which is officially proclaimed." *Id.* art. 4(1). Further derogations must be "strictly required by the exigencies of the situation" and may not involve discrimination "solely on the grounds of race, color, sex, language, religion or sound origin." *Id.* Finally, "derogations cannot be open-ended, but must be limited in scope and duration." Alfred

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obligations regulate U.S. operations even when conducted outside the United States.[31] In addition to guaranteeing the basic rights associated with fair trials,[32] these obligations prohibit arbitrary arrest and detention[33] as well as torture and cruel, inhuman or degrading treatment or punishment.[34]

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de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 15, 16 (2005).

[31] *See, e.g.,* Conclusions and Recommendations of the Committee Against Torture, United States of America, ¶ 15, U.N. Doc. CAT/C/USA/C/2 (May 19, 2006). Referring to the U.S. position that its international obligations do not apply on Guantanamo, for example, the Committee notes that:

> [A] number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (articles 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable.
>
> *The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.*

Id. (emphasis in original).

[32] *See* ICCPR art. 14 (outlining rights to an independent tribunal, counsel, opportunity to confront witnesses, and the presumption of innocence until proven guilty).

[33] ICCPR art. 9. Arbitrary detention also violates international law if it is prolonged and practiced as state policy. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment h (1987) (quoting Statement of U.S. Delegation, 13 GAOR, U.N.Doc. A/C.3/SR.863 at 137 (1958)).

[34] ICCPR art. 7. *See also* Convention Against Torture. Note that the prohibitions on torture and cruel, inhuman or degrading treatment or punishment are nonderogable. ICCPR art. 4(2). Generally, human rights law has been incorporated into Security Council resolutions authorizing U.S. detentions in Iraq and Afghanistan and should be incorporated in bilateral agreements between the U.S. and other countries that authorize U.S. detentions with the consent of other countries (such as with the proposed Strategic Framework Agreement between the U.S. and Iraq).

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Conclusion

A new President and Congress will have the opportunity to restore the rule of law to U.S. detention policy and to undo the damage wrought over the last seven years to our reputation and national security. The principles and policy reforms proposed here will be an important part of that process. In the meantime, the President and Congress should refrain from interfering with the ongoing habeas proceedings in federal courts pursuant to *Boumediene v. Bush*.[35] Then, a new administration can take stock of the guidance provided by the courts in undertaking reforms.

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[35] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

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STATEMENT OF
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TO THE CONSTITUTION SUBCOMMITTEE
OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY
ON RESTORING THE RULE OF LAW

Senator Feingold and Members of the Subcommittee:

I am pleased to offer this statement in support of the subcommittee's inquiry into necessary steps to restore the rule of law in our federal government. From 1978 to 1981, I was a career attorney in the Justice Department's Office of Legal Counsel, serving under Assistant Attorney Generals John Harmon and Theodore B. Olson. For several months during this period, I was also detailed to serve as an Assistant General Counsel in the Office of Management and Budget. Since 1981, I have been a law teacher and scholar, specializing in constitutional and administrative law, with a special focus on separation of powers law. I am the lead author of what is still the only law school coursebook on separation of powers law, and have written roughly forty scholarly articles and book chapters on such topics as signing statements, presidential war powers, executive privilege, judicial independence, independent prosecutors, and legislative-executive relations. Your topic is one I address, therefore, as a concerned citizen, a separation of powers scholar, and a former government lawyer. I can hardly imagine a topic more important to the future of our governance.

Focusing on the Rule of Law

The rule of law in the United States stands compromised today by an accelerating trend since 1981 toward a philosophy of government I have called "presidentialism." The most aggressive presidentialists argue that the Constitution guarantees the President expansive powers in foreign and military affairs, in the exercise of which he is legally accountable to no one. They further argue that he has complete and unfettered authority to direct other members of the executive branch in how they exercise any and all policy making discretion that is vested in them through statutes enacted by Congress. This is a gross misreading of the Constitution. Unfortunately, however, because of the too frequent deference of both Congress and the judiciary to presidential initiative, recent chief executives have been able to behave as if they truly were invested with the constitutional powers that presidentialists advocate. This trend has reached unprecedented heights during the current Administration, which appears to believe in a version of the rule of law that requires nothing but the occasional rhetorical invocation of legal authority, often without plausibility.

Part of what advocates of this view of the presidency ignore is that, in operation, the ethos of executive entitlement is utterly corrosive of the rule of law. The ideological prism of presidentialism bends the light of the law so that nothing is seen other than the prerogatives of the sitting chief executive. It too frequently threatens to corrupt the processes of government lawyering that stand as the only means by which the law is actually brought to bear on government decision making. Most executive branch decisions are too low in visibility or too

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diffuse in impact to elicit judicial review or congressional oversight as ways of monitoring legal compliance; if federal lawyers substitute extreme advocacy for careful, balanced advice, there will frequently be no one else effectively situated to do the job of assuring diligence in legal compliance. As we have seen in the Bush Administration's treatment of such issues as torture, warrantless surveillance, and the legal status of enemy combatants, government lawyers imbued with the ideology of presidentialism too easily abandon their professional obligations as advisers and too readily become ethically blinkered advocates for unchecked executive power. The rule of law depends, in part, on government lawyers' understanding that their "client" is the American people, and not the ephemeral roster of incumbent federal officer holders.

At its core, the rule of law is about accountability. It means that those in power cannot do what they want just because they want to do it, or because they have force on their side. The rule of law means they can do only what the law permits. But this simple idea must take account of two common facts. One is that public officials, even if conscientiously attentive to law, will often find the written law vague. The second fact is that, with regard to a great deal – perhaps most – government activity, the chances are remote that law can and will be enforced against nonconforming behavior. We thus need government officials to bear allegiance to a concept of the rule of law that applies even when law is uncertain and the prospects for sanction are remote.

Fifty years ago, Justice Frankfurter explained this idea beautifully:

> [L]aw is not a code of fettering restraints, a litany of prohibitions and permissions. It is an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests. Once we conceive "the rule of law" as embracing the whole range of presuppositions on which government is conducted . . ., the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.[1]

In short, for the rule of law to have force, government officials and the lawyers who advise them must always embrace their accountability to others. They must be guided by reasons they would be willing to declare publicly, and these reasons must be consistent with the law they are charged with implementing. They must be mindful not only of what advances the political agenda of one party or another, but also of the needs and interests of the public more generally and of all the critical institutions of government. For this to happen, the written documents of law have to be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they truly are accountable to the public interest and to legitimate sources of legal and political authority at all times, even when the written rules are ambiguous and even when they could probably get away with merely self-serving behavior.

Creating a Rule of Law Culture in Government

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[1] Felix Frankfurter, *Address: John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 28 (A. Sutherland ed. 1956).

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If we see that the rule of law depends on habits of behavior, then it is obvious that what must buttress the rule of law is not just more law, but the creation of an institutional context in which rule of law behavior is more likely to occur. We must throw out presidentialism as an ethos of governance and replace it with a "rule of law culture" in government. Two interrelated factors are absolutely central to this goal. One is openness. The other is dialogue – assurance that critical policy making will follow only from vigorous and open debate within government as to what the public interest requires. To the extent government officials operate openly and with conspicuous exposure to the challenge of competing points of view, the prospects of adherence to law are maximized. If government officials know they can operate in secret, if they know that they can pursue their agendas without taking into account the views of those with whom they disagree, what will follow, ultimately, is lawlessness.

With these premises in mind, I offer the following suggestions for rebuilding the rule of law in the ntional government of the United States.

First, we must return to an ethos of open government by reversing virtually every information policy adopted unilaterally by the George W. Bush Administration. For example, Congress enacted an Open Government Act of 2007,[1] intended to enhance enforcement of the Freedom of Information Act, or FOIA. To increase public access to government records, the Act created an office of FOIA Ombudsman in the National Archives and Records Administration, an agency widely respected for its professionalism and political neutrality. President Bush relocated the office to the Justice Department, the agency charged with defending government decisions to withhold records from disclosure. The office should be moved back to NARA.

In a similar vein, the Bush Justice Department promised federal agencies that the Department would defend decisions not to disclose records upon public request whenever such decisions to keep records secret could be sustained by formal reliance on a statutory exemption from the rule of mandatory disclosure under FOIA. This reversed a policy of the Clinton Justice Department to defend agency failures to disclose only if they were defensible both on a legal basis and on a policy basis, that is, only if the agency not only had technical legal authority for withholding a document, but also a plausible explanation why making the document public would harm the public interest. A new Administration should go back to the Clinton policy.

A new Administration should revoke Bush's Executive Order 13,233, which complicated the release of records from prior presidential administrations. The order should be rewritten to simplify the release of historical records under the Presidential Records Act. A new order should eliminate the prerogative for anyone other than a president or former president to claim executive privilege, and renounce the notion of vice-presidential privilege.

A comprehensive analysis should be undertaken of all government information withdrawn from the World Wide Web in the wake of September 11, and any information whose public disclosure does not pose a genuine risk to national security should be restored to easy public access. In a similar vein, the executive order on the classification of national security documents should be redrafted to restore the Clinton Administration's insistence that equal priority be attached to the

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1 Pub. L. No. 110-175, 121 Stat. 2524 (2007).

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declassification of documents whose confidentiality is unnecessary to American security. Vice presidential records should again be subject to mandatory declassification review by the National Archives and Records Administration.

The new Administration should catalogue and reexamine all agency practices of withholding unclassified information based upon categories of "sensitivity" not authorized by law. Such systems should be eliminated, unless they are fully in compliance with the Freedom of Information Act.

Both Congress and the President should emphatically renounce the constitutional theory of the "unitary executive." The President should repudiate the use of "signing statements" to reinterpret congressionally enacted statutes, except in those rare cases where statutory provisions may violate clearly established principles of constitutional law. Congress should consider enacting a statute providing that signing statements are not to be treated as legal authority.

The use of executive privilege should be curtailed. The President should pledge good faith negotiation with Congress regarding requests for executive branch information, to insure that Congress is able to conduct its legislative and oversight responsibilities effectively. The President should order the Justice Department to limit the invocation of the state secrets privilege to defeat judicial review only when actually necessary to protect the foreign policy or national security interests of the United States in specific cases. The President should support the independence and authority of agency inspectors general, and order agencies to cooperate fully with the investigative authority of the Government Accountability Office. Finally, the President should broaden consultation with Congress in the making of national policy within areas of shared constitutional responsibility, and candidly seek congressional authorization for any increased discretionary authority the executive branch may need to respond to national needs more effectively.

Congress, of course, will also be a critical actor in restoring the rule of law – whether in deploying its own independent powers, drafting legislation, or reestablishing informal norms of communication with the executive branch. For example, Congress needs to rethink its role in the appointments process. The Senate should take seriously its role not merely to consent, but to advise – and should give weight not only to the character and records of achievement of presidential nominees, but also to their commitment to implementing the law within their jurisdiction and their determination to operate in an open and accountable manner. With regard to judicial nominations, the members of the Senate Judiciary Committee should commit themselves to a merit-centered focus on lower court appointees, and should support presidential nominations that emanate from a process of independent review.

With regard to Supreme Court nominees, the Senate Judiciary Committee needs to rethink its hearing process from the bottom up. Members should appropriately concern themselves with both the merit of individual appointees and the representativeness of the Court as a whole. Unfortunately, the quality of committee questioning in recent hearings has too often been ineffective, with members either trying fruitlessly to "nail" a nominee on a controversial question of constitutional interpretation or to exact pledges of fidelity to law that are either so general as to be meaningless or simply oblivious to how the Justices' judicial philosophies actually animate

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their work. In this context, the Committee could usefully provide an extended period for questioning of the candidates led by litigators, some of whom might even be hired for the specific hearing. People who practice or teach constitutional law for a living would be helpful in framing questions that would be more revealing and harder to evade, and to follow up meaningfully when answers appear incomplete or ambiguous. The Committee should also remain committed to seeking external input through the American Bar Association Standing Committee on the Federal Judiciary, which has long provided a useful independent assessment of judicial nominees' qualifications.

In the wake of controversial dismissals of U.S. attorneys in politically questionable circumstances, Congress should rethink whether U.S. attorneys should be dischargeable by presidents at will. The public interest in nonpartisan law enforcement might be served better by U.S. attorneys appointed for four-year terms and removable only for good cause, such as malfeasance or an inability to discharge the responsibilities of office. Keeping terms relatively short would assure Presidents of a law enforcement apparatus philosophically compatible with the Justice Department's political leadership, but limiting the removal power to instances of "good cause" would protect the independence of prosecutorial decision making in sensitive cases.

Congress should also think systematically about its oversight powers. Although hearings to ferret out specific wrongdoing may occasionally be called for, priority should ordinarily be determined according to the potential of various inquiries to shed light on the need for new legislation. At this point, the need is urgent for a set of retrospective hearings on the separation of powers practices of the Bush Administration. The point should not be to assign blame for particular mistakes, but to clarify the nature of the controversies that persist between the branches and to determine specific areas where legislative reforms need to occur. As I have mentioned, Congress should consider whether a statute expressly limiting the legal effect of presidential signing statements is appropriate. A statutory process for the orderly resolution of interbranch executive privilege disputes might be in order. The State Secrets Protection Act proposed in 2008[2] to provide an orderly process for assessing in civil litigation whether invocations of the state secrets privilege are justified should be enacted. Congress should reconsider whether the trend towards deepening the levels of political agency management should be reconsidered, and the role of and protections for the career civil service instead be intensified.

In the area of military policy making, the War Powers Resolution, in its current form, has simply proven inadequate to discipline executive branch unilateralism. A "Use of Force Act," proposed in 1995 by Senator Joseph Biden of Delaware, remains the most promising reform proposal so far advanced.[3] The Biden proposal would replace the War Powers Resolution with a more detailed and potentially more restrictive regulation of presidential power and, perhaps most significantly, institutionalize ongoing consultation between the President and key cabinet members with a statutorily designated bipartisan congressional leadership group to focus on

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2 S. 2533, 110th Cong., 2d Sess. (2008).

3 S. 564, 104th Cong., 1st Sess. (1995).

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foreign and national security policy. It would represent a significant step forward in extending the rule of law to issues of military and foreign affairs.

To its credit, the Bush Administration did make one conspicuous attempt at promoting government openness – its so-called "electronic rulemaking" initiative, the public face of which is a web site called Regulation.Gov. The Administrative Procedure Act, of course, requires federal agencies to create opportunities for public comment before implementing most significant administrative rules.[4] The process, though, can be notably arcane for Americans who are unaware of how rules are made or what rules are being considered at what time and by which agencies. The vision behind Regulations.Gov is a one-stop portal that would enable members of the public to identify quickly the rules on any subject that are being proposed and deliberated by any agency within government, and to take advantage of a simple online process for providing public input.

Unfortunately, the initiative has not reached its potential because Congress never provided it with sufficient appropriations or a sound governance structure. Instead, design of this potentially powerful tool for pluralistic dialogue has become enmeshed in a seemingly endless process of push-and-pull among various agencies, typically resisting OMB efforts to force uniformity of practice on agencies with very different regulatory missions and cultures. If Congress wants to empower Americans through the Internet to participate more meaningfully in a pluralistic policy dialogue within the executive branch, it will have to provide the project a clear legislative mandate and adequate financial and personnel resources. Increasing the openness of federal regulatory processes should help to foster greater agency accountability to law.

Congress should go even further to make the executive branch transparent to the public. Presidents have long claimed that "predecisional documents," memoranda that reveal the substance of policy-oriented discussions within government that precede public administrative initiatives such as the promulgation of a regulation, are presumptively immune from mandatory disclosure whether in court, Congress, or any other forum. As written, the federal Freedom of Information Act currently permits the executive branch to implement that position with regard to everyday public requests for information, although the need for such secrecy is questionable.[5] Congress should reconsider the range of decision making documents that the executive branch is entitled to withhold from the public under the Freedom of Information Act. A strong presumption against secrecy should prevail whenever release of a document has no implications for military affairs, foreign policy, or criminal law enforcement.

Of course, empowering citizen input into representative government through enhanced transparency is not a strategy that ought be limited to the executive branch. Sunshine in the legislative branch would also enhance the government's "rule of law" culture. Congressional practices that disguise the responsibility of individual legislators, such as the process in the Senate of secret "holds" on nominations, should be categorically abolished. Congress also needs to attend to the imperative of opening up its own deliberations. A Library of Congress web site

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[4] 5 U.S.C. § 553.

[5] 5 U.S.C. § 552(b)(5).

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currently provides free and comprehensive access to information about pending legislation, committee proceedings (including full text reports), and the Congressional Record.[6] But users need to know a lot about Congress in advance in order to take real advantage of the web site. And, of equal importance, the site fails to offer "one-stop shopping" for citizens interested in the legislative process. It offers nothing, for example, about Members' position statements and voting records.

Of the three branches, the judiciary has the least capacity to participate in an aggressive and systematic way in a recalibration of checks and balances and a taming of presidentialism. That is because courts cannot determine for themselves which questions and controversies will be brought before them for resolution, and uniformity of judicial response can be achieved only through decisions of the United States Supreme Court, which in recent years has decided fewer than one hundred cases per term.

Nonetheless, it relatively easy to spot one area of public law doctrine where the evolution of a new approach (or resuscitation of an old one) would help advance the cause of pluralism and keep checks and balances healthy. The Supreme Court should affirm, on the earliest relevant occasion, that presidential signing statements have no jurisprudential weight in determining the meaning of statutes enacted by Congress. Congress, not the President, is the legislative branch, and the Court should simply reject at its earliest opportunity the proposition that the scope of a law's impact may be authoritatively altered through presidential interpretation.

Nearly all the reforms I have thus far recommended would operate fairly directly either to intensify interbranch accountability directly or to animate the rule of law governance by increasing openness and elevating the importance of pluralistic democratic deliberation. To endure, however, and to be maximally effective, these changes should reinforced by other structural reforms in our systems of politics and political communication that will promote shifting coalitions and vigorous debate and discussion, while precluding a hardening of factions.

I suspect that cataloguing such reforms would go beyond the immediate concerns of your subcommittee. But I deeply believe that there is an intimate relationship between the vitality of the rule of law and the health of our democratic system. James Madison and his colleagues believed, in 1787, that provisions on parchment for the disciplining of government could not succeed without a citizenry dedicated to the ideals of what they called "republicanism." The restoration of the rule of law should reflect a national conviction that a "government of laws, and not of men" remains an effective operating philosophy for American democracy in the twenty-first century – a philosophy that public vigilance and participation are essential to sustaining.

Thank you for the opportunity to share these views with you.[7]

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[6] The web site, called Thomas (for President Jefferson), appears at http://thomas.loc.gov.

[7] Portions of this statement are excerpted from the forthcoming book, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (University of Chicago Press, 2009).

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"Restoring the Rule of Law"
Statement to the Subcommittee on the Constitution
United States Senate Judiciary Committee
September 16, 2008

Geoffrey R. Stone*

The actions of the George W. Bush Administration over the past several years have raised serious concerns about the appropriate level of government secrecy. The Administration has attempted to shield from public and even congressional scrutiny a broad range of controversial government decisions, including, for example, the secret creation of the National Security Agency (NSA) surveillance program, the secret authorization of the use of torture and rendition, the secret approval of the incommunicado detention of American citizens, and the secret establishment of prisons in Eastern Europe.

To achieve an unprecedented level of secrecy, the Bush administration has promulgated secret policies, narrowly interpreted the Freedom of Information Act, broadly interpreted its power to classify government documents, closed deportation proceedings from public view, redacted vast quantities of "sensitive" information from government documents and websites, fired and otherwise punished government whistleblowers, jailed journalists for refusing to disclose confidential sources, threatened to prosecute the press for publishing confidential information, and aggressively invoked both executive immunity and the state secrets doctrine.[1]

To some degree, the administration's emphasis on secrecy is an understandable consequence of the distinctive nature of the war on terror. In most circumstances, threats to the national security, like threats to the public safety, can be addressed through the conventional policies of deterrence and punishment. During the Cold War, for example, the Soviet Union was deterred from launching a nuclear attack against the U.S. in part by of its fear of a retaliatory counter-strike. In the war on terror, however, the enemy is not a nation state against which the U.S. can retaliate. Moreover, the enemy's "soldiers" have convincingly demonstrated their willingness to commit suicide for their cause. Deterrence and punishment are largely ineffective against such an enemy.

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[1] See John Podesta, *Need to Know: Governing in Secret*, in Richard C. Leone and Greg Anrig Jr., eds, *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* 220, 221-225 (Washington, D.C.: Century Foundation, 2003); Richard C. Leone, *The Quiet Republic: The Missing Debate about Civil Liberties after 9/11*, in Leone and Anrig, *War on our Freedoms* at 9 (cited in this note).; John F Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, in Leone & Anrig eds, *War on Our Freedoms* at 237 (cited in this note); *Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation* (August 1, 2002).

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Adding to the danger, for the first time in human history a relatively small group of individuals has the potential to wreak large-scale havoc and destruction through the use of chemical, biological, nuclear or (as illustrated by September 11, 2001) other unconventional weapons. Because there appears to be no effective way to protect the nation by deterring or punishing this enemy, prevention becomes all-important.

Jack Goldsmith, who served a stint as head of the Justice Department's Office of Legal Counsel, has vividly described the mindset within the administration in his 2007 book, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION.[2] In 2004, after Goldsmith informed David Addington, the Special Counsel to the Vice-President, that the Administration could not lawfully implement a potentially important counterterrorism measure, Addington responded: "'If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands.'"[3]

Addington's response speaks volumes about the pressure felt by the Bush Administration to keep America safe. According to Goldsmith, every morning the White House received a "'threat matrix'" that listed every threat directed at the U.S. in the preceding 24 hours. The matrix might be dozens of pages long. As Goldsmith notes, "It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives."

One of Goldsmith's colleagues in the Administration analogized "the task of stopping our enemy to a goalie in a soccer game who 'must stop every shot,'" for if the enemy "'scores a single goal,'" the terrorists succeed. To make matters worse, "'the goalie cannot see the ball -- it is invisible. So are the players -- he doesn't know how many there are, or where they are, or what they look like.'" Indeed, the invisible players might shoot the ball "'from the front of the goal, or from the back, or from some other direction -- the goalie just doesn't know.'"[4] With such a mindset, it is no wonder that the war on terrorism has generated a "panicked attitude" within the White House.[5]

In such an environment, it is easy to understand why the Bush Administration has been so focused on gathering huge amounts of information, using aggressive methods of interrogation, and preserving secrecy. In an atmosphere in which prevention is critical, and the failure to prevent even a single attack can lead to the deaths of thousands of Americans, the control of information is essential. The more we know about the enemy, and the less the enemy knows us, the better. This mindset is a natural and understandable product of the need to find every needle in every haystack, without fail.

Against this backdrop, I want to consider the issue of secrecy in the realm of national security. What is the right approach to this issue? The government often has exclusive possession of information about its policies, programs, processes, and activities

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[2] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton 2007).
[3] Id. at 71.
[4] Id. at 73-74.
[5] Id. at 74.

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that would be of great value to informed public debate. In a self-governing society, citizens must know what their representatives are doing if they are intelligently to govern themselves. But government officials often insist that such information must be kept secret, even from those to whom they are accountable – the American people.

The reasons why government officials demand secrecy are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes, government officials rightly fear that the disclosure of secret information might undermine the national security (for example, by revealing military secrets). Sometimes, they are concerned that the revelation of secret information would betray the confidences of citizens or other nations who provided the information on an assurance of confidentiality. Sometimes, they want to keep information secret because disclosure would expose to public view their own incompetence or wrongdoing.

The value of such information to informed public discourse may also vary widely. Sometimes, the information is extremely important to public debate (for example, the disclosure of unwise or even unlawful government programs or activities). Sometimes, the information is of no real value to public debate (for example, the disclosure of the identities of non-newsworthy covert agents).

The most vexing problem arises when the public disclosure of a government secret is both harmful to the national security and valuable to self-governance. Suppose, for example, government officials conduct a study of the effectiveness of security measures at the nation's nuclear power plants. The study concludes that several nuclear power plants are vulnerable to terrorist attack. Should this study be kept secret or should it be disclosed to the public? On the one hand, publishing the report might endanger the nation by revealing our vulnerabilities to terrorists. On the other hand, publication would alert the public to the situation, enable citizens to press government officials to remedy the problem, and empower the public to hold accountable those public officials who have failed to keep the nation safe. The public disclosure of such information could both cost and benefit the nation. Should the study be made public?

In theory, this question can be framed quite simply: Do the benefits of disclosure outweigh the costs of disclosure? That is, does the value of the disclosure to informed public deliberation outweigh its danger to the national security? Unfortunately, as a practical matter, this simple framing of the issue is not very helpful. It is exceedingly difficult to measure in any objective, consistent, predictable, or coherent manner either the "value" of the disclosure to public discourse or the "danger" to national security. And it is even more difficult to balance such incommensurables against one another.

Moreover, even if we were to agree that this is the right question, we would still have to determine who should decide whether the benefits outweigh the costs of disclosure. Should this be decided by public officials whose responsibility it is to protect the national security? By public officials who might have an incentive to cover-up their own mistakes? By low-level public officials who believe their superiors are keeping information secret for inadequate or illegitimate reasons? By reporters, editors, and bloggers who have gained access to the information? By judges in the course of criminal prosecutions of leakers, journalists, and publishers? Ultimately, someone has to decide whether public officials can keep such information secret.

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In this statement, I will briefly address these questions both from the perspective of the First Amendment and from the broader perspective of public policy. My conclusions, though, are clear: the Bush Administration has tilted too far in the direction of secrecy at the expense of accountability and informed self-governance. Although the danger to the United States is quite real and not to be underestimated, so too is the danger of an overly aggressive insistence on secrecy. As James Madison observed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[6]

I. THE RIGHT TO PUBLISH SECRETS

Suppose the press obtains information that the government would prefer to keep secret. May the press publish the information? This issue arose during the war on terror after the *New York Times* publicly disclosed President Bush's secret directive authorizing the National Security Agency to engage in warrantless electronic surveillance of international communications. Several Republican members of Congress accused the *Times* of "treason," and 210 Republicans in the House of Representatives supported a resolution condemning the *New York Times* for putting "the lives of Americans in danger." Attorney General Alberto Gonzales went so far as to suggest that the *Times* might be prosecuted for publishing "information relating to the national defense" with "reason to believe" that the information could be used "to the injury of the United States."[7]

Perhaps surprisingly, in the entire history of the United States there has never been a criminal prosecution of the press for publishing confidential information relating to the national security. It may be that the press has exercised great restraint and has never published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or, it may be the government has exercised great restraint and has never prosecuted the press even though such prosecutions would have been constitutionally permissible. Whatever the explanation, because there has never been such a prosecution, the Supreme Court has never had occasion to rule on such a case.

The question whether the government should have the authority to control the press in this way arose rather dramatically in World War I during the debate over enactment of the Espionage Act of 1917. It is useful to consider that debate, because it shows both that this is not a new issue and that we have a long tradition of respecting the freedom of the press.

As initially presented to Congress, the bill drafted by the Wilson Administration included a "press censorship" provision, which would have made it unlawful for any

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[6] James Madison, The Writings of James Madison (1822), Gaillard Hunt, ed. (G. P. Putnam's Sons 1910).
[7] 18 U.S.C.§793(e). See Walter Pincus, "Senator May Seek Tougher Law on Leaks," *Washington Post* (Feb. 17, 2006), A1; Michael Barone, "Blowback on the Press," *U.S. News & World Report* (May 8, 2006); Rick Klein, "House Votes to Condemn Media Over Terror Story," *Boston Globe* (June 30, 2006), A1; David Remnick, "Nattering Nabobs," *New Yorker* (July 10, 2003), 33, 34. The *New York Times* won the Pulitzer Prize for journalism for publishing these stories.

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person in time of war to publish any information that the president had declared to be "of such character that it is or might be useful to the enemy."[8]

This provision triggered a firestorm of protest from the press, which objected that it would give the president the final authority to determine whether the press could publish information about the conduct of the war. The American Newspaper Publishers' Association objected that this provision "strikes at the fundamental rights of the people, not only assailing their freedom of speech, but also seeking to deprive them of the means of forming intelligent opinion." The Association added that "in war, especially, the press should be free, vigilant, and unfettered."[9]

Many in Congress supported the proposed legislation. Representative Edwin Webb of North Carolina argued that "in time of war, while men are giving up their sons and while people are giving up their money," the press should be willing to give up its right to publish what the president "thinks would be hurtful to the United States and helpful to the enemy." Webb added that, in time of war, "we have to trust somebody," and just as we trust the president, as commander in chief, with the fate of our boys in uniform, so too must we trust him to prescribe what information "would be useful to the enemy."[10]

Opposition to the legislation was fierce, however. Representative Simeon Fess of Ohio warned that "in time of war we are very apt to do things" we should not do."[11] Senator Hiram Johnson of California reminded his colleagues that "the preservation of free speech" is of "transcendent importance" and that in times of stress "we lose our judgment."[12] Describing the provision as "un-American," Representative Martin B. Madden of Illinois protested that "while we are fighting to establish the democracy of the world, we ought not to do the thing that will establish autocracy in America."[13]

When it began to appear that the press censorship provision would go down to defeat, President Wilson made a direct appeal to Congress, stating that the "authority to exercise censorship over the press . . . is absolutely necessary to the public safety."[14] Members of Congress were unmoved. The House defeated the provision by a vote of 184 to 144, effectively ending consideration of the "press censorship" provision for the duration of the war.

Although the Supreme Court has never had occasion to rule on a criminal prosecution of the press for publishing classified or other confidential government information, it ruled on a related issue in *New York Times v. United States*,[15] the Pentagon Papers case. In 1967, Secretary of Defense Robert McNamara commissioned a top-secret

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[8] H.R. 291 tit. I § 4, 65th Cong., 1st Sess., in 55 Cong. Rec. H. 1695 (April 30, 1917).
[9] Resolutions of the American Newspaper Publishers' Association, 65th Cong., 1st Sess. (April 25, 1971), in 55 Cong. Rec. S. 1861 (May 5, 1917).
[10] 65th Cong., 1st Sess., in 55 Cong. Rec. H. 1590-91 (April 30, 1917).
[11] Id., at 1591 (April 30, 1917.
[12] 65th Cong., 1st Sess., in 55 Cong. Rec. S. 2097 (May 11, 1917).
[13] 65th Cong., 1st Sess., in 55 Cong. Rec. H. 1773 (May 3, 1917).
[14] *Wilson Demands Press Censorship*, New York Times 1 (May 23, 1917) (quoting a letter from Woodrow Wilson to Representative Webb).
[15] 403 U.S. 713 (1971).

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study of the Vietnam War. That study, which filled forty-seven volumes, reviewed in great detail the formulation of United States policy toward Indochina, including military operations and secret diplomatic negotiations. In the spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the Pentagon Papers to the *New York Times*. After the *Times* began publishing excerpts from the papers, the United States filed a complaint for injunction. The matter quickly worked its way to the Supreme Court, which held that the *Times* could not constitutionally be enjoined from publishing the information. The Court held that the publication of even classified information cannot constitutionally be restrained unless the government can prove that the disclosure would "surely result in direct, immediate, and irreparable damage to our Nation."[16]

Against this background, it is not surprising that, despite all the saber-rattling following the disclosure of the Bush Administration's secret NSA surveillance program, the government has not prosecuted the *New York Times* for its disclosure of the NSA program. Clearly, the government could not prove that that disclosure of a probably illegal program caused "direct, immediate, and irreparable" harm to the national security.[17] Although the Pentagon Papers case dealt with a prior restraint rather than a criminal prosecution, it seems likely that the standard for a criminal prosecution would be similarly demanding on the government. Although the precise boundaries of this doctrine are undefined, it seems clear that the right of the press to publish even classified information is generally well-protected by the First Amendment.

II. The Right to Know Secrets

The result in the Pentagon Papers case gives rise to an interesting question. If the press has a First Amendment right to publish classified information unless that publication will cause "direct, immediate, and irreparable damage" to the national security, does it follow that the public has a First Amendment right to such information? We protect the right of the press to publish confidential information because the publication of that information serves the public interest. That being so, it would seem that the ultimate right being protected is not the right of the press to publish, as such, but the right of the public to know. And, if that is so, then it would seem that citizens should have a First Amendment right to insist that the government must disclose information to the public, unless the disclosure would result in "direct, immediate, and irreparable damage" to the nation.

Although this reasoning seems logical, the Supreme Court has never interpreted the First Amendment in this manner. Rather, the Court has construed the First Amendment as protecting a right to speak and a right to publish, but not a right to information. On this view, individuals have no First Amendment right to insist that the

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[16] Id., at 730 (Stewart, J., concurring). Although the Pentagon Papers case involved a prior restraint, it seems reasonable to conclude that essentially the same standard would apply in a criminal prosecution of the New York Times for publishing the information. See Stone, *Top Secret* at 22-24 (cited in note *).

[17] The NSA surveillance program involved an additional twist, for there is good reason to believe that the program itself was unlawful. Although the issue has never arisen, it is difficult to believe that the Supreme Court would ever sustain a criminal prosecution for the public disclosure of *unlawful* government actions. See Stone, *War and Liberty* at 143-163 (cited in note *); Stone, *Top Secret* at 24-26 (cited in note *).

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government must reveal information that the government would prefer to keep secret. Put differently, a citizen has no constitutional right to knock on the president's door and demand information about the president's decisions. The Court has rejected the idea that the First Amendment is a constitutional Freedom of Information Act. For practical, historical, and textual reasons, the Court has drawn a sharp distinction between the right to communicate what one knows and the right to learn what one wants to know.[18]

There is an intermediate case, however. Consider a public employee who discloses confidential information to the press. The Pentagon Papers situation illustrates the issue. In the Pentagon Papers case, two things were clear: First, the government could not constitutionally restrain the *New York Times* from publishing the Pentagon Papers. Second, neither the *New York Times* nor any member of the public had any First Amendment right to demand that the government must disclose the Pentagon Papers. What, then, of Daniel Ellsberg, who unlawfully turned over the Pentagon Papers to the *New York Times*? Could the government constitutionally punish Ellsberg for leaking the Pentagon Papers to the press and the public?

The government filed criminal charges against Ellsberg, but the prosecution was dismissed because of government misconduct, so the issue was never resolved. But it seems clear under current law that a public employee who leaks classified information ordinarily can be discharged and/or criminally punished for his conduct, even if the press has a First Amendment right to publish the information he unlawfully disclosed.

The doctrine that the government can constitutionally punish public employees for disclosing classified information is premised largely on the intersection of two considerations. First, there is the principle of waiver. Constitutional rights can be waived. A criminal defendant can waive his right to jury trial, a citizen can waive his right not to be searched, a litigant can waive his right to counsel. Similarly, public employees can waive their First Amendment rights.

But the government's authority to compel a waiver of constitutional rights as a condition of government employment is not unbounded. It would clearly be unconstitutional, for example, for the government to insist that public employees must agree never to vote for a Democrat, never to have an abortion, or never to practice the Muslim faith. Such waivers would be unconstitutional and unenforceable. Thus, waiver is relevant, but not necessarily dispositive. We need to decide when the government can constitutionally insist upon such waivers.

This brings us to the second consideration – the legitimate interest of government in being able to function effectively. Although the government cannot automatically require individuals to waive their constitutional rights as a condition of public employment, it can require them to waive those rights insofar as the waiver is reasonably necessary to enable the government to fulfill its responsibilities. As the Supreme Court explained in *Pickering v. Board of Education,* the government

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[18] See, e.g., *Pell v. Procunier*, 417 U.S. 817 (1974) (no right of the press to interview prisoners); *Houchins v. KQED*, 438 U.S. 1 (1978) (same). See Lillian BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 Cal. L. Rev. 482 (1980).

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> has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services its performs through its employees.[19]

Applying this reasoning, the Supreme Court held in *Snepp v. United States*[20] that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to his Agency, its activities or intelligence activities generally, either during or after the term of [his] employment, [without] specific prior approval by the Agency." The Court emphasized that a "former intelligence agent's publication of . . . material relating to intelligence activities can be detrimental to vital national security interests."[21]

In light of *Snepp* and *Pickering*, it seems clear that public employees can be required as a condition of employment to agree not to disclose classified information to the press or the public – in at least some circumstances. The critical question is to identify the circumstances in which such a compelled waiver would be valid. Under existing law, the prevailing presumption is that public employees can constitutionally be discharged and/or criminally punished for leaking classified information if the disclosure could *potentially harm the national security.*[22]

Now, here lies the puzzle. Except in rare instances, the press will not be in a position to publish classified information that is relevant to public debate unless a public employee reveals it to them. Giving the press the protection guaranteed in the Pentagon Papers case is of limited value to the public if the press can almost never gain access to the information. If the Pentagon Papers decision states the proper standard for reconciling the interests of an informed public with the needs of national security, shouldn't that same standard protect the right of public employees to disclose such information to the press?

The conventional answer to this puzzle was offered by the Yale law professor Alexander Bickel, who aptly characterized this as a "disorderly situation." Bickel argued that if we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; but if we give the government too little power to control confidentiality "at the source," we risk too great a sacrifice of secrecy.[23] The solution, he concluded, was to reconcile the irreconcilable values of secrecy and accountability by guaranteeing both a strong authority of the government to prohibit leaks and an expansive right of the press to publish them.

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[19] 391 U.S. 563, 568 (1968).
[20] 444 U.S. 507 (1980).
[21] *Id.*, at 511.
[22] See Stone, *Top Secret* at 10-14 (cited in note *).
[23] Alexander Bickel, *The Morality of Consent* 79-82 (Yale University Press, 1975).

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I recently wrote that this state of affairs "may seem awkward in theory and unruly in practice, but it has stood the test of time."[24] Upon further reflection, I have come to doubt the wisdom of this conclusion. The power we have given the government to control confidentiality "at the source" is simply too great. Even if one accepts both *Pickering* and *Snepp*, it does not necessarily follow that the government should have the authority to prohibit the disclosure of classified information whenever the disclosure might "potentially harm the national security." A more appropriate constitutional standard might be whether *the potential harm to the national security outweighs the value of the disclosure to public discourse*. Under this approach, a public employee who reveals classified information in circumstances where the value to public discourse outweighs the harm to national security would be protected by the First Amendment.

Admittedly, this is a more difficult standard to administer than whether disclosure "might potentially harm the national security." The concept of "value to public discourse" is hardly self-defining, and it is always vexing to balance such incommensurable values. It is easy to see why the Court prefers to keep it simple. But recent experience suggests that the existing standard errs too much on the side of secrecy. We need a standard that better reflects the proper balance in a self-governing society between secrecy and transparency. Moreover, there is some evidence that a more even-handed standard would be manageable, because this was in fact the classification standard used during the Clinton Administration.[25]

In any event, it is improbable that the current Supreme Court would be inclined to embrace such a change. The very real difficulties of applying a more even-handed constitutional standard in the employment context would likely dissuade the Court from adopting such a test as a matter of First Amendment doctrine. Any change in this regard is therefore more likely to have to come from the executive and/or legislative branches.

Another First Amendment issue that affects the issue of real-world balance between secrecy and disclosure concerns the journalist-source privilege. This question came to public attention most dramatically in recent years in the controversy over the disclosure of Valerie Plame's identity as a CIA operative and the subsequent jailing for contempt of the *New York Times* reporter Judith Miller.

The argument for a First Amendment journalist-source privilege is relatively straightforward. It is often in society's interest to encourage individuals to reveal information to the press, but individuals may be reluctant to do so if they cannot retain their anonymity. The logic of the journalist-source privilege is therefore similar to the logic of the attorney-client privilege or the doctor-patient privilege.

In its 1972 decision in *Branzburg v. Hayes*,[26] the Supreme Court held that the First Amendment does not provide such a privilege. The four dissenting justices argued that "when a reporter is asked to appear before a grand jury and reveal confidences," the government should be required to "demonstrate a compelling and overriding interest in

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[24] Stone, *Top Secret* at 22 (cited in note *).
[25] See *e.g.*, Executive Order 12958 (Clinton Executive Order). This Executive Order was revised by President Bush. See Executive Order 13292 (March 28, 2003).
[26] 408 U.S. 665 (1972).

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the information" before it can compel the reporter to disclose confidential sources.[27] But the majority disagreed. The Court held that the First Amendment protects neither the source nor the reporter from having to disclose relevant information to a grand jury.

The Court's decision in *Branzburg* was premised on two First Amendment principles. First, as a general matter of First Amendment jurisprudence, the Court is reluctant to invalidate a law because it has an incidental effect on free speech. Except in highly unusual circumstances, in which the application of the law would have a substantial impact on First Amendment freedoms, the Court routinely rejects such challenges. To avoid the complex balancing and line-drawing that would be involved in invalidating laws that have only an incidental effect on speech, the Court presumes that such laws are constitutional.[28]

Second, the Court expressed concern that if it recognized a First Amendment-based privilege, it would have "to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan newspaper."[29]

When all is said and done, then, the First Amendment serves as an important but limited safeguard against undue government secrecy. As construed by the Supreme Court, the First Amendment gives strong protection to the press when it publishes even classified information relating to the national security, but it gives the press and the public essentially no constitutional right to demand such information from the government, it gives only minimal constitutional protection to public employees who disclose such information to the press, and it gives no meaningful protection to journalists who want to shield their sources from public disclosure. It is clear, then, that barring a revolution in First Amendment doctrine, what is needed to bring government secrecy into reasonable balance with the public's need to know is a significant change in public policy, either in the form of executive action or federal legislation.

III. Recommended Changes in Public Policy

Overbroad government assertions of secrecy can cripple informed public debate. It is impossible for citizens responsibly to consider the merits of the actions of their elected representatives if they are kept in the dark about their conduct. As Senator Daniel Patrick Moynihan once observed, "secrecy is the ultimate form of regulation because people don't even know they are being regulated."[30]

Because the First Amendment will not solve this problem, a careful redefinition of public policy is essential. Apart from a generally more open approach to executive transparency and accountability, which is essential, I have four specific policy recommendations.

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[27] Id. at 743 (Stewart, J., dissenting).
[28] See Stone, *Top Secret* at 50-52 (cited in note *).
[29] 408 U.S., at 704.
[30] John Podesta, *Need to Know* at 220, 227 (cited in note 1).

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First, either by executive order or congressional amendment of the Freedom of Information Act (FOIA),[31] the executive should no longer be authorized to classify information merely because its disclosure has the potential to harm the national security. This practice, which dates back to an October 2001 directive from then-Attorney General John Ashcroft, does not balance security interests against open society interests. The proper standard for classification should be "whether the potential harm to the national security outweighs the value of the disclosure to public discourse." This standard has been used by past administrations, and there is no reason why it cannot be imposed either as a matter of executive order or congressional action. The solution to overclassification is simple: less classification.

Second, the Congress should enact the pending Federal Employee Protection of Disclosures Act, which would provide greater protection to national security whistleblowers. Perhaps most important, this legislation would offer express protection to public employees who disclose unconstitutional or otherwise unlawful government actions.[32]

Third, the Congress should enact the proposed State Secrets Protection Act,[33] which would clarify and limit the use of the state secrets privilege, a common law privilege designed to allow the government to protect sensitive national security information from disclosure in litigation, whether or not the government is a formal party to the litigation. The Bush Administration has inappropriately invoked the privilege, repeatedly using itto block judicial review of questionable constitutional practices, including the secret NSA surveillance program, the secret rendition of alleged terrorists, and challenges to the legality of the dismissal of government whistleblowers.[34]

Fourth, Congress should enact the Free Flow of Information Act, pending legislation that would recognize a qualified journalist-source privilege. The privilege established by the legislation could be overcome if disclosure of the protected information is necessary to prevent significant harm to the national security that would "outweigh the public interest in newsgathering and maintaining the free flow of information to citizens."[35]

Enactment of these four laws would go a long way towards redefining the balance between secrecy and accountability. Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush administration's obsessive secrecy has effectively and intentionally constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. As the legal scholar Stephen Schulhofer has noted, one

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[31] 5 U.S.C. § 552 *et seq.* (last amended 2007). While the recent passage of the OPEN Government Act of 2007 made some laudable changes to the current FOIA framework, certainly more improvements could be made.
[32] See S. 274, 110th Cong., 1st Sess. (2007).
[33] See S. 2533, 100th Cong., 1st Sess. (2007).
[34] See *ACLU v. NSA*, 467 F. 3d 590 (6th Cir. 2006) (surveillance program); *El-Masri v. Tenet*, 479 F. 3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007) (rendition); *Edmunds v. U.S. Department of Justice*, 323 F. Supp. 65 (D.D.C. 2004), aff'd 161 Fed. Appx. 6 (D.C. Cir. 2005) (whistleblower).
[35] See S. 2035, 100th Cong., 1st Sess. (2007).

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cannot escape the inference that the cloak of secrecy imposed by the Bush administration has "less to do with the war on terrorism" than with its desire "to insulate executive action from public scrutiny."[36] Such an approach to self-governance weakens our democratic institutions and renders "the country less secure in the long run."[37] This is an area in which serious reconsideration of our laws is necessary.

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[36] Stephen J Schulhofer, *No Checks, No Balance: Discarding Bedrock Constitutional Principles,* in Leone and Anrig, eds, *War on our Freedoms* at 91 (cited in note 1).
[37] Podesta, *Need to Know* at 225 (cited in note 1).

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