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American Civil Liberties Union

On

"Restoring the Rule of Law"

Before the Subcommittee on the Constitution

Senate Judiciary Committee

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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

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.

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

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.

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.

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

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).

[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."