

**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.

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

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;

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>

- 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.

- 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.