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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

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,

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

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

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,

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.