Statement of Meredith Fuchs
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To the Constitution Subcommittee of the
Senate Judiciary Committee on
"Restoring the Rule of Law"
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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

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).

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.

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.

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

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

[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.

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.

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.

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Thank you for your consideration of these issues.