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

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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

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 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 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

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

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 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.

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[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

[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.

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 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 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

10 Committee on the Records of the Government 1985:9, 86-87.

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 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.