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"RESTORING THE RULE OF LAW"

Tuesday, September 16, 2008

Written Testimony of

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Senior Counsel

Urging Congress to establish a bipartisan, independent investigatory Commission to determine what has gone wrong with our policies and practices in confronting terrorism since September 11, 2001, and to adopt a series of specific reforms aimed at restoring checks and balances and the rule of law in order to reduce risk of repetition of recent abuses.

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Testimony of Frederick A.O. Schwarz, Jr.
Before the Hearing on "Restoring the Rule of Law"
By the Constitution Subcommittee of the Senate Judiciary
Committee of the United States Senate

September 16, 2008[1]

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I. Introduction.

The title of this hearing cuts to the heart of the matter. The current Administration has ignored, defied, and defiled the Rule of Law. In so doing, it has undermined America's greatest strength. And that has not only left Americans less free, it has also made us less safe. It is vital to our country's future that we do indeed restore the Rule of Law. In my testimony, I draw on my experience as Chief Counsel to the Church Committee to suggest how a new Congress and President in 2009 could start this immense and important task, especially in the context of counter-terrorism policy.

In the almost eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House arrogated to itself unprecedented powers of coercion, detention, and surveillance. All the while, it has tried to use a patina of legal and constitutional justifications to disguise the degree to which it has abandoned the core American values in whose defense these tactics have been deployed. The result has been a distortion of the Constitution, an evisceration of the rights and liberties of individuals, and a perversion of American values. All of this has done grave harm to our nation's reputation and has reduced our security here and abroad.

It is of the utmost importance to review our policies and practices, and to make changes where we find unseemly and illegal programs or inefficient and counterproductive policies. The time to act is at hand. The members of the 111th Congress will take their seats in early January, and a new administration will enter the White House on January 20, 2009. They, and the nation as a whole, have the opportunity to return to our values, check the overextension of the executive branch in recent years, and renew our national commitment to the constitutional framework under the rule of law.

The urgent need to restore checks and balances under the rule of law is far more important than the controversies that divide us. Instead, understanding the importance of righting the separation-of-powers imbalance and restoring respect for the rule of law should bring *all* Americans together. If today's President hails from one party and the congressional majority from another, in the future these affiliations will surely change. But the core principle—that the preservation of the Constitution's checks and balances, and respect for the rule of law, is essential to effective governance—endures regardless of what party controls either branch. If we turn a blind eye to this truth, the nation will feel the consequences far into the future.

Therefore, I am grateful to have the chance to share with you some thoughts on specific measures aimed at restoring the proper constitutional balance between the branches of government, reinvigorating the separation of powers, and restoring respect for American values.[2] Broadly speaking, I make two sorts of suggestions:

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[2] Other thoughts are contained in *Unchecked and Unbalanced*, particularly in the addendum to the paperback revision (The New Press, 2008) and in the Brennan Center's publication, Aziz Huq, *Twelve Steps to Restore Checks and Balances*, *available at* http://www.brennancenter.org/content/resource/twelve_steps_to_restore_checks_and_balances.

(i) a bipartisan independent investigatory Commission should be established by the next Congress and President, first to determine what has gone wrong (and right) with our policies and practices in confronting terrorists since September 11, 2001, and then to recommend lasting solutions to address past mistakes (see pp 3 to 10 below); and

(ii) a series of specific reforms should be adopted aimed at reforming the executive branch and ensuring no repetition of recent abuses. Among the topics I touch on are the need for a clear rejection of the "monarchial" presidency theory; improved oversight and accountability mechanisms; responses to the pathological secrecy that today characterizes executive branch operations; and coercive interrogations (see pp 10 to 27 below).

We must resolve to confront our mistakes so that we do not repeat them. Throughout American history, in times of crisis, presidents have accumulated significant new powers, and the executive branch has often engaged in abusive conduct.[3] Crisis always makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of foolish mistakes. This nation has, at times, admirably set about correcting its course—realizing, as the dust settles, or as previously secret facts are revealed, that constitutional and legal norms have been breached, shaming and harming our nation.

One such moment, in which I was involved, came in 1975-1976, when an investigation conducted by a Senate Select Committee, known as the Church Committee for its Chair, Senator Frank Church of Idaho, revealed intelligence agencies' excesses during the Cold War. The Church Committee's investigation of the intelligence agencies, most importantly the FBI, the CIA, and the NSA and other components of the Defense Department, found that these agencies had exceeded their authority through abusive surveillance and disruption of political activity at home (*e.g.*, trying to provoke Martin Luther King, Jr. to commit suicide), and unwise overseas covert action (*e.g.*, hiring the Mafia to try to assassinate Cuba's Fidel Castro, and supporting the overthrow of Chile's democratically elected government). While men and women of the intelligence agencies directly committed abuses, the most serious breaches of duty were those of presidents and other senior executive branch officials who, the Church Committee determined, had the "responsib[ility] for controlling intelligence activities and generally failed to assure compliance with the law."[4]

The Church Committee's investigation illuminated what had been going wrong with our intelligence agencies. Exposing the truth strengthened both our democracy and our ability to defend the country without waste or abuse, confirming that America's ability to self-correct is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

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[3] For an overview of past excesses, see *Unchecked and Unbalanced*, *supra* n. 1, at 3-5 ("Introduction"), chapter 2 21-49 ("Revelations of the Church Committee"). See also Geoffrey B. Stone, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism* (2004).

[4] *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II*, 1 S. REP. NO. 94-755, at 137 (1976).

II. Create an Investigatory Commission to Conduct a Thorough Accounting of National Security Policy and Its Systemic Flaws.

The new Congress and new President should by law create an independent, bipartisan Investigatory Commission charged with determining what has gone wrong (and right) with our policies in confronting terrorism, and to recommend solutions.

This is my first and most fundamental recommendation. Without full knowledge of all the facts, we cannot know why wrong steps were taken. We cannot take the necessary steps to repair the damage. Even with a new Administration in January 2009, if we fail to understand fully what went wrong or why we strayed so far, we risk repetition. We will instead proceed in ignorance, blindly trusting claims about what has made us safer without really knowing what has worked and what has rather harmed our country.

I know from my Church Committee experience that making the case for reform requires full knowledge and responsible exposure of the facts. I also know that accountability is not easy. Plenty of those who have made mistakes will push to ensure their errors are never revealed. But without accountability, it is the nation's security and its liberties that will suffer.

A. <u>We Know Enough To Conclude There Is a Serious Problem.</u>

Based on what we know now—about torture, about extraordinary rendition to torture, about permanent detention, about warrantless wiretapping, and about the Administration's "monarchical" theory of presidential power—it seems clear that the course we have charted over the last seven years has in fact made us less safe, as well as less free:

- We have squandered one of our greatest assets—respect for our values.
- By abandoning our values and choosing instead to adopt tactics of the enemy, we have given enemy recruiters powerful tools to stir up passions in the Muslim world.[5]
- After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance even from our closest allies. We have lost much crucial support from our allies, as admiration and respect for America has dropped substantially. This is not a hypothetical risk. It is already happening with many nations, including our closest ally. Thus, the British Parliament's Intelligence and Security Committee undertook an investigation of "extraordinary

[5] *See, e.g.*, PEW GLOBAL ATTITUDES PROJECT, AMERICA'S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS (June 13, 2006), *available at* http://pewglobal.org/reports/display.php?ReportID=252. The Brennan Center is presently conducting empirical research in the United Kingdom and the United States about the effect of adopting such tactics on the success of domestic policing efforts.

rendition." Its July 2007 report frankly describes British intelligence agencies' increasing reluctance to share information with their American counterparts, due in large part to concerns that the U.S. will utilize such information in "extraordinary rendition" operations notwithstanding Britain's "caveats" prohibiting such use. Among the "serious implications" for the relationship between the two nations is a "greater caution in working with the U.S., including withdrawing from some planned operations, following these cases."[6]

Things have indeed gone awry. On the matter of torture alone:

- Former Secretary of State Colin Powell warned that "The world is beginning to doubt the moral basis of our fight against terrorism."[7] And, as Marine General P.X. Kelley and my co-panelist today Robert F. Turner have explained, torture has "compromised our national honor and ... place[d] at risk the welfare of captured American military forces for generations to come."[8]

- President George W. Bush correctly states that "the values of this country are such that torture is not part of our soul and our being," while at the same time he contradicts himself by insisting that the CIA should be permitted to use "enhanced interrogation techniques" that go far beyond what the American military believes is proper and which conflict with any fair reading of the torture treaties and laws to which we are subject.

- Attorney General Michael Mukasey cannot bring himself to prohibit as torture the practice of waterboarding—a torture measure that dates back to the medieval Inquisition;[9] and Vice President Dick Cheney positively embraces it, even though the United States prosecuted Japanese soldiers as war criminals for using waterboarding on American soldiers in World War II.

- Similarly, President Bush and Secretary of State Condoleezza Rice defend "extraordinary rendition" to send prisoners to Egypt and Syria for questioning despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for regularly using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture "our

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[6] *See* Intelligence and Security Committee, Rendition, 2007, Cm. 7171 and p.27; *British Panel Doubts U.S. on Torture*, N.Y. TIMES, July 21, 2008, at A11.

[7] Letter from Colin S. Powell, Secretary of Defense and General, to John McCain, Senator from Arizona (Sept. 13, 2006).

8 P.X. Kelley & Robert F. Turner, *War Crimes and the White House. The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21.

[9] Darius Rejali, *Torture and Democracy* 280 (2007).

> prisoners." Not believable. Particularly not believable given that there is proof that "our prisoners" have been tortured.[10]

For America to adopt tactics of the enemy—such as torture—saps our moral and public strength.[11] It is all the worse when our leaders' public positions are manifestly hypocritical.

The Administration's legal justification for its conduct is almost as troubling as the conduct itself. Other moments in history have seen abuse that cannot be squared with our values or traditions. But the constitutional and legal theory under which this Administration has acted is unprecedented because it purports to justify breaking the law and neutering checks and balances. Thus, the Administration presents a remarkably troubling theory of presidential power that flies in the face of our own Revolution's core values, that is inconsistent with the language and history of our Constitution, and that ignores crucial Supreme Court decisions.

The Administration's post-9/11 position is simply that the President—like a seventeenth century British monarch—is above the law when it comes to security. Surprisingly, this theory is not a post-9/11 beast. It was first raised twenty years ago by then-Congressman Dick Cheney when he dissented in 1987 from Congress's Iran-Contra Report by saying the President will "on occasion feel duty-bound to assert monarchial notions of prerogative that will permit him to exceed the laws."[12] The attacks of 9/11 allowed the Vice President—supported by compliant lawyers in the Justice Department's Office of Legal Counsel—to put into effect this dangerous, erroneous and unprecedented reading of America's history and America's Constitution.[13]

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[10] NYU Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After* Rasul v. Bush (2005) ("[E]xtraordinary renditions [by the CIA] have been carried out pursuant to a classified directive signed by President Bush a few days after September 11, 2001"); Scott Horton, *More on Maher Arar*, HARPER'S MAGAZINE, June 5, 2008.

[11] The law also has been perverted to justify the invasion of Americans' constitutional privacy rights through warrantless surveillance, and possibly black bag searches or worse. Most importantly, the Constitution has been perverted by government lawyers so that they can advise the President that he need not comply with the law of the land.

[12] *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental, Minority, and Additional Views*, S. REP. NO. 100-216; H. REP. NO. 100-433, at 465 (1987) [hereinafter " "]. Of course, President Nixon also had claimed that "when the President does it, that means that it is not illegal." But when he said this, he was no longer in office. Nixon and his cohort all knew that the illegal acts they did or ordered in seeking to stay in office were illegal, and never pretended otherwise.

[13] Chapter 7 ("Kings and Presidents") of *Unchecked and Unbalanced*, *supra* n.1, debunks this monarchial theory. Chapter 8 ("The King's Counsel") exposes the irresponsibility of the lawyers in the Justice Department's Office of Legal Counsel—although some other government lawyers (particularly in the military) have been exemplary in, for example, attempting to resist torture.

B. Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves.

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government are prerequisites to democratic legitimacy and lawful government. As James Madison famously observed:

> "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[14]

While some of our recent history has dribbled or leaked out, the Administration itself has denied a free people knowledge of many of the actions it has taken in their name. Excessive secrecy smothers the popular judgment that gives life to democracy.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. What are described as successes often turn out to be nothing of the kind. Still other programs remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) that a departure from America's ideals actually risked undermining the battle against terrorists.[15] The executive branch insists the truth about what it has done—and how it decided what to do—must remain secret. But without access to these facts, even for those with security clearance, the public can never know the full story and judge whether the United States conducted itself appropriately.

The fundamental message of this part of my testimony is this: The abuses that have taken place must be accounted for. We need to know what went wrong, how it is that mistakes and illegal actions were allowed to occur, and how they have harmed us. When there are allegations that ultimately are proven wrong, they should be aired and names cleared. When the United States has conducted its anti-terrorism policy forthrightly and wisely, it should be commended for doing so. But given the ample evidence that the Administration's unchecked policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law.

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[14]Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 1 *The Founders' Constitution* 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

[15] Based upon its extensive review of CIA covert actions—for example to overthrow governments—the Church Committee found that the "cumulative effects of covert actions" were "rarely noted" in CIA presentations or "taken into account" by the responsible National Security Council reviewing officials. *See Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book I,* 1 S. REP. NO. 94-755, at 156 (1976).

I should note that this is not about placing blame on those on the front lines. Too often, for example, illegal torture has been blamed on a "few bad apples" while those in political offices who directed and set conditions for the abuse have washed their hands of the matter. Accountability ultimately lies more with those elected officials and senior appointed officials than with the men and women on the front lines.

A Commission would serve several vital functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. And there is much we do not know. We still do not know, for example, the legal justifications advanced for the so-called "extraordinary rendition" or "terrorist surveillance" programs. We do not know with sufficient detail who was responsible for advocating and implementing the troubling policies based on these legal opinions. Nor do we know whether there are other secret programs that have not yet been revealed. But, as former Attorney General Nicholas deB. Katzenbach and I have argued elsewhere, in a country whose government is premised on the rule of law, there is never a justification for keeping binding legal decisions secret.[16]

Documenting violations of the public commitments that the United States has made also fulfills a moral imperative. Officially, our leaders have made statements that renounce the use of torture and degrading treatment.[17] In practice, they have not lived up to this pledge. Indeed, they have recently sought new legal opinions from the OLC that allegedly would allow for new combinations and packages of torture.[18] Renewing our commitment to the rule of law by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can help begin to restore our international reputation.

The findings of a Commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. Justice is not served when our leaders piously wash their hands and blame those at the bottom. Democratic government demands that public officials—particularly those at the highest level—are held accountable for their actions. Aiming to avoid accountability, government officials who authorized and carried out improper or illegal actions attempt to ensure that their deeds remain forever secret. The public revelations made by a Commission would lodge accountability for those deeds where it belongs and serve as a warning to future government officials that they should take no action for which they would not like to be held publicly responsible.

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[16] Nicholas deB. Katzenbach & Frederick A.O. Schwarz Jr., *Release Justice's Secrets*, N.Y. TIMES, Nov. 20, 2007, at A23 ("Opinions that narrowly define what constitutes torture; or open the door to sending prisoners for questioning to Egypt and Syria, which regularly use torture; or rule the president has some 'inherent power' to ignore laws are all of concern to Congress and the public whether one agrees or disagrees with the legal analysis."); *see also* Louis Fisher, *Why classify legal memos?*, NAT'L L.J., July 14, 2008.

[17] *E.g.*, Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100.20, 1465 U.N.T.S. 85; 18 U.S.C. §§ 2340-2340A.

[18] Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

Finally, and indeed most importantly, the Commission's work would play an instrumental role in preventing future abuses. Its findings would form the factual basis for informed public debate on the role of governmental activities in a free society during an extended time of crisis. Charting a new course is impossible without knowing first how we found ourselves where we are now. Rather than dooming ourselves to the repetition of past mistakes, we must studiously commit ourselves to the avoidance of error and abuse. Determining what legislative and executive action is appropriate to prevent the recurrence of past abuses requires an understanding of how those abuses came about.

While the revelations of a new Commission charged with rooting out the truth of this most recent period of government failures might prove embarrassing to some individuals, and perhaps even to the country as a whole. That embarrassment is a price that must be paid. For, as the Church Committee concluded:

> "We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past."[19]

C. Essential Qualities of a Commission.[20]

To accomplish this, I urge Congress and the next president to establish by law an Investigatory Commission that would document what went wrong—the abuses of power; the violations of law; the distortions of the constitutional structure, including the sweeping assertions of executive power and the undermining of checks and balances—as well as who was responsible, and how it has harmed us. The Commission should also make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future. An investigation should be as open as possible. And it must be comprehensive.

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[19] *Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975). While this thought was in the Interim Report, it pervaded all the Church Committee's work.

[20] These thoughts are based on my experience as Chief Counsel of the Church Committee. The Committee conducted a comprehensive and non-partisan investigation into abuses carried out by the intelligence agencies during the Cold War era. It also covered the failures of presidential leadership in the six presidencies from Roosevelt through Nixon. (*See also* Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (1985); Frank John Smist, *Congress Oversees the United States Intelligence Community*, 1947-1994 25-81 (1994); and LeRoy Ashby & Rod Gramer, *Fighting the Odds: The Life of Senator Frank Church* 453, 468-92 (1994); Schwarz & Huq, *supra* n.1, at Chapter 2 ("Revelations of the Church Committee"), at 21-49.

More recently, I have summarized some of the process lessons from the Church Committee in Chapter 3 ("The Church Committee Then and Now") of *U.S. National Security, Intelligence and Democracy; From the Church Committee to the War on Terror* (Russell A. Miller, ed., 2008). (The relevant pages on how the Church Committee operated are pp. 27-31.)

I want to emphasize only three detailed points that are based on my experience with the Church Committee:

First, a successful Commission must be independent, bi-partisan in membership and non-partisan in approach. Its members should understand our Constitution and how our government works. They should know American history—including prior occasions when crisis made it tempting to ignore the wise restraints that keep us free.

Second, without detailed facts, oversight and investigation will necessarily be empty. Only with a record that is comprehensive and covers a wide range can one be sure that one understands patterns, be confident of conclusions, and make a powerful and convincing case for change. Without detailed facts, it is simply not possible to make a creditable case that something is wrong and needs fixing.

Testimony is important, often essential, and can be dramatic. Documents often provide the best key to the truth and to developing good testimony. A good investigatory commission involves much time and much hard work—to secure testimony and the necessary documents and to put a huge record together in a comprehensive and understandable fashion.

A Commission must therefore have the investigative tools—most importantly the power to subpoena—that are essential for an effective investigation. It must have access to all relevant information in all agencies and the White House—as well as that held by relevant private contractors. All of this information should be obtained by agreement if possible and by subpoena if necessary.

Third, investigating secret government programs requires access to secrets. It forces analysis of the overuse of secrecy stamps, and of the harm caused by excessive secrecy.[21] All concerned within the intelligence community must understand and accept that those tasked with ensuring accountability are entitled to any and all secrets.

A Commission must handle secrecy issues responsibly. But ultimately, the investigation may require the describing and revealing of some secrets. Nonetheless, there are obviously also legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed as well as irresponsible. But it is the responsibility of the investigators—and not the investigated—to decide (after a fair exchange of views) on what must remain hidden.

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[21] I know from my own experience with the Church Committee that secrecy stamps are often used to cover up and conceal embarrassment and illegality. As the experience of the recent 9/11 Commission and the Church Committee shows, responsible investigative committees or commissions handle secrecy issues appropriately.

Throughout the history of the nation, independent commissions have been used to serve these purposes. At the start, President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794.[22] There have been many commissions since, some successful, some not so. The 9/11 Commission (which is largely reckoned to be a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of recurrence.[23]

The Church Committee's and the 9/11 Commission's investigations remain a model for how comprehensive investigations can clarify what has gone wrong and provide guidance going forward. One was a congressional committee, while the other was an independent entity created by statute. So long as an investigatory committee has the features I have listed above, I do not believe it is crucial whether Congress chooses to create an internal body (like the Church Committee), or an independent entity. In my view, however, an independent body such as the 9/11 Commission would be better suited at this moment in history.

Of course, if the newly elected president resists a commission, Congress should go ahead with its own investigation. In the past, in fact, I have suggested the value of such a congressional probe. Upon further reflection, I believe that an independent panel is preferable. Unlike the time when the Church Committee was established, we now have standing committees on intelligence (and longstanding committees such as Judiciary have been strengthened). Congress will have huge responsibilities in myriad policy areas, including relating to terrorism. There are many important subjects for legislation—including those I suggest below—that undoubtedly will take substantial time and thought. An independent commission would free up Congress from responsibility for an in-depth, time-consuming analysis of the past. An independent commission also may be more successful in navigating partisan divides. It is worth noting, too, that an independent panel would also be free to touch on Congress and its role in ways that might prove uncomfortable for a sitting committee.

III. Restoring Checks and Balances: Rectifying Recent Expansions of Executive Authority and Creating Laws to Prevent Repeated Abuse.

A. <u>Renounce the Unprecedented "Monarchial Presidency" Theory.</u>

The next president should reject the unprecedented "monarchial prerogative" asserted by the present Administration, thereby acknowledging once more the Framers' intended checks and balances. This Committee and the House Judiciary Committee should also continue to marshal expert testimony demonstrating that the theory flies in the face of the Constitution's origins, its text, subsequent history, and judicial interpretations.

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[22] Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1428 (2005).

[23] Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, xv (2004).

The theory—first enunciated by Congressman Dick Cheney in his Iran-Contra dissent[24]—has been used by the Administration to justify breaking the law—laws, for example, that forbid torture and warrantless wiretapping. The theory that has been repeatedly put forward by the Justice Department's Office of Legal Counsel cannot withstand any scrutiny.[25]

Revealingly, the Administration has refused to release key OLC opinions that defend in full its monarchial theory. (To be sure, several of the opinions that have been released *rely* on this theory, but they do not explain it, or defend it fully or professionally.)

The next president should make it unequivocally clear that he rejects the unprecedented claim of a monarchial right to break the law—that he will keep faith with the original constitutional compact and in particular its curbs on executive power. The Constitution of 1787 was designed in conscious reaction to the British monarchy's concentrated power. As designed, it prevents the accumulation of power in any one branch of government. This is evident from the text of the Constitution, which not only split power between three branches of government, but also left all three branches subject to check by the others. In matters of national security, including not only the awesome question of when and how the nation should go to war, but also detailed issues covering the standards of conduct for our armed forces, the Constitution gave Congress authority. The importance of limits on executive authority was eloquently and exhaustively expressed in the 1787 Philadelphia Convention and in all subsequent debates about the Constitution's ratification. And the most recent scholarship echoes and confirms the Founding Era's rejection of the notion of an unbridled executive.[26]

The Framers, well acquainted with the follies and excesses of (British) monarchical power, divided and shared martial power between the branches because they knew that concentrating such authority risks harm to the nation. Their wisdom remains just as valid today. The contemporary White House insistence on unilateralism harms the country in two ways. First, it leaves the country with no effective national security policy-making mechanism. Presidential unilateralism provides no forum for comprehensive debate to air pros, cons, and flaws in any policy. Instead, it deprives government of effective means of identifying and correcting errors, and increases the likelihood that we spend precious resources on tough-sounding policies that in fact do little to promote security.

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[24] See *Iran-Contra Report*, *supra* n. 12.

[25] See Schwarz & Huq, *supra* n. 1, at Chapter 7 ("Kings and Presidents"), at 153-86.

[26] *See* David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb-Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Louis Fisher, *Presidential War Power* (2004); Morton Halperin, Op-Ed., *Listening to Compromise*, N.Y. TIMES, July 8, 2008, at 21; Editorial, *Defeated in Court-Again*, WASH. POST, Aug. 1, 2008, at A16.

The result of presidential unilateralism has been policies that seriously undermine our credibility around the world, and provide terrorists with a powerful recruiting tool.[27] Today, America is often linked internationally to images of Guantánamo and Abu Ghraib more than to the ideals of liberty and equality. As even Bush Administration veterans acknowledge, these associations create an unacceptable "drag" on counterterrorism efforts.[28] As I have noted, even our closest allies in the United Kingdom now hesitate before cooperating with our intelligence services. In Germany, prosecutors investigating the rendition of its citizen Khalid El-Masri (who was ultimately released without charges, apparently after the CIA concluded that it had the wrong man), issued arrest warrants in 2007 for thirteen suspected CIA agents, and forwarded them to Interpol.[29] In Italy, a judge has issued indictments for twenty-six CIA officers and five members of the Italian secret service, all allegedly involved in the abduction and rendition to Egypt of Osama Moustafa Hassan Nasr, known as Abu Omar.[30] The judge called the case "a question of principle," and declared, "Today, it's Abu Omar. Tomorrow, it could be my daughter. These are fundamental human rights, and we have to respect them."[31]

Restoring our flagging credibility depends on unambiguous renunciation of the monarchical prerogatives by those who will lead America starting on January 20, 2009. Repudiating the "monarchical prerogatives" that lie beneath the harmful policies of the current Administration is therefore the first and most important part of any course correction the next president can single-handedly take.

B. Renounce the Use of Signing Statements to Circumvent the Law.

The next president must commit to ending the way in which open-ended signing statements have been used to repudiate laws without justifying the law's annulment or notifying the legislature. Congress can also do more to challenge signing statements.

Since the founding of the Republic, presidents have used signing statements. In and of themselves, signing statements are not harmful. The current Administration,

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[27] According to a March 2007 Pew Global Attitudes Project poll, between 2002 and 2007, the proportion of people holding favorable views of the U.S. dropped from 75 percent to 56 percent in Great Britain and 63 percent to 39 percent in France. *See* Andrew Kohut, President, Pew Research Center, Testimony on America's Image in the World: Findings from the Pew Global Attitudes Project before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs (Mar. 14, 2007), *available at* http://pewglobal.org/commentary/display.php?AnalysisID=1019. The Pew Trust explicitly singled out Abu Ghraib and Guantánamo as drivers in this trend.

[28] *See* Matthew Waxman, Op-Ed., *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4; Colin Powell's and P.X. Kelley's and Robert F. Turner's quotes at *supra* ns. 7 and 8.

[29] *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, SPIEGEL ONLINE, Jan. 31, 2007; Mark Lander, *German Court Confronts U.S. On Abduction*, N.Y. TIMES, Feb. 1, 2007; John Goetz, Marcel Rosenbach & Holger Stark, *CIA Arrest Warrants Strain US-German Ties*, SPIEGEL ONLINE, Jun. 25, 2007; Michael Isikoff & Mark Hosenball, *Hunting the Hunters*, NEWSWEEK, Mar. 29, 2007; *US Displeased over German Hunt for CIA Agents*, SPIEGEL ONLINE, Mar. 5, 2007.

[30] Georg Mascolo & Matthias Gebauer, *The CIA in the Dock*, SPIEGEL ONLINE, Jan. 10, 2007.

[31] Ian Fisher & Elisabetta Povaledo, *Italy Braces for Legal Fight Over Secret C.I.A. Program*, N.Y. TIMES, June 7, 2007.

however, has employed the device in new, troubling ways, making them a tangible manifestation of its "monarchical" vision of the executive.[32]

First, the Administration has used such statements to signal aggressive non-compliance with an unprecedented *range* of laws. In more than 200 years, presidents before George W. Bush challenged the constitutionality of 600 statutory provisions. By 2007, President Bush had used signing statements to challenge more than 1,100 provisions.[33] By signing an unprecedented number of signing statements, President Bush has bypassed congressional enactments that protect liberties, ban torture and "cruel, inhuman, and degrading treatment," and that ensure disclosure and accountability.

Second, President Bush's signing statements have been opaque about both the precise statutory provisions being repudiated and the exact constitutional theory being asserted to justify the signing statement.[34] This makes it impossible for Congress or the public to know exactly what is being complied with, and what is being defied. The result is the appearance of transparency without its substance.

Finally, the Administration has extended the use of signing statements by objecting to laws that require *reporting* executive noncompliance with the law.[35] That is, the President has declined to tell Congress and the people what laws he refuses to follow—and has used a signing statement to do so.

The next president must do better. He must abandon publicly the use of signing statements as a way to evade the law and to conceal such evasion from Congress and the people. Congress also must do better. It must challenge any improper use of signing statements. It must insist—by subpoena if necessary—that the president provide his reasons for each signing statement, as well as the specific statutory provisions to which it

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[32] *See* The Constitution Project, *Statement on Presidential Signing Statements By the Coalition to Defend Checks and Balances* 1 (2006), *available at* http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf (noting that President Bush has "transformed" the use of signing statement); *see also* Schwarz & Huq, *supra* n. 1, at 91-92.

[33] Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 228 (2007).

[34] *See* Curtis A. Bradley & Eric A Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317 (2006) (noting the practice of simultaneously objecting to multiple provisions). For example, responding to an Amendment barring cruel, inhuman and degrading treatment, the President stated that "[t]he executive branch shall construe [the Amendment] in a manner consistent with the constitutional authority of the President ... as Commander in Chief." President's Statement on Signing H.R. 2683, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," Dec. 30, 2006, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html. This was a backhanded way of asserting monarchical powers without either saying what those powers were, or what precisely the scope of the objection was.

[35] *See* 28 U.S.C. § 530D (2006) (imposing reporting requirement in cases when the executive decides to contest affirmatively or to refrain from enforcing, applying, or administering any federal law).

applies. In short, the president must be required to justify publicly any determination that validly enacted legislation should not be enforced.

C. Enact a Law That Regulates the Invocation of Executive Privilege in Response to Congressional Requests for Information.

Congress should enact a statute to regulate and limit the use of executive privilege, particularly in cases involving potential wrongdoing within the executive branch.

Executive privilege is at the core of excessive governmental secrecy. It must be addressed and limited for there to be effective accountability in government.

Executive privilege is the president's claimed right to resist disclosure of documents and communications.[36] It can prevent the discovery of wrongdoing and error, preserve flawed and failing policies, and preclude accountability.[37] Excessive and inappropriate use of executive privilege is fundamentally destabilizing the constitutional architecture, and thus needs to be redressed.

Executive stonewalling of recent congressional efforts to secure crucial information in multiple ongoing oversight investigations—including investigations into allegations of politicization of prosecutorial decisions within the Justice Department, decisions regarding the hiring and firing of federal prosecutors, and EPA policy—illustrate this need for reform.[38] Currently, resolution of such disputes is abandoned to the give-and-take of the realm of power politics. Consequently, if the Executive chooses to block congressional access to information through a claim of executive privilege, there

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[36] In fact, there are several kinds of privilege commonly referred to as executive privilege:

> The [p]resident's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the [p]resident or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the [p]resident or his advisors (deliberative process privilege).

Exec. Order No. 13,233, *reproduced at* 44 U.S.C § 2204 note (2007); *see also* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 n.3 (1990). The focus of this section and the Brennan Center's forthcoming report is the "presidential communications" privilege and its application to congressional requests for information.

[37] After the November 2006 elections, the pace of congressional investigations picked up. *See* Thomas E. Mann, Molly Reynolds, & Peter Hoey, *A New Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK11 ("During the first seven months of 1995, Congressional oversight of the executive branch increased modestly in the Senate but not at all in the House. But this year Congress, especially the House, has intensified its oversight, following years of inattention and deference by its Republican predecessor."). Many of these congressional efforts to exercise oversight powers have been thwarted, however, by claims of executive privilege. *E.g.*, Carl Hulse, *House Vote on Contempt is Expected Soon*, N.Y. TIMES, Feb. 13, 2007, *available at* http://www.nytimes.com/2008/02/13/us/13contempt.html.

[38] Del Quentin Wilber, *Judge Orders Miers to Testify*, WASH POST, Aug. 1, 2008, at A2 ("The Bush administration has increasingly invoked executive privilege in its battles with Congress over documents and testimony related to issues as diverse as greenhouse gas emissions and FBI interviews of Vice President Cheney about the controversial leak of a CIA officer's identity.").

is very little Congress can now do to access that information. The House of Representatives' recent success in the Washington, D.C. district court in Congress's suit against Harriet Miers and Josh Bolton is an outlying exception.[39]

Moreover, presidents' aggressiveness in withholding information—and Congress's willingness to acquiesce—historically has varied depending on the political strength of the particular president, the prevailing political environment, the presence or absence of scandal (or the suspicion of scandal), and the Executive's theory of the scope of his power. As a result, the rules of executive privilege have remained undefined and contingent.

Executive privilege claims should be recognized for what they are—legal arguments over entitlement to information. As such, they each have a "right" and a "wrong" resolution. And whatever means are used to resolve them should be designed to bring about the "right" resolution in as many instances as possible, rather than having the result based on what political actors can get away with. The current mechanism—pure politics, with legal arguments used merely as bargaining chips—is not so designed.

The Brennan Center is working on a comprehensive report and proposed legislation to reform executive privilege. The report concludes that the current system for resolving executive privilege disputes between Congress and the President is irremediably flawed: What is revealed depends not on what should be disclosed according to the law, but on the happenstance of the balance of political forces at a given moment. And the absence of clear legal benchmarks, let alone the means to enforce them, leads to overprotection of secrecy.

But law, and not politics, should govern this vital question. The Brennan Center report will propose new legislation to facilitate quicker and more principled resolution of inter-branch information disputes. It includes a draft of legislation that would enable fair and speedy resolution of executive privilege claims in line with the Constitution as interpreted by the Supreme Court. The proposed legislation includes a cause of action for a House of Congress to enforce compliance with a duly issued subpoena, even if the subject of the subpoena is an executive-branch official. In addition, the statute defines categories of information over which the executive may assert executive privilege, as well as what Congress must do to overcome the privilege. Significantly, the statute provides that when there is credible evidence of executive malfeasance, misconduct, or illegality, executive privilege may not prevail in response to a congressional attempt to investigate. This would ensure necessary and appropriate congressional oversight and

[39] While the case has not yet succeeded in securing the information Congress seeks, the court soundly rejected the executive's argument that presidential aides are absolutely immune from testifying before Congress. *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008) ("[T]he asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.")

lawmaking, while not allowing frivolous congressional fishing expeditions. (The report and proposed statute will be available before the end of the year.)

D. Legislate To Limit the State Secrets Privilege.

Congress should confirm the federal courts' power and duty to adjudicate cases in which the executive branch is alleged to have used national security powers to inpinge on constitutional liberties or human rights by enacting legislation to regulate the invocation of the state secrets privilege.

The state secrets privilege is an "evidentiary rule that protects information from discovery when disclosure would be inimical to the national security."[40] The Court first articulated a "state secrets" privilege in 1953.[41] Between 1953 and 1976, the government invoked the privilege in four law suits; between 1977 and 2001, the courts were asked to adjudicate claims of "state secrets" 51 times.[42] Since 2001, however, the government has invoked the privilege vigorously in cases said to concern national security in order to block judicial scrutiny of wrongdoing, to seek "blanket dismissal of cases challenging the constitutionality of specific, ongoing government programs,"[43] and to prevent oversight of allegations of civil liberties violations.[44] In two cases concerning the extraordinary rendition and subsequent torture of clearly innocent individuals, for example, the executive invoked the privilege to prevent the involved individuals from obtaining justice.[45] In another unprecedented invocation of "state secrets," the government argued that a detainee at the Guantánamo Bay Naval Base should not be permitted access to his lawyers because he would divulge state secrets—namely, information about the

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[40] *In re United States*, 872 F.2d 472, 474 (D.C. Cir.) *cert. denied sub nom. United States v. Albertson*, 493 U.S. 960 (1989). While some courts have suggested casually that the privilege can be traced back to the 1807 trial of Aaron Burr, that early precedent in fact offers no support for an absolute refusal by the government to share information with the courts. *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power And The Reynolds Case* 218 (2006); *see also* Amanda Frost, *The State Secrets Privilege and the Separation of Powers*, 75 FORDHAM L. REV. 1931, 1938-51 (2007) (surveying evolution and recent cases). The phrase "state secrets privilege" first took form in a 1953 Supreme Court case where the government used it to shield an accident report from discovery in a tort suit. Only later was it discovered (by relatives of those who died in the accident) that the report contained no classified evidence—only evidence of the government's negligence. *See United States v. Reynolds*, 345 U.S. 1 (1953); Fisher, *In the Name of National Security*, *supra*, at xi, 113, 181-82.

[41] *United States v. Reynolds*, 345 U.S. 1 (1953).

[42] See William G. Weaver & Robert M. Pallito, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005).

[43] Frost, *supra* n. 40, at 1939.

[44] *See generally id.* at 1938-51 (surveying evolution and recent cases).

[45] *See El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). For other examples of the state secrets privilege at work, *see e.g.*, *American Civil Liberties Union v. National Security Agency*, Nos. 06-2095/05-2140, *appeal decided* (6th Cir. July 6, 2007); *Hepting v. AT&T Corp.*, Nos. 17132/17137 (9th Cir. argued Aug. 13, 2007); *Center for Constitutional Rights v. Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *American Civil Liberties Union v. National Security Agency*, No. 06-CV-10204, *opinion at* 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev'd* Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

"alternative interrogation methods" used to torture him.[46] By blocking plaintiffs from seeking judicial relief in national security-related litigation, the "state secrets" privilege undermines the judicial branch's constitutional checking function.[47]

Legislation is now needed to preserve courts' essential functions as protectors of individual rights and as watchdogs against executive branch aggrandizement.[48] The federal courts have their own independent authority to limit and control the state secrets privilege, but they have been unduly wary of exercising this power. Congressional intervention must strengthen the resolve of judges facing a recalcitrant executive branch.[49]

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[46] Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at Al. The detainee, Majid Khan, was allowed eventually to see a lawyer—who in turn was slapped with a gag order. *See* Gitanjali S. Gutierrez, *Going to See a Ghost*, WASH. POST, Oct. 15, 2007, at A15; *see also* Editorial, *Top Secret Torture*, WASH. POST, Nov. 21, 2006, at A26; Eric Rich & Dan Eggen, *From Baltimore Suburbs to a Secret CIA Prison*, WASH. POST, Sept. 10, 2006, at A8.

[47] Judicial oversight also provides an important supplement to Congress's oversight function. This adjunct role is especially important in an era in which unilateral executive action is more common, and Congress finds it increasingly difficult to muster the supermajorities necessary to overcome the executive's first-mover advantage. If the courts are taken out of the picture, the president will be able often to act unilaterally and then to block the majority will of both Houses with his veto power, or a signing statement. Without the courts to police strictly the executive's compliance with legal limits, it becomes much more difficult for Congress to impose any effective check. Moreover, courts have a comparative advantage discerning violations of individual liberties because they are relatively insulated from political pressures and have more fine-grained tools for identifying specific rights violations. *See* Frost, *supra* n. 40, at 1952-53.

[48] The federal courts, as James Madison explained, are also "in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the [D]eclaration of [R]ights." 1 Annals of Cong. 457 (Joseph Gales ed., 1834); *see also Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citations omitted)).

As the bipartisan Constitution Project has explained, "[u]nless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions." The Constitution Project, *Reforming the State Secrets Privilege* i (2007) *available at*
http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf.

[49] Even when vested with clear statutory authority to review claims of executive secrecy, however, courts tend to shirk this responsibility. Consider the courts' response to Congress's amendment of the Freedom of Information Act in 1974 to repudiate the Supreme Court's ruling in *EPA v Mink*, 410 U.S. 73 (1973). *See* Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561-64 (1974). Since that date, courts "have been friendly to the executive," consistently deferring to executive judgments; "apparently, the judiciary is not excited by the idea of developing national security expertise." Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 939-40 (2006); *see also* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58

There are presently two bills pending in the House and Senate that would reform the state secrets privilege: (1) S. 2533, the "State Secrets Protection Act," introduced by Senators Kennedy, Specter, and Leahy; and (2) H.R. 5607, the "State Secrets Protection Act of 2008," introduced by Representatives Nadler, Petri, Conyers, and Delahunt. Both take important strides, but both could be strengthened so as to prevent the repetition of past abuses of the state secrets privilege. Both bills appropriately place in the hands of judges—not self-interested executive officials—the power to determine whether relevant evidence must be shielded from disclosure. Both also bar threshold dismissal on state secrets grounds, allowing parties an opportunity to make a preliminary case with non-classified evidence and requiring courts to let lawsuits proceed by directing the government to produce unclassified substitutes for secret evidence whenever possible.

These bills and other regulation of state secrets fall securely within Congress's authority. Contrary to the assertion of Attorney General Michael Mukasey, they would neither represent an unconstitutional infringement on Article II powers nor compromise national security.[50] Congress regulates the Executive's use and dissemination of information—including sensitive or even classified information—in numerous contexts. The Classified Information Procedures Act[51] ("CIPA"), the Foreign Intelligence Surveillance Act[52] ("FISA"), the Freedom of Information Act[53] ("FOIA"), and the Presidential Records Act[54] ("PRA") all establish rules regarding information flow from and within the executive branch. Congress also has required the President to "establish procedures to govern access to classified information" and security clearances.[55] The National Security Act requires the Executive to disclose national-security-related information to the congressional intelligence committees.[56] No serious question has ever arisen as to the constitutionality of any of these statutes.

E. Strengthen Congressional Oversight of Intelligence Activities.

Congress should review and strengthen the present statutory disclosure and reporting requirements concerning intelligence and national security activities in order to enhance oversight.

The Constitution's separation of powers assigns to Congress a necessary role conducting oversight of the activities of the executive branch. After all, when policies

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ADMIN. L. REV. 162-67 (2006). For an example of excessive deference in the national security arena, see *Center for Nat'l Sec. Stud. v. Dep't of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003).

[50] Letter from Michael Mukasey, Attorney General, U.S. Department of Justice, to Patrick J. Leahy, Senator and Chairman of the Judiciary Committee of the United States Senate 1 (Mar. 31, 2008).

[51] 18 U.S.C. app. 3.

[52] 50 U.S.C. § 1806(f).

[53] 5 U.S.C. § 552(a)(4)(B).

[54] 44 U.S.C. § 2201 et seq.

[55] *E.g.*, 50 U.S.C. § 435(a).

[56] 50 U.S.C. §§ 413(a), 413b(c).

are viewed by more than one person—or branch of government—erroneous facts, flawed reasoning, and accidental conclusions are more likely to be detected. Indeed, the Administration's decision to exclude key military officers and military lawyers from many pivotal discussions on detainee policy, including the use of torture, helped lead to errors that would have been avoided had more experienced voices been heard. Experience demonstrates this can be done even where there are issues of critical law enforcement or national security at stake. Indeed, it is precisely in those areas where mistakes in judgment owing to insufficient debate and discussion are most costly to the nation.

Experience also demonstrates that in the absence of congressional oversight, national security and law enforcement powers are often misused, either for partisan ends or in ways that harm U.S. residents and national security. As one longtime CIA general counsel explained at the time of the Church Committee, the absence of congressional oversight caused *problems* for that agency because "we became a little cocky about what we could do."[57] On matters as diverse as political corruption and counterterrorism, Congress serves the nation best when it vigorously guarantees that federal law is applied in a fair, just, and effective manner. And that cannot be done if Congress is blinded.

Congress should strengthen reporting requirements for intelligence oversight.[58] Although the 1947 National Security Act regulates and mandates disclosures of intelligence activities to Congress,[59] its disclosure provisions contain loopholes and warrants legislative attention.[60]

One area where Congress needs to focus is the work of its intelligence and related committees, which are supposed to facilitate accountability.[61] Oversight by committee is

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[57] Schwarz & Huq, *supra* n. 1, at 20. For source, see also Smist, *supra* n. 20, at 5, 9.

[58] Describing legislative oversight during the Cold War, former CIA director William Colby explained that "[t]he old tradition was that you don't ask. It was a consensus that intelligence was apart from the rules." Loch Johnson, *A Season of Inquiry: Congress and Intelligence* 7 (1976). In the Cold War a "few members of Congress ... protected the CIA from public scrutiny through informal armed services and appropriations subcommittees." Tim Weiner, *Legacy of Ashes: The History of the CIA* 105 (2007). In the current presidency, there has been a larger collapse of oversight. *See* Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress is Failing American and How to Get It Back on Track* 151-53 (2006).

[59] *See, e.g.*, 50 U.S.C. §§ 413(a) & 413b.

[60] For example, the law states that all disclosure must be "consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C. § 413(a). Although this statement seems relatively anodyne, it may be/[is] used to deny Congress vital information or to deprive it of all information concerning specific programs.

[61] As Gov. Thomas Kean and Lee Hamilton recently reemphasized, this remains a pressing problem: "Three years ago, the 9/11 commission noted that the Department of Homeland Security reported to 88 congressional committees and subcommittees—a major drain on senior management and a source of contradictory guidance. After halfhearted reform, the number is now 86." Thomas Kean & Lee Hamilton, *Are We Safer Today?*, WASH. POST, Sept. 9, 2007, at B1. The 9/11 Commission, however had "no staff team or hearing on congressional oversight," and it is possible that further investigation would yield a conclusion different from their recommendation of "unity of effort." Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 287-88.

especially vital because Congress' other tools, such as spending power and impeachment authority, are too unwieldy to be effective as an ongoing guarantee for a full flow of information. Big guns simply cannot be wheeled out on every occasion. Limiting excessive classification and reining in executive privilege alone will not ensure that Congress gets the information it needs to fulfill its constitutional role.[62] There must be an affirmative obligation on the executive branch to disclose information. Statutory disclosure obligations are especially important in the national security arena because Congress, particularly in the absence of leaks from executive officials to the press, will not always be aware of the existence of the information it needs.

Statutory disclosure obligations fulfill their function only if the congressional committees that receive the resulting disclosures work properly.[63] Congress should in particular reconsider and limit the use of "gang of eight" briefings, which create the impression of accountability without its substance.[64]

Congress should further consider whether the weaknesses of congressional oversight bodies during periods of unified government (i.e., when the same party holds power on Capitol Hill and in the White House) suggests the need for more radical change. Congress should consider giving equal control of the intelligence committees' information-forcing powers to the party not in the Oval Office, whether or not they are in the majority in Congress.[65] Although this idea is at odds with a tradition of majority control in Congress, it has received serious attention from major legal scholars.[66]

In any event, oversight need not be a partisan matter—as the Church Committee demonstrated by bringing together both Republicans and Democrats to pursue inquiries into Administrations of both parties.[67] Neither Republicans nor Democrats, for example, should want a government where prosecutors are fired on partisan grounds. Neither

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[62] Congress's power to investigate is "perhaps the most necessary of all the powers underlying the legislative function.... [It] provides the legislature with eyes and ears and a thinking mechanism." J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951); *see also McGrain v. Daughtery*, 252 U.S. 135, 174 (1927); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) ("The scope of [Congress'] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.").

[63] The literature here is already exhaustive. *See, e.g.*, Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform* ROGER WILLIAMS U.L. REV. 1, 69-74 (2005).

[64] For example, the White House misleadingly claimed that it had disclosed the NSA program "to Congress" without stating it had only disclosed to the "gang of eight." *See* Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5.

[65] Aziz Huq, *Spy Watch: After Years of Neglect, Congress Must Intensify Oversight of Intelligence Agencies*, LEGAL TIMES, May 15, 2006 (suggesting that control of intelligence oversight be vested in the party not in possession of the White House).

[66] Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2342, 2347 (2006) (suggesting that the minority party could hold hearings); *see* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1050-53 (2004).

[67] *See* Smist, *supra* n. 20, at 77-78 (1990).

should want the "national security" or the "executive privilege" label to be applied to obscure partisan goals or to hide abusive exercises of power. Oversight should be a shared responsibility. And before facts are fully aired, nobody should prejudge the matter.

F. Strengthen the Inspector General System and Other Internal Checks and Balances.

Congress should review and strengthen by law the "internal checks and balances" of the executive branch, in particular the system of inspectors general for agencies and departments engaged in national security policy, and the protections for internal whistleblowers.

Congress alone cannot ensure that the law is followed all the time. The federal government, and in particular the national security apparatus, has swollen far beyond anything envisaged by the Framers, and far beyond the capacity of Congress and the courts to supervise. As the current Administration acknowledges, there is a consequent need for "strong measures to improve compliance [with the law] in ... national security mechanisms."[68] Such internal checks and balances and protections would "help the Congress to hold the [e]xecutive [b]ranch accountable by rooting out waste, fraud, and abuse, and by shedding light on issues in need of attention."[69]

Many internal investigative and oversight mechanisms are familiar: a stronger system of inspectors general (or "IGs," the statutory office responsible for internal auditing of executive branch activity); better protection for whistleblowers; separate and overlapping cabinet officers to ensure that the president hears competing opinions; agency "stovepipes" to ensure that there are internal channels to raise challenges to actions of questionable legality; mandatory review of government action by different agencies; civil-service protections for agency workers; reporting requirements to Congress; and an impartial decision-maker to resolve inter-agency conflicts to replace the now compromised Office of Legal Counsel. Many of these internal institutions exist in some form today but are too weak to be wholly effective. They should be strengthened.

G. Legislate To Reduce Excessive Secrecy and Over-Classification.

Congress should hold hearings on the abuse of secrecy and enact compehensive rules to guard against the misuse of security-related classification and declassification. It should strengthen internal mechanisms that control oversight of classification.

Excessive secrecy affects the Constitution's checks and balances in three ways. First, it prevents Congress and the public from knowing what problems exist or how best

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[68] *See* Letter from Alberto R. Gonzales, Attorney General, U.S. Department of Justice, & Robert S. Mueller III, Director, Federal Bureau of Investigation, to Hon. Richard B. Cheney, Vice President (July 13, 2007) (on file with Brennan Center for Justice).

[69] Project on Government Oversight, *POGO's 2007 "Baker's Dozen" of Suggested Congressional Oversight Priorities*, Jan. 3, 2007, *available at* http://www.pogo.org/p/govemment/go-070101-bakersdozen.html.

to regulate them. Second, it shifts power to the executive branch, which can, and does, selectively release classified information in order to promote its political or policy agenda. Third, excessive secrecy limits the flow of information *within* the Executive—in some instances handicapping inter-agency processes of policy formation and yielding bad decisions.[70] For these reasons, Congress must promptly address excessive secrecy and over-classification, which has become an immense problem.[71]

Secrecy increased at the start of the Bush Administration and dramatically escalated after 9/11. Classification doubled from 2001 to 2004 alone.[72] "The problem of over-classification is apparent to nearly everyone who reviews classified information," wrote Governor Thomas H Kean and Lee H. Hamilton after chairing the 9/11 Commission: "The core of the problem is the fact that people in government can get in trouble for revealing something that is secret, but they cannot get in trouble for stamping SECRET on a document."[73] Furthermore, in the national security arena, excessive secrecy hampers Congress's ability to gather information and formulate informed responses.[74]

Congress should carefully review the regulations that now structure classification and declassification efforts. Such reviews might be done in the first instance by an expert, non-partisan panel. Based on this review, Congress should enact a comprehensive law limiting classification and installing checks to guard against the political manipulation of either classification or declassification. (The House of Representatives attempted to address this problem through legislation passed last week. I

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[70] National Security Advisor Condoleezza Rice, for example, only learned of the Department of Justice's infamous August 2002 opinion on torture in June 2004—and then only from the *Washington Post.* Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1.

[71] According to J. William Leonard, Director of the Information Security Oversight Office, more than two million of the 20.5 million classification decisions made in 2006 were incorrect. This error rate, Leonard told Congress, "calls into question the propriety" of the initial classification decisions. Charles Pope, *Government is Overzealous with Secrecy, Reichert says*, SEATTLE POST-INTELLIGENCER, July 26, 2007, at B1. Other executive branch officials are even more concerned about excessive classification than Leonard. One official has estimated that "beyond 50%" of currently classified documents have been improperly kept from the public. *Emerging Threats: Classification and Pseudo-Classification Before the S. Comm. On Government Reform*, 109th Cong. (2005) (statement of Thomas S. Blanton, National Security Archive, George Washington University) *available at* http://www.gwu.edu/~nsarchiv/news/20050302/index.htm.

[72] Fuchs, *supra* n. 49, at 131, 133. On March 25, 2003, the White House ratcheted up government secrecy by imposing a presumption of non-disclosure on all federal agencies. Secrecy extends to the practices of individual policy-makers. Vice President Cheney, for example, "declines to disclose the names or even the size of his staff, generally releases no public calendar and ordered the Secret Service to destroy his visitor logs." Barton Gellman & Jo Becker, *A Different Understanding With the President,* WASH. POST, June 24, 2007, at A1.

[73] Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 69; *see also* Mann & Ornstein, *supra* n. 58, at 158-62 (describing the Congress's "tolerance of executive secrecy" even before 9/11); *see generally* Daniel Patrick Moynihan, *Secrecy: The American Experience* (1999); *cf.* Sessile Bok, *Secrets: On the Ethics of Concealment and Revelation* 109-10 (1983) ("Long-term group practices of secrecy... are likely to breed corruption and to spread.").

[74] Most importantly, this includes the Governmental Accounting Office. The Congressional Research Services has access to less information on security issues when it compiles information for Congress.

urge the Senate also to focus on such legislation.) Further, Congress should strengthen both inter-branch and intrabranch oversight mechanisms. The General Accounting Office should be given a clear mandate over security agencies. Internal bodies such as the Information Security Oversight Office and the Public Interest Declassification Board should be strengthened and vested with greater disclosure-forcing powers, e.g., subpoena authority.[75]

H. Disclose the Office of Legal Counsel's Legal Opinions That Influence the Use of National Security Powers, and Consider Restructuring the Office.

The next Administration should release to Congress and the public all relevant internal legal opinions and presidential authorizations, especially those that rely on a "monarchical prerogatives" theory of presidential authority, or that otherwise negate or narrow the application of national security laws enacted by Congress. Congress should legislate to strengthen the independence of the Office of Legal Counsel (OLC) by insulating it from improper White House influence. It also should legislate to ensure maximum transparency for OLC opinions.

The Justice Department's OLC provides written and oral legal opinions to others in the executive branch, including the president, the attorney general, and heads of departments. It stands at the front line of executive branch legal interpretation.[76] But it has recently played a central role in sanctioning the dangerous theory of monarchical executive power that has corroded the checks and balances of constitutional government. Congress should curb with legislation this deviation in the OLC's role and promote OLC's transparency.

In legal opinions sanctioning torture, rendition, and warrantless surveillance, the OLC failed to check—and instead enabled—flagrant governmental disregard of the law. Rather than fulfilling its "special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers," the OLC fell into an "advocacy model," i.e. simply signing off on what the White House wanted.[77] As a distinguished group of OLC alumni have explained: "The advocacy

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[75] The Public Interest Declassification Board, established to reduce excessive classification, has been rendered ineffectual by White House control. Shaun Waterman, *Analysis: Secrecy board called 'toothless,'* UNITED PRESS INTER'L, Oct. 30, 2006.

[76] Schwarz & Huq, *supra*, n. 1, at Chapter 8 ("The King's Counsel"), at 187-199; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH L. REV. 676, 710-11 (2005); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309-10 (2000). The Office of Legal Counsel was created by statute in 1953; its head, an assistant attorney general, is subject to presidential appointment and Senate confirmation. *See* Reorganization Plan No. 2 of 1950, 64 Stat. 1261.

[77] Walter Dellinger et al., Principles to Guide the Office of Legal Counsel 25, (Dec. 21, 2004), *available at* http://www.acslaw.orefiles/2004%20programs_OLC%20tinciples_white%20paper.pdf. It did so both by proffering the untenable theory of a "monarchical executive" to underwrite extraordinary new powers, and by interpreting statutes such as the September 2001 Authorization for the Use of Military Force, as a

model of lawyering, in which lawyers merely craft plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."[78] Optimally, the OLC provides "thorough and forthright" advice that "reflect[s] all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power."[79]

At the threshold, Congress should require transparency to promote integrity in OLC legal opinions. OLC opinions—past and future—should as much as feasible be disclosed to Congress and the public. These opinions have the force of law. In this country we should have no secret laws.

Since 9/11, OLC has issued legal memoranda—including the infamous "torture memo" of August 2002—that rely on a monarchical theory of presidential power to license torture, warrantless surveillance, and "extraordinary rendition."[80] Remarkably, the present Administration has refused to expose all its legal reasoning to the light of day—even as it continues to press its expansive vision of presidential power. To date, some legal opinions regarding compliance with international law, the detention of persons seized in Afghanistan in the course of Operation Enduring Freedom, and the use of coercive interrogation have been released or leaked. But others are known to exist and have been kept secret.[81] The *current* Administration should release immediately all legal

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wholesale repudiation of checks and balances in the national security field. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[78] Dellinger et al., *supra* n. 77, at 1.

[79] *Id.* at 2; *accord* Jack Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 35-37 (2007). In an age of increasing statutory and regulatory complexity, the OLCs role as an honest broker within the executive branch on legal issues is of paramount importance: Increasing numbers of legal questions never reach the courts, such that the executive functionally may have the last word on constitutional and statutory questions where vital human interests are at stake. *See* Pillard, *supra* n. 76, at 758.

[80] Many of these legal opinions provided internal legal justification, and hence "cover," for arguably illegal programs. In the absence of legal cover, illegal programs would not—and did not—continue. *See, e.g.*, Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1 (quoting one CIA official to the effect that the interrogation program "has been stopped until we sort out whether we are sure we're on legal ground").

[81] These include—but are not limited to—the following:

- Memoranda dated October 4 and November 2, 2001, January 9, May 17, and October 11, 2002, February 25, 2003, March 15, May 6, and July 16, 2004, and February 4, 2005, concerning the so-called "Terrorist Surveillance Program" of the NSA. (Referenced in Letter to Patrick J. Leahy, Senator, from Shannon W. Coffin, Counsel to the Vice President, Aug. 20, 2007 (on file with Brennan Center for Justice).)
- Memorandum dated March 13, 2002, for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee Assistant Attorney General, Office of Legal Counsel, entitled "The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations," and undated memorandum concerning the President's authority to transfer terrorist suspects to other countries where they are likely to be tortured. (Although no record of this

opinions issued by the OLC that license policies of interrogation, detention, transfer, and surveillance. It seems likely that these opinions each rely in some measure on the presumption of monarchical prerogatives.[82] If this Administration persists in its refusal to disclose these legal opinions, the next president should commit to doing so. If he refuses, Congress should subpoena them or legislate to require disclosure.

Congress should also address the OLCs institutional drift by strengthening its capacity to resist political pressures and to provide neutral and impartial advice that accounts for all relevant constitutional concerns.[83] Congress should also, among other things, require guidelines to ensure "appropriate executive branch respect for the coordinate branches of the federal government" and for individual constitutional and international human rights.[84] Congress should direct OLC to "seek the views of all affected agencies [as well as other] components of the Department of Justice before rendering final advice."[85] To the maximum extent feasible, OLC opinions also should be made publicly available via an easily searchable public website.[86] Congress should also require that "absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, [the OLC] should publicly release a clear statement explaining its deviation."[87]

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memorandum has surfaced, a law review article by a former OLC lawyer reads remarkably like an OLC memo; the same lawyer has published other articles that cribbed from his work at OLC. *See* John Yoo, *Transferring Terrorists,* 79 NOTRE DAME L. REV. 1183 (2004); *see also* Schwarz & Huq, *supra* n. 1, at 163 (discussing article).)

- Memorandum dated spring 2005, signed by Steven Bradbury, concerning the legality of CIA enhanced interrogation techniques used either alone or in combination, and concluding that these did not amount to "cruel, inhuman, or degrading" treatment . *See* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations,* N.Y. TIMES, Oct. 4, 2007, at A1.

These are the opinions we are fortunate enough to know about due to cross-references in other documents or press reports. There are likely others that we do not know exist, but that should be in the public domain.

[82] Evidence for this derives from the fact that opinions that have been released do rely on extravagant theories of executive power. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, for William J. Haynes II, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," Jan. 9, 2002; *see also* Robert Delahunt & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002).

[83] To implement this, Professor Neal Kumar Katyal has suggested splitting the OLC into distinct adjudicative and advisory divisions. Katyal, *supra* n. 66, at 2335-40. Judge Patricia Wald and Professor Neil Kinkopf argue that OLC should shift to a wholly "judicial model" that is distinct from the "advocacy model." Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 31, 57 (2007).

[84] Dellinger et al., *supra* n. 77, at 3. By authorizing internal guidelines aimed at a legislatively stipulated goal in lieu of regulating directly, Congress recognizes the leeway that the Department of Justice properly exercises in maintaining professional standards.

[85] *Id.* at 5.

[86] *Id.* at 4; *see also* Pillard, *supra* n. 76, at 750 (advocating for public database).

[87] Dellinger et al., *supra* n. 77, at 4.

I. Make It Clear: No More Torture, No More "Torture Lite."

Recognizing the damage that abuse and rumors of abuse have done to America's reputation since 9/11, Congress should enact legislation closing loopholes that the executive branch believes allow or decriminalize the use of coercize interrogation measures including (but not limited to) waterboarding, prolonged sleep deprivation, and stress positions.

American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment.[88] But, since 9/11, the current Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal legal limits and devise ways to evade what should be clear and impenetrable barriers. Even though federal law and international law—clearly, and without reservation or caveat—prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics—including waterboarding and prolonged sleep deprivation[89]—which clearly constitute torture.

Congress should not have to clarify again the law against torture. But given the executive's repeated evasions of that law, Congress must do so. In particular, Congress should specifically prohibit the "enhanced interrogation techniques" that the Administration reportedly uses, as well as the reported combinations of multiple

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[88] *See* Schwarz & Huq, *supra* n. 1, at 67-69 (summarizing those laws).

[89] In confirmation hearings, Attorney General nominee Michael Mukasey was unable to state clearly that water-boarding constituted torture. *See* Attorney Transcript of Senate Judiciary Committee Hearing for Nomination of Judge Michael Mukasey as Attorney General, Day Two (Oct. 18, 2007), *available at* http://www.washingtonpost.com. But water-boarding has been considered torture since the Spanish Inquisition. There is no question of its tremendous pain-inducing power. *See* Rejali, *supra* n. 9, at 279-85.

Moreover, in July 2007, President Bush promulgated an executive order setting forth rules for CIA interrogations (the military being covered by a separate, and stringent, field manual on interrogation). The order listed a series of criminal statutes concerning torture and the McCain Amendment, and explained that these, along with religious and sexual abuses, defined the universe of the Geneva Conventions' Common Article 3 violations. The order also stated that detainees would receive "the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care." *See* Executive Order Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (July 20, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/07/print/20070720-4.html.

Critically, the order did not specify which tactics the CIA would use. Further, it was carefully drafted to exclude several "enhanced" interrogation techniques allegedly already authorized for the CIA. Space remained, in short, for several of the harsher measures that had long been used against post-9/11 detainees. Certainly, that was how the order was read by the military's lawyers, who expressed concern to the White House that interrogations pursuant to the order would likely violate the 1949 Geneva Conventions. *See* Karen DeYoung, *Bush Approves New CIA Methods*, WASH. POST, July 21, 2007, at A1; Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, ASSOC. PRESS, July 21, 2007, *available at* http://abcnews.go.com/Politics/wireStory?id=3399803; *see also* Charlie Savage, *Military cites risk of abuse by CIA*, BOSTON GLOBE, Aug. 25, 2007, at A1.

"enhanced" interrogation measures.[90] These restrictions should not be exclusive, but given as examples of the larger category of prohibited conduct. (In addition, all interrogations conducted by the CIA or the military should be videotaped. The involvement of doctors in interrogations should be carefully examined.) Absolute prohibitions should apply to all agents, employees, and contractors of the federal government (regardless of whether they are inside or outside the United States) and to individuals who work alongside the federal government. Finally, Congress should prohibit, without caveat, the transfer of suspected terrorists to other countries known to use torture.[91] Reliance on another country's assurance that it will not torture—in the face of State Department reports that they regularly *do* torture—is patently hypocritical and inadequate.[92]

IV. Conclusion.

Checks and balances need to be restored to the Framers' original vision. From the outset, our nation has been strongest when our government formulates policies by deliberative and open processes. Without the clarity that informed criticism brings, our national security policy is much more likely to be ineffective, uninformed, flawed and possibly harmful to our citizens and our standing in the world. Effective checks and balances are a prerequisite to informed criticism and open deliberation. In their absence, novel and erroneous constitutional theories have led to conduct that is contrary to American values. We will spend many years remedying the harms, both foreign and domestic, that these ill-advised policies have caused.

Consequences, not motive, are key. Make the assumption that the conduct which has undermined our values and sapped our strength arose in the context of seeking to protect the country from further attacks. But also remember—as Justice Louis Brandeis warned in a somewhat different context—that at times "the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[93] After 9/11, the most important lack of "understanding" was that America's greatest strength lies in our adherence to the rule of law.

Again, the Church Committee's words are as true today as they were three decades ago:

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[90] In a recent report, Human Rights First and Physicians for Human Rights have demonstrated that all of these techniques are torture. HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007), *available at* http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf.

[91] *See generally* Schwarz & Huq, *supra* n. 1, at 97-123. For an excellent overview of the international law issues, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

[92] *See* HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005) *available at* http://hrw.org/reports/2005/eca0405/.

[93] *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

> "The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes [us] free, is lessened."[94]

The United States will (as it should) continue to have a massive and powerful executive branch. This makes it particularly pressing to find effective ways to ensure that the powers of the presidency are used wisely and fairly. During the past eight years—and indeed for years before that—oversight of the executive branch, in particular its formidable national security powers, has withered. Now, as the public catalog of flawed, harmful, and unwise policies grows, the case for comprehensive reform is undeniable and urgent.

Bringing the checks and balances of constitutional government to national security policy does *not* exchange liberty for security. To establish accountability is to ensure that security powers are targeted correctly and sensibly. It is to ensure that government officials do not hide their mistakes, claim victory when none is at hand, or turn security into a partisan game. The Framers knew well the temptation to ignore our own errors, to presume ourselves infallible, and to stifle evidence to the contrary. That is why they installed constitutional checks and balances to resist such natural and human tendencies. We have forgotten the Framers' wisdom. But, if we are to prevail in the "war of ideas" at the heart of contemporary counterterrorism, if we are to convince others that America stands on solid moral ground, and that America remains committed to the "inalienable rights" of all, then we must find our way back to the original wisdom of the Constitution, and to a government that follows the rule of law and welcomes checks and balances.

September 16, 2008

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[94] S. REP. NO. 94-465, *supra* n. 19, at 285. At the dawn of America, George Washington similarly rejected using tactics of the enemy: "Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army in their Treatment of our unfortunate brethren." Washington to Samuel Blachley Webb, New Jersey, Jan. 8, 1777, reprinted in 8 *The Papers of George Washington: Revolutionary War Series* 16 (W.W. Abbot ed., 1985).

Similarly, the code that President Lincoln approved in the Civil War forbade soldiers using "torture to extort confessions." Instructions for the Government of Armies of the United States in the Field art. 16, Apr. 24, 1863, General Orders No. 100, *available at* http://www.yale.edu/lawweb/avalon/lieber.htm.