American Civil Liberties Union

Testimony Regarding Civil Liberties and National Security:

Stopping the Flow of Power to the Executive Branch

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives

Submitted by Laura W. Murphy

Director, Washington Legislative Office

December 9, 2010

American Civil Liberties Union

Testimony Regarding Civil Liberties and National Security:

Stopping the Flow of Power to the Executive Branch

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives

Submitted by Laura W. Murphy

Director, Washington Legislative Office

December 9, 2010

Stopping the Flow of Power to the Executive Branch

INTRODUCTION

Chairman Nadler, Ranking Member Sensenbrenner, Full Committee Chairman Conyers, Full Committee Ranking Member Smith, and Members of the Subcommittee: the American Civil Liberties Union ("ACLU"), representing its nearly 600,000 members, respectfully submits this testimony on Civil Liberties and National Security.

The ACLU celebrated its 90th anniversary this year. The Obama Administration is nearing the end of its second year, and we are on the brink of a new Congress. It is an appropriate time to take stock of where we are, and the decisions that lie ahead of us in the 112th Congress.

It can be a disheartening time to reflect. It feels as though scissors have cut out whole portions of our liberties in the name of fighting the war on terrorism. The conversation about national security often falls prey to overheated rhetoric that obscures rather than elucidates a bipartisan examination of the facts. We have trained ourselves to jump and react and legislate every time there is a terrorism-related incident or trial. That behavior often undermines rather than reinforces faith in our institutions. But the good news is that it is not too late to restore our faith in the institutions of the courts, the Congress and the executive branch and the important checks and balances they provide to safeguard our liberty.

Congress is a co-equal branch of the federal government. It has an important role that should be used but not abused in holding the executive branch to account for its extraordinary powers – powers that have vastly expanded since the horrific attacks of 9-11.

History teaches us that executive branch of the US government – regardless of the party in power – always seizes opportunities to expand its own power, and the American people need Congress to serve as a healthy check on that tendency.

CHALLENGES TO OUR SECURITY

There is no question that the 9/11 attacks were a serious blow to our nation. We continue to experience periodic attempts by terrorists to harm innocent people. The risk of future significant attacks is a frightening prospect and something our government must work to prevent.

We must work *intelligently* to prevent attacks, however, and we must do so with the integrity that we as Americans owe to ourselves and future generations.

Intelligence means making sure the steps we take are smart ones – that we marshal our limited security resources, and devote them to those measures that will do the most good without imposing disproportionate costs, in treasure or in our liberties. *Integrity* means keeping faith with our nation's highest ideals as outlined in the Bill of Rights, which have made us what we are – at our best, a beacon of liberty for the world – and which are the real source of our strength as a nation.

What we should not do is let our policies be driven by fear. Fear can push us to act without either intelligence or integrity. We are a strong nation, and our strength comes from our values and the rule of law. Violating those values and the rule of law rarely gives us much protection in the short term, and in the long term weakens the foundations of our strength.

Security risks are not exactly something that started on 9/11. There is a long, diverse history of terrorist activity in the United States, from anarchists to Puerto Rican nationalists to the Weather Underground to the Ku Klux Klan to Timothy McVeigh. More broadly, Americans have lived through civil war, economic collapse, an attempt to conquer the world by a mad, genocidal dictator, a surprise military attack on U.S. territory, world war on two fronts, and, for 50 years, the threat of nuclear Armageddon. Through all these threats, we mostly stayed true to our values and preserved our freedom.

And when we didn't, it didn't make us safer and we always came to regret it. Whether it was the Alien and Sedition Acts, the suspension of Habeas Corpus during the Civil War, the Palmer Raids and the World War I Red Scares, the internment of Japanese-Americans, or domestic spying under the COINTELPRO program during the Vietnam War – we got a bad deal. We gave up freedom without getting improvements in our safety. In each case, that was eventually recognized, and the policy was discredited.

RESPONSES TO THOSE CHALLENGES

In the wake of 9/11, we have repeated that pattern. Unfortunately, there are many examples to cite. Let me discuss a few of them.

Warrantless surveillance

President Bush dealt a body blow both to long-respected traditions of privacy and to the rule of law with his program of illegal warrantless wiretapping.

Information about the precise nature of this spying is difficult to obtain, but our spy agencies have departed radically from their supposedly exclusive focus on overseas spying, and have turned their eyes and ears inward upon the American people.

In December 2006 the *New York Times* first reported that the NSA was tapping into telephone calls of Americans in violation of existing laws and the Constitution. Furthermore, the agency gained direct access to the telecommunications infrastructure through some of America's largest companies. Using that access, the agency appeared to be using broad data-mining techniques to evaluate the communications of millions of people within the United States.

In May 2006, Americans learned that at least some of the major telecommunications companies granted the NSA direct, wholesale access to their customers' calling records – once again, outside the law – and that the NSA was compiling a giant database of those records. According to the *New York Times*, the NSA was working with "the leading companies" in the telecommunications industry to collect communications patterns, and accessing "switches that act as gateways" at "some of the main arteries for moving voice and some Internet traffic into and out of the United States."[1] These apparently included telephone gateways as well as key nodes through which a large portion of Internet traffic passes. Access to these network hubs provides access to a direct feed of all the communications that pass through them, and the ability to sift through those communications as it sees fit.

Congress worsened the situation in 2008 by passing the Foreign Intelligence Surveillance Act Amendments Act (FAA), which permits the government to get annual court orders that can capture all communications coming into or going of the United States – even if an American citizen is on one end, and even if that person is not suspected of doing something wrong. The amount of private American communications that can be collected under this law is staggering, and this un-American and unconstitutional spying continues under President Obama. The ACLU has challenged the constitutionality of this law and our case is pending before the Second Circuit.

Secret warrantless eavesdropping on American citizens – is this the heritage our generation wants to pass along to future Americans?

Targeted killings

Of all of the national security policies introduced by the Obama administration, none raises human rights concerns as grave as those raised by the so-called "targeted killing" program. According to news reports, President Obama has authorized a program that contemplates the killing of suspected terrorists – including U.S. citizens – located far away from zones of actual armed conflict. If accurately described, this program violates international law and, at least insofar as it affects U.S. citizens, it is also unconstitutional.

The entire world is not a war zone. Outside of armed conflict, lethal force may be used only as a last resort, and only to prevent imminent attacks that are likely to cause death or serious physical injury. According to news reports, the program the administration has authorized is based on "kill lists" to which names are added, sometimes for months at a time, after a secret internal process. Such a program of long-premeditated and bureaucratized killing is plainly not limited to targeting genuinely imminent threats. Any such program is far more sweeping than the law

[1] Eric Lichtblau and James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, December 24, 2005; www.nytimes.com/2005/12/24/politics/24spy.html

allows and raises grave constitutional and human rights concerns. As applied to U.S. citizens, it is a grave violation of the constitutional guarantee of due process.

The program also risks the deaths of innocent people. Over the last eight years, the government has repeatedly detained men as "terrorists," only to discover later that the evidence was weak, wrong, or non-existent. Of the many hundreds of individuals previously detained at Guantánamo, the vast majority have been released or are awaiting release. Furthermore, the government has failed to prove the lawfulness of imprisoning individual Guantánamo detainees in some three-quarters of the cases that have been reviewed by the federal courts thus far, even though the government had years to gather and analyze evidence for those cases and had itself determined that those prisoners were detainable. This experience should lead the administration – and all Americans – to reject out of hand a program that would invest the CIA or the U.S. military with the unchecked authority to impose an extrajudicial death sentence on U.S. citizens and others found far from any actual battlefield. The ACLU has launched a constitutional challenge to this policy, which is pending before a district court in D.C.

The right to unilaterally kill anyone, including American citizens, far from any battlefield – is this the heritage our generation wants to pass along to future Americans?

Airline Security

The spread of unjustifiably intrusive airline security measures continues, such as virtual strip search body scanners and extremely personal pat-downs conducted without even the tiniest basis for suspicion.

Thanks to a new Transportation Security Administration (TSA) policy, many passengers are being forced to undergo an extremely intrusive and humiliating "pat down" search that is unlike anything most Americans have experienced before.

In the few weeks since the policy came into effect, the ACLU has received hundreds of complaints from travelers who have been subject to these invasive and suspicionless searches. These complaints came from men, women and children who reported feeling humiliated and traumatized by the searches they received, and, who, in some cases, compared the psychological impact to a sexual assault. Travelers with specific medical conditions, such as a breast cancer survivor with a breast prosthesis and a bladder cancer survivor with a urostomy bag, have reported being humiliated by less-than-sensitive agents.[2]

Meanwhile, the government is also engaging in the widespread deployment of body scanners – a move that makes no sense as a tradeoff between safety and our liberty. This technology involves a striking and direct invasion of privacy, by producing graphic images of passengers' bodies. It is a virtual strip search that reveals not only our private body parts, but also intimate medical details like colostomy bags. Such a degree of examination amounts to a significant assault on

[2] "TSA Pat-Down Leaves Mich. Man Covered in Urine," CBS News, Nov. 22, 2010; at http://www.cbsnews.com/stories/2010/11/22/national/main7078699.shtml; "TSA Makes Cancer Victim Remove prosthetic Breast," CBS News, Nov. 19, 2010; at http://www.cbsnews.com/stories/2010/11/19/national/main7070415.shtml.

the essential dignity of passengers. Some people do not mind being viewed naked, but many do and the issue is their right to have their integrity honored.

Some try to portray the situation as if we will be 100% safe with these scanners, and doomed without them. Of course, there is no such thing as 100% security, and many plots have been thwarted in recent years without the scanners. The question is, exactly how much of an uptick in security will we receive in exchange for the privacy and dignity we give up? Based on what experts are saying, the answer is: not much. The U.S. Government Accountability Office has reported that the body scanners may well have missed the explosives that "underwear bomber" Umar Farouk Abdulmutallab carried in his pants.[3] Some experts have said explosives can be hidden by being molded against the human body, or in folds of skin,[4] and government testing in the UK found that the technology comes up short in detecting plastic, chemicals and liquids.[5] At London's Heathrow airport, a four-year test of the scanners resulted in a decision to discontinue their use.

The ineffectiveness of body scanners in preventing attacks simply confirms the absence of justification for the level of intrusion involved. Ultimately if we are to protect ourselves with intelligence and integrity, our limited security dollars should be invested where they will do the most good and have the best chance of thwarting attacks. That means investing our scarce dollars in the development of competent intelligence and law enforcement agencies that will stop terrorists before they show up at the airport. The TSA should also invest in developing other detection systems that are less invasive, less costly and less damaging to privacy. For example, "trace portal detection" particle detectors hold the promise of detecting explosives while posing little challenge to flyers' privacy.

The government must indeed work zealously to make us as safe as possible and to take every reasonable step to make sure security breaches do not happen. But they need to act wisely, not by trading away our privacy for ineffective policies.

Security guards who can violate personal privacy and dignity in the most appalling ways in airports, and who knows where else tomorrow – is this the heritage our generation wants to pass along to future Americans?

Military Commissions

The embrace of military commission trials at Guantánamo by the Bush Administration and the Obama Administration (albeit with some procedural improvements) has been a major disappointment to those committed to due process and the rule of law. The effort to create an entirely new court system for Guantánamo detainees is a failure and needs to be halted. President Obama did encourage an effort to redraft the legislation creating the commissions and signed that bill into law. To be sure, the reformed Military Commissions Act contains

[3] "DHS and TSA Have Researched, Developed, and Begun Deploying Passenger Checkpoint Screening Technologies, but Continue to Face Challenges," Government Accountability Office, October 2009, at http://www.gao.gov/new.items/d10128.pdf.

[4] Thomas Frank, "X-ray tests both security, privacy," *USA Today*, Dec. 27, 2006, at http://www.usatoday.com/news/nation/2006-12-26-backscatter_x.htm.

[5] Jane Merrick, "Are planned airport scanners just a scam?" the Independent (UK), Jan. 3, 2010, at http://www.independent.co.uk/news/uk/home-news/are-planned-airport-scanners-just-a-scam-1856175.html.

improvements, but there remains a very real danger that defendants might be convicted on the basis of hearsay evidence obtained under coercion from those who will not be available for cross-examination.

More fundamentally, the existence of a second-class system of justice with a poor track record and no international legitimacy undermines the entire enterprise of prosecuting terrorism suspects. So long as the federal government can choose between two systems of justice, one of which (the federal criminal courts) is fair and legitimate, while the other (the military commissions) tips the scales in favor of the prosecution, both systems will be tainted in the eyes of the public and the international community. The perception will persist that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.

The error in continuing with a flawed military commission system is perhaps most starkly illustrated by the first prosecution to go forward at Guantánamo under President Obama's watch.

The defendant, accused child soldier Omar Khadr, is a Canadian citizen who was only 15 years old when he was captured after a firefight in Afghanistan. Khadr is alleged to have thrown a grenade that killed a U.S. soldier. If the allegations are true—and they have been cast into serious doubt by subsequent revelations—then Khadr was a child soldier brought to the battlefield by adults. In any event, Khadr was subjected to cruel and humiliating interrogations during his eight years at Guantánamo. These interrogations began almost immediately after his capture, while Khadr was in serious pain, being treated for life-threatening wounds in a military field hospital. The very first hearing at the revamped military commissions concerned whether Khadr's statements to interrogators could be used against him, despite this torture and abuse. It was marred by the same chaotic lack of regular process that characterized other hearings in the military commissions. Proceeding with this prosecution or any other in so flawed a system would be not only unjust but unnecessary: the federal criminal courts are both fairer and more effective. It is long past time to end the failed experiment of military commission trials at Guantánamo.

A parallel court system lacking in core legal protections that have long been part of our tradition – is this the heritage our generation wants to pass along to future Americans?

Detention

Over a hundred prisoners remain locked up in the Guantanamo prison, almost two years after President Obama promised to close the facility. In court, the administration has fought the release of detainees against whom the government has scant evidence of wrongdoing. Worse, the administration has embraced the theory underlying the entire Guantanamo detention regime: that the Executive Branch can detail militarily – without charge or trial – terrorism suspects captured far from a conventional battlefield.[6]

To its credit, the administration has now publicly stated that it will not support any new legislation expanding detention authority. Nevertheless, it has continued to assert, in habeas

[6] President Barack Obama, Remarks on National Security at the National Archives (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ .

corpus proceedings involving Guantánamo and Bagram detainees, a dangerously overbroad authority to detain civilian terrorism suspects militarily. And its task force has identified 48 Guantánamo detainees who will be held indefinitely without charge or trial.

Perhaps the most troubling iteration of this sweeping theory of detention authority occurred in legal proceedings in which the Obama administration defended the detention without judicial review of detainees in the Bagram prison in Afghanistan. While the Obama administration has improved the military screening procedures in place at Bagram, those procedures still fall far short of basic due process standards. In response to *habeas corpus* petitions filed by prisoners who had been captured *outside* of Afghanistan and transferred by the Bush administration to military detention at Bagram Air Base, the government argued that the courts lacked jurisdiction even to hear the prisoners' challenges, let alone decide their merits, because the prisoners were being detained in a war zone. This was disingenuous bootstrapping: the prisoners had been captured outside the war zone and transferred into it. The government thereafter relied on their presence in the war zone as a basis for avoiding any judicial scrutiny.

The Court of Appeals for the D.C. Circuit sided with the administration, effectively giving the government carte blanche to operate the prison at Bagram without any judicial oversight. Armed with this decision, Obama administration officials have reportedly begun debating whether to use the Bagram prison as a place to send individuals captured anywhere in the world for imprisonment and interrogation without charge or trial.[7]

Finally, the Obama administration has advocated for the transfer of some Guantánamo prisoners to a prison in Thomson, Illinois, where they would be detained by the military without charge or trial. If a precedent is established that terrorism suspects can be held without trial within the United States, this administration and future administrations will be tempted to bypass routinely the constitutional restraints of the criminal justice system in favor of indefinite military detention. This is a danger that far exceeds the disappointment of seeing the Guantánamo prison stay open past the one-year deadline. To be sure, Guantánamo should be closed, but not at the cost of enshrining the principle of indefinite detention in a global war without end.

A government that can imprison people forever without trial – is this the heritage our generation wants to pass along to future Americans?

State Secrets

The state secrets privilege, when properly invoked, permits the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security. However, the Bush administration began using the privilege to dismiss entire lawsuits at the onset – and the Obama Administration has supported and continued that abuse of power.

The government has invoked the privilege to evade accountability for torture, to silence national security whistleblowers, and even to dismiss a lawsuit alleging racial discrimination. Most recently the government has invoked the privilege to block a challenge to the government's authority to use lethal force against a U.S. citizen without due process. This once-rare tool is

[7] Julian E. Barnes, *U.S. Hopes to Share Prison with Afghanistan*, L.A. Times, June 9, 2010.

being used not to protect the nation from harm, but to cover up the government's illegal actions and prevent further embarrassment.

In the ACLU's landmark case challenging the Bush administration's warrantless wiretapping program, a federal court rejected the government's claim that the lawsuit could not proceed because of state secrets. In her August 17, 2006 ruling in *ACLU v. NSA*, Judge Anna Diggs Taylor recognized that the government had publicly acknowledged that President Bush authorized the National Security Agency to wiretap Americans without warrants, and thus it could not claim that discussing the program in court would harm national security.

Although the state secrets privilege has existed in some form since the early 19th century, its modern use, and the rules governing its invocation, derive from the landmark Supreme Court case *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the widows of three civilians who died in the crash of a military plane in Georgia filed a wrongful death action against the government. In response to their request for the accident report, the government insisted that the report could not be disclosed because it contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. When the accident report was finally declassified in 2004, it contained no details whatsoever about secret equipment. The government's true motivation in asserting the state secrets privilege was to cover up its own negligence.

While the Supreme Court upheld the use of the privilege in *Reynolds*, it did not dismiss the lawsuit. Instead the Court recognized the potential for abuse of the privilege, and placed restrictions on its use to ensure the power would not be "lightly invoked."

There has been no apparent difference between the policies of the Bush and Obama administrations on state secrets, even though the current administration has promised a more rigorous administrative process in deciding when to advance a state secrets argument. In a lawsuit brought by five survivors of the CIA's rendition program, Mohamed v. Jeppesen Dataplan, Inc., the Bush administration argued that the case could not be litigated without the disclosure of state secrets, and that it should therefore be dismissed at the outset. A district court agreed. To the surprise of many, the Obama administration defended that district court decision in the Court of Appeals for the Ninth Circuit, arguing that the district court was correct to deny the plaintiffs any opportunity to present their case in court. Even after a three-judge panel of the Ninth Circuit court sided with the ACLU and vacated the lower court decision, the Obama administration persisted in its argument that the case should not be litigated at all. It asked the full Ninth Circuit to reconsider the decision of the three-judge panel, and the court did so. And by a 6-5 vote, the court affirmed the government's overbroad and premature claim of secrecy. The ACLU is seeking Supreme Court review.

Unless the courts reject the government's overbroad claims of privilege, the government will have every incentive to continue invoking "state secrets" as a shield against embarrassing disclosures.

A government that can evade responsibility in court for all manner of injustices by simply crying "secrecy" – is this the heritage our generation wants to pass along to future Americans?

Watch lists

The national security establishment's record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates the rights of innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, which are consistent in their identification of persistent design flaws and ongoing, unacceptably high error rates.[8]

In May 2009 the Department of Justice Inspector General found that many subjects of closed FBI investigations were not taken off the list in a timely manner, and tens of thousands of names were placed on the list without appropriate basis.[9] A 2009 report by the Inspector General of DHS detailed extensive problems with the redress process for people improperly identified on watch lists.[10]

Further, because of outmoded information technology systems, the method for clearing the names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can't even monitor how many cases it resolves. Yet in the wake of Umar Farouk Abdulmutallab's failed Christmas Day bombing, National Counter-Terrorism Center Deputy Director Russell Travers told Congress that the watch list architecture "is fundamentally sound," and suggested that the lists would soon be getting bigger: "The entire federal government is leaning very far forward on putting people on lists."[11]

Rather than reform the watch lists, the Obama administration has expanded their use and resisted the introduction of minimal due-process safeguards to prevent abuse and protect civil liberties. The Obama administration has added thousands of names to the No Fly List, sweeping up many innocent individuals. As a result, U.S. citizens and lawful permanent residents have been

---

[8] *See for example*, GAO Report to Congressional Requesters, GAO-03-322 *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing* (April 2003); Department of Homeland Security, Office of Inspector General, OIG-04-31 *DHS Challenges in Consolidating Terrorist Watch List Information* (August 2004); Department of Justice, Office of the Inspector General, Audit Report 05-27 *Review of the Terrorist Screening Center (Redacted for Public Release)* (June 2005); Department of Justice, Office of the Inspector General, Audit Report 05-34, *Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program (Redacted for Public Release)* (August 2005); Department of Justice, Office of the Inspector General, Audit Report 07-41, *Follow-Up Audit of the Terrorist Screening Center (Redacted for Public Release)* (September 2007); Department of Justice, Office of the Inspector General, Audit Report 08-16, Audit of the U.S. Department of Justice Terrorist Watchlist Nomination Processes (March 2008); Department of Justice, Office of the Inspector General, Audit Report 09-25, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009); Department of Homeland Security, Office of Inspector General, OIG-00-103, *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, (September 2009).

[9] Department of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009), Audit Report 09-25.

[10] Department of Homeland Security, Office of Inspector General, Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program OIG-00-103 (September 2009).

[11] *See The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening, Hearing of the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. (2010)(Statement of Russell Travers, Deputy Director National Counterterrorism Center); *and* Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, Apr. 6, 2010, at: http://www.nytimes.com/2010/04/07/us/07watch.html.

stranded abroad, unable to return to the United States. Others are unable to visit family on the opposite end of the country or abroad. Individuals on the list are not told why they are on the list and thus have no meaningful opportunity to object or to rebut the government's allegations. The result is an unconstitutional scheme under which an individual's right to travel and, in some cases, a citizen's ability to just return to the United States, is under the complete control of entirely unaccountable bureaucrats relying on secret evidence and using secret standards. The ACLU has filed a lawsuit challenging this lack of due process.

A kafkaesque system in which the government can secretly tag its own citizens as "risks" without appeal or relief – is this the heritage our generation wants to pass along to future Americans?

Expanded FBI investigative powers

Revisions to the Attorney General Guidelines in 2002 and 2008 expanded the FBI's investigative authorities. The 2002 revisions lowered the threshold for initiating investigations, authorized FBI agents to attend public meetings or events without documenting such activities, and expanded the length and scope of preliminary investigations opened upon mere allegations. The 2008 revisions removed the requirement of factual predication altogether for a type of investigation called an assessment, in which agents can conduct physical surveillance, gather information using ruses, recruit and task informants and use grand jury subpoenas to obtain telephone records of Americans not even suspected of wrongdoing. These expanded powers would allow the FBI to conduct meritless investigations of peaceful political activism and religious practices, and now there is ample evidence this has occurred.

For example, when the Attorney General Guidelines were first changed in 2002, FBI Director Robert Mueller dismissed concerns in Congress that the FBI would use these expanded powers to infiltrate mosques. But a December 5, 2010 *Washington Post* article revealed a broad effort to spy on the Muslim community in southern California by using an FBI informant to infiltrate area mosques.[12] Similar cases where the FBI used dubious informants as *agents provocateurs* in Muslim communities have occurred in Miami, Florida; Lodi, California; and Albany and Newburgh, New York, sowing distrust within the Muslim community across the country. In 2009 Director Mueller defended these tactics, saying the FBI would not "take [its] foot off the pedal of addressing counterterrorism," despite the negative impact on the larger Muslim-American community.

A September 2010 review by the Department of Justice Inspector General, initiated after ACLU Freedom of Information Act requests revealed FBI spying operations against a number of domestic advocacy organizations, concluded the FBI initiated these inappropriate investigations with "factually weak" and "speculative" justifications. The IG determined most of these investigations did not violate the 2002 guidelines because the FBI only required the "possibility" of a federal crime to open a preliminary inquiry. Still, the FBI often failed to document the reasons for opening these investigations as required, and classified non-violent acts of civil disobedience as terrorism. In some cases the IG found the FBI opened full investigations and extended their duration without sufficient basis. As a result, the political activists who were the

[12] Jerry Markon, *Tension grows between Calif. Muslims, FBI after informant infiltrates mosque*, Washington Post, Dec. 5, 2010, at: http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710.html.

subjects of these investigations were placed on terrorist watch lists, and sometimes remained on them even after the cases were closed.

Unfortunately the IG investigation only covered FBI activities through 2006, and was limited to cases the ACLU had already exposed. The fact that the Attorney General Guidelines were further weakened in 2008 makes it likely that similarly abusive and ineffective investigations targeting non-violent political and religious activity are occurring today. Because the FBI has shown an unwillingness to police itself, Congress must step in and narrow the FBI's investigative authorities in order to focus its efforts on real threats.

A society in which federal law enforcement can roam about at will on the thinnest of pretexts, spying, gathering information and hiring informers against politically disfavored groups – is this the heritage our generation wants to pass along to future Americans?

UPCOMING ISSUES

In these areas and many others, Congress has ceded dangerously broad powers to the executive branch. Despite these sweeping grants of authority, some are saying that still more powers are needed. Whatever you might think of airline security or eavesdropping policies or other controversies, there is no question that the government today has more than enough powers to conduct anti-terrorism operations.

Let me discuss three other new or continuing issues that we are likely to face in the coming two years.

A new declaration of a worldwide war without end

One issue that Congress may confront in its next session is indefinite detention and the Authorization for the Use of Military Force (AUMF). This issue eclipses all others – and could become the single biggest ceding of unchecked authority to the Executive Branch, in modern American history. As incredible as it may sound even to people intimately familiar with the legislative branch, some key lawmakers want the next Congress to pass a new declaration of worldwide war without end. A sleeper provision buried deep inside habeas legislation first drafted in 2008 by former Attorney General Michael Mukasey's staff, and twice introduced by the incoming House Judiciary Committee Chairman Lamar Smith and Senator Lindsey Graham, would greatly expand the authority given to the executive branch by the post-9/11 Authorization for Use of Military Force. It is two simple sentences that declare that the United States is in an armed conflict with the Taliban, al Qaeda, and associated forces and can detain persons caught in those conflicts, but the course of U.S. history would be forever altered.

Very few members of Congress, and perhaps not even the sponsors themselves, realize the monumental effect that the proposed new declaration of war would have. The current Authorization for Use of Military Force passed in 2001 is focused on the 9/11 attacks and did not declare the United States to be in an armed conflict, but it was used by the Executive Branch as authority to go to war in Afghanistan and Pakistan, torture and abuse detainees, eavesdrop and

spy on American citizens without warrants, and imprison people without charge or trial far from any battlefield. The proposed new declaration of war goes much further and:

- has no geographic boundaries, which means the president could take America to war in any country in the world – including America itself – where a suspected terrorist resides;

- has no limitation on the president using the new war powers within our own country or against American citizens;

- authorizes indefinite imprisonment without charge or trial, without any exceptions for American citizens or persons captured on American soil;

- authorizes the president to use the new war powers, even when there is no harm to the United States and no threat to America's national security. Unlike the current Authorization for Use of Military Force that ties the authority to the 9/11 attacks, the new proposal authorizes war against all terrorism suspects everywhere, thereby turning the United States into the world's most powerful unrestrained cop;

- has no end, which could set America on a course for decades of war;

- has no statutory limitation on whether or how it can be invoked domestically or abroad to supersede laws protecting the civil liberties or human rights of others.

At a time when Department of Justice officials have testified that the government does not need new detention authority, the president and Secretary of Defense have stated their commitment to withdrawing from Iraq and Afghanistan, and the American people want to reclaim our due process rights and focus on peacetime needs, the proposed new declaration of war would set the United States on a very different and far more dangerous course. The issues raised by the proposed new declaration of war are too fundamental to who we are – and who we will become – as a nation to let this issue become partisan. The enormous harm that this proposal would cause to America's values, national security, and economic security should concern members from both sides of the aisle. We urge you to avoid setting the country off on this new course.

Rewiring the Internet for Eavesdropping

A second issue that Congress will confront is the Obama Administration's proposal to change the very architecture of the Internet in order to make eavesdropping easier. The details of this proposal have not yet been formalized, but they have been floated in the press.

According to the *New York Times*, the administration is expected to submit legislation to Congress early next year that would require all online services – even those which operate by putting individuals in direct contact with each other – to make it possible for the government to eavesdrop upon demand. This would require companies to completely restructure the way their services work. The proposed measure would mandate that all online communications services allow the government to collect private communications and decode encrypted messages that Americans send over texting platforms, BlackBerries, social networking sites and other "peer to peer" communications software.

The administration has argued that it is simply hoping to emulate the Communications Assistance to Law Enforcement Act (CALEA), which mandated that telephone companies rework their networks to be wiretap-ready. The reported proposal, however, differs from CALEA in that it would require reconfiguring the Internet to provide easier access to online communications.

This is particularly problematic because many of the privacy protections that governed the government's wiretapping powers when CALEA passed in 1994 no longer exist or have been significantly weakened. For example, Congress has granted the executive branch virtually unchecked power to conduct dragnet collection of Americans' international e-mails and telephone calls without a warrant or suspicion of any kind under the FISA Amendments Act of 2008.[13]

This proposal would interfere with technological innovation, create significant new cybersecurity vulnerabilities, reduce privacy and chill expression on the Internet, and pose dangers of government and third-party abuse. Under the guise of a mere technical fix, the executive branch seeks significant new power to reconfigure the Internet and conduct easy dragnet collection of Americans' most private communications.

Patriot Act reauthorization

The third upcoming Congressional issue is reauthorization of the Patriot Act. The Patriot Act made it easier for the government to spy on innocent people, often with no court review. There are three sections up for reauthorization before February 28.

- Section 215, the so-called "library provision," which gives the government sweeping new powers to seize any tangible thing – library records, tax records, the hard drive of a computer, a DNA sample – that the government deems merely "relevant" to an investigation. That means this power can be wielded against people who are not suspected terrorists or spies – and even people who aren't suspected of doing anything wrong (but are somehow just "relevant.") That's a stunningly broad standard completely out of proportion to the power this authority conveys.
- The "lone wolf" provision. It used to be that secret warrantless FISA surveillance could be used only against people who were members of terrorist groups or spies for foreign countries. The secret FISA powers were created outside criminal wiretap statutes because they were supposed to be used against international conspiracies to harm the United States. The "lone wolf" provision dispensed with that limit, allowing FISA spying to be conducted against anyone suspected of being involved in international terrorism. In 2009, the FBI admitted that this supposedly crucial provision had never actually been used.
- Roving John Doe wiretaps. The Fourth Amendment requires warrants to state "with particularity" the things to be searched or seized. That prevents the government from executing general warrants that leave all discretion in the hands of the executive branch. With the advent of cell phones and other technology, a person may have more than one device for communication – so it makes sense to permit the government to "rove" with an

[13] Interview by Eric Schmidt with Senator Barack Obama at Google (Nov. 14, 2007), http://www.youtube.com/watch?v=m4yVlPqeZwo.

individual, and tap him as he moves from home phone to cell phone to lap top computer, as long as that individual is identified. However, the roving John Doe authority permits the government to get an order without naming either the place or the person to be tapped. This provision should be amended to reflect long standing criminal law: either the person or the place must be identified in the warrant application and order. That will prevent the government from both roaming from device to device AND from person to person at the same time.

None of these three provisions deserve reauthorization. Perhaps more importantly, though, is the dire need to pull back some of the other Patriot Act authorities that independent authorities have shown to be subject to executive branch abuse. Chief among them is the National Security Letter (NSL) authority – similar to the Section 215 authority, but requiring no judicial review. Multiple reports of the DOJ Inspector General have found an explosion in the use of NSL's. In addition, this tool has been regularly abused – with this extrajudicial process being substituted for a court process when courts fails to go along with investigators' requests. Also, courts have already declared aspects of the authority to be unconstitutional – holding, for example, that the automatic gag provisions are far too broad. Congress must take the time to pull back the extraordinary authorities it has given the executive branch to invade the private records of Americans under the Patriot Act.

FISA Amendments Act renewal

Finally, NSA spying will also be up for review in the 112th Congress. The FISA Amendments Act, which as discussed above gave a Congressional stamp of approval to the previously illegal warrantless eavesdropping, expires on December 31, 2012.

Documents obtained last week by the ACLU through a Freedom of Information Act request show that programs conducted under the FAA have repeatedly violated its own targeting and minimization procedures meant to protect Americans' information. The documents confirm that there have been abuses of the FAA power – although because of heavy redactions, it is difficult to tell exactly what those specific abuses are and how systemic they may be. The documents make clear, however, that violations continued to occur on a regular basis even through March 2010. Every internal, semi-annual assessment conducted by the Attorney General and the Director of National Intelligence from when the FAA was enacted through March 2010 found incidents of violations of the FAA's targeting and minimization procedures.

It is incredible that, despite the sweeping new powers this law granted the executive branch, and the sensitivity of this law with regard to our longstanding traditions of privacy, no public oversight of this program has yet taken place. The new Congress should conduct such oversight and significantly reign in the warrantless surveillance it permits.

CONCLUSION

With as much power as we have ceded to the government, the prospect of ceding even more should be questioned by all, whether Democrat or Republican, conservative or liberal. Protecting the constitution is not a partisan issue. The executive branch, whether under control

of Democrats or Republicans, tends to push for expanded powers of monitoring and control over the American people. It is up to the legislative branch – whichever party is in control – as well as the judicial branch to be vigilant in protecting the time-honored, longstanding legal principles and traditions that have always formed the basis of life in the Anglo-American tradition of freedom and democracy.

At the very least, when the executive branch claims that it needs new powers, the people's representatives in Congress must ask sharp questions about:

- exactly why those new powers are needed
- what they will be used for
- why those goals cannot be accomplished using existing authorities
- and whether the needs are proportional to the cost the new powers will impose on our freedom, and the freedom of future generations.

We need to keep the history of past American security scares and civil liberties violations in mind, and the fact that those abuses have never made us more secure and are always seen by posterity as a source of shame and failure.

As Americans we have inherited a treasure of liberty, but all too often recently we have been trading it away at bargain-basement prices – getting little or nothing in exchange, except for temporary illusions of security, and depriving future generations of the inheritance of liberty that they deserve for us to pass along intact.