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American Civil Liberties Union

On

"Getting to the Truth Through a Nonpartisan Commission of Inquiry"

Before the Senate Judiciary Committee

March 4, 2009

We are pleased to submit this statement on behalf of the American Civil Liberties Union, a non-partisan organization with more than half a million members and fifty-three affiliates nationwide, regarding our views on how Congress and the next President can begin to restore the rule of law. The ACLU is well suited to provide this advice as we were founded in 1920 to defend the constitutional rights of political dissidents targeted in an illegal campaign of harassment led by U.S. Attorney General A. Mitchell Palmer during a period of perceived national emergency similar to the one we face today. As new crises emerged over the decades, the ACLU has remained a vigilant defender of the American values enshrined in our Constitution and Bill of Rights, and we have been at the forefront since the terrorist attacks of September 11, 2001, in challenging illegal and unconstitutional government programs undertaken in the name of national security.

The ACLU believes that preserving our commitment to the rule of law, human rights, and individual liberties at home and around the world is essential to developing effective and sustainable policies to protect our national security. As its primary goal, this Committee should put to rest the dangerously false assumption that new threats to our security justify a deviation from these fundamental values. In his first inaugural address, Thomas Jefferson acknowledged the honest fear some held that our republican form of government would not be strong enough to protect itself in troubled times, yet he argued it was our nation's commitment to individual liberty and "the standard of the law" that made it the strongest on earth.[1] Jefferson counseled that if we ever found, in a moment of "error or alarm," that our government had abandoned its essential principles we should retrace our steps in haste "to regain the road which alone leads to peace, liberty, and safety." The ACLU applauds the Committee for holding this hearing and for exploring, after an extended period of error and alarm, the quickest path to restoring that greatest protector of our national security: the rule of law.

There are many paths towards restoring the rule of law and the ACLU commends Chairman Leahy for inquiring whether and how a truth commission should be constituted. We recommend today that in addition to any such work done by a commission, the Attorney General appoint a special prosecutor to pursue criminal charges if appropriate and that Congress conduct an intensive investigation of abuses of the past to set a record of how to move forward. Indeed, multiple accountability efforts are only complementary. After revelations of wiretapping, assassinations and other abuses in the 1970s, two select committees and a presidential commission all operated concurrently. Just as in the '70s, there are many oversight goals, accountability initiatives and institutional interests and each can be fulfilled by a different investigating body.

THE NEED FOR TRUTH AND ACCOUNTABILITY

An effort by Congress and the President to account fully for government abuses of the recent past is absolutely necessary for several reasons. First, only by holding those who engaged in intentional violations of law accountable can we re-establish the primacy of the law, deter future abuses, and reclaim our reputation in the international community. Second, only by creating an accurate historical record of recent failures and the reasons for them can government officials, historians, and other chroniclers properly understand the failure of internal and external oversight mechanisms and how to reform our national security programs and policies. Finally,

only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

In January 1776, Thomas Paine declared "in America, the law is king."[2] With this simple statement, Paine sparked a revolution and altered forever the way people would evaluate the legitimacy of not only our government, but all governments. Around the world, wherever the law is king, freedom, equality, and legitimacy naturally follow. Unfortunately, after the devastating terrorist attacks of September 11, 2001, the Bush administration deliberately chose to abandon the law in favor of working "on the dark side," in secret, in violation of our own core principles and universally recognized standards of international behavior.

Relying on an aggrandized theory of executive power that is diametrically opposed to the fundamental concept of checks and balances enshrined in the Constitution, the last administration secretly initiated extra-judicial detention programs and cruel, inhuman and degrading interrogation methods that violated international treaties and domestic law. It engaged in extraordinary renditions – international kidnappings – in violation of international law and the domestic laws of our allied nations. It conducted warrantless wiretapping within the United States in violation of the Foreign Intelligence Surveillance Act and the Fourth Amendment. And these are only the abuses that have come to light at this time. The Bush administration intentionally weakened internal oversight mechanisms by politicizing the Department of Justice in an unprecedented fashion and by promulgating secret legal opinions deliberately crafted to provide a veneer of legitimacy over these illegal programs, but which could not withstand scrutiny under any generally accepted standard for legal analysis. It intentionally hindered external oversight by obscuring its activities behind a cloak of secrecy designed not to protect our national interests but to hide abuse and illegality and to thwart constitutional checks and balances. Rather than improve our security these misguided policies have provided propaganda victories for our enemies, alienated our allies, and sown distrust of the government here inside the United States. Meanwhile, at least according to recent testimony from the leaders of our intelligence agencies, the threats to our national security are increasing rather than diminishing.[3]

Yet an honest assessment of our predicament cannot lay the blame entirely at the feet of that administration, or even the cumulative usurpations of power of Presidents past. For while a forceful desire to expand executive power beyond its constitutional limits was necessary to achieve such an unchecked concentration of power within one branch, it could not have been achieved without the willful abdication of responsibility by the other branches. James Madison explained in Federalist 51 that "the great security against the gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." In short, "[a]mbition must be made to counteract ambition."

The Constitution provides ample tools for Congress and the courts to check executive abuses of authority, such as those described above. The failure to use those tools leaves the members of both other branches equally to blame for the consequences of the administration's misguided policies. The courts have too often and too easily acquiesced to government state secrets privilege claims in dismissing lawsuits challenging illegal programs like extraordinary rendition and NSA warrantless wiretapping.[4] Congress is perhaps more at fault, however,

because the Constitution gives it the more robust tools. As Madison said, "[i]n republican government, the legislative authority necessarily predominates," yet Congress did not fulfill its responsibility.

THE ROAD BACK TO RESTORING THE RULE OF LAW

I. RESTORE CONSTITUTIONAL CHECKS AND BALANCES THROUGH CONGRESSIONAL OVERSIGHT

A program to restore the rule of law must focus on restoring the constitutional checks and balances that ensure the three branches of government are accountable to one another, and to the American public they serve. Congress should begin vigorous and comprehensive oversight hearings to examine all post-9/11 national security programs to evaluate their effectiveness and their impact on civil liberties, human rights, and international relations, and it should hold these hearings in public to the greatest extent possible. Congress has several options in how it could pursue such oversight, whether through standing committees with jurisdiction, or ideally, through a select committee that could allocate the necessary time and resources outside of the day-to-day demands of the current structure However, it is critically important that Congress do this work itself rather than to just appoint an outside commission. Only by vigorously exercising congressional oversight powers will Congress be able to restore its authority to compel the timely production of documents and witnesses from the executive branch, thereby empowering Congress to perform more effective oversight going forward.

Passing substantial oversight responsibility to an outside commission without concurrently performing its' own investigation might reinforce the perception that Congress has neither the authority, capability nor political will necessary to conduct proper oversight on its own. Outside commissions can also limit Congress's options in addressing a particular problem by issuing recommendations. Because the public views these commissions as politically independent, deservedly or not, it often becomes politically expedient for Congress to adopt their recommendations wholesale, regardless of whether its own review would come to the same conclusions. The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government.

President Obama may want to commission an independent review of his predecessor's national security policies, and this would be entirely appropriate in determining which programs to continue and which to abandon going forward. But there is no reason two inquiries could not move forward simultaneously. A congressional select committee investigation would only complement other investigative and oversight efforts conducted either directly by the executive branch or by an independent commission. After revelations of wiretapping, assassinations and other abuses in the 1970s, two select committees and a presidential commission all operated concurrently. Just as in the '70s, there are many oversight goals, accountability initiatives and institutional interests and each can be fulfilled by a different investigating body.

As the "predominant" branch of our republican government, to use Madison's expression, the Constitution provides Congress with robust powers to exert its will over the executive. The Congressional Research Service Congressional Oversight Manual lists six

constitutional provisions authorizing Congress to investigate, organize, and manage executive branch activities.[5] The most direct and forceful tools are the power of the purse, the confirmation power, and the impeachment power. Congress can use these powers to leverage cooperation from the executive branch, but Congress can also directly compel compliance with congressional inquiries when necessary. The Supreme Court explained the constitutional basis for Congress's power to investigate, and to compel compliance, in *McGrain v. Daugherty*:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed… Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[6]

Yet despite the unquestioned legitimacy of this authority, Congress has not used its inherent contempt power since 1935. While we respect Congress's self-restraint in its use of its power to deny people their personal liberty, the failure to compel compliance has allowed recalcitrant executive branch officials to thwart congressional oversight by using unjustifiable delaying tactics, incomplete compliance, or outright refusal to cooperate based on specious claims of privilege and litigation. Once the threat of inherent contempt proceedings becomes real, however, Congress would likely find future Presidents and executive officials more responsive to congressional requests for information.

And despite administration claims to the contrary, Congress retains these robust powers even in matters of national security and foreign affairs. Not only does the Constitution require a role for Congress in the decision-making process over national security matters, but sound government policy demands it. The Constitution gives Congress the power to declare war and to make rules regulating land and naval forces. Congress, and Congress alone, has the power to levy and collect taxes for the common defense and to appropriate funds as it sees fit. These powers were given to the legislative branch intentionally so that the legislature, as the representatives of the people and the more deliberative branch of government, would have direct control over the critical decisions regarding war and peace. The framers realized our democracy would be strongest when congressional action, supported by the will of the people, guides our use of military activities abroad.

Congress has the power to demand access to national security information and Congress must use this authority to oversee intelligence activities.[7] The National Security Act of 1947 and the Intelligence Oversight Act of 1980 codify Congress's right to national security information, but access to this information is inherent in the constitutional power to legislate. Under the current statutory structure, congressional oversight of intelligence matters is primarily conducted in classified sessions, so Members of Congress who become aware of abusive security programs are prohibited from sharing this information with the public. This secrecy thwarts public

oversight, a key aspect of accountability for both the executive branch and Congress. Recent revelations that certain Members of Congress were advised of the NSA's domestic wiretapping activities and the CIA's interrogation practices long before they were revealed to the public illuminate this problem, as their ability to curb these activities was limited to filing secret letters of concern.[8] This problem is only exacerbated when the executive limits notification regarding covert activities to the "Gang of Eight" -- congressional leaders of both houses and both parties and the chairmen and ranking members of the intelligence committees.[9] Notice regarding particular intelligence activities is meaningless if congressional leaders cannot share the information with colleagues as necessary to pursue legislative measures curb executive abuse.

Congress has the power under its own rules to declassify national security information, though it has never exercised this authority.[10] Congress should use its power to demand access to national security programs and should immediately declassify any information that reveals illegal government activities or abuses of rights guaranteed under the Constitution or international treaties, in a manner that does not disclose technical military information that could harm national security. Congress should also exercise the power of the purse to defund illegal or abusive programs, or any program the President refuses to let Congress examine.

The President has no right to deny Members of Congress access to national security matters, or to limit access to classified information to certain Members. Congress should examine why the intelligence committees and current congressional oversight procedures failed to check executive abuses in national security programs. Learning the reasons for these procedural failures is a necessary first step to establishing a more effective system for the future.

II. ENFORCE THE LAW

The rule of law is meaningless if left unenforced. Some of the programs that have been exposed through internal investigations, government whistleblowers, or press reports appear to involve violations of U.S. criminal statutes. American CIA officers allegedly involved in extraordinary renditions in Europe have found themselves prosecuted for kidnapping by Italian authorities, and under criminal investigation elsewhere.[11] Our government's failure to address these matters in our own courts of law and failure to defend these charges publicly diminishes our moral standing on the international stage.

Justice Department regulations require the appointment of an outside special counsel when a three-prong test is met.[12] First, a "criminal investigation of a person or matter [must be] warranted." Second, the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department." And, third, "under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." When this three-prong test is met a special counsel must be selected from outside the government and given full investigatory and prosecutorial powers and the authority to secure the necessary resources.

The ACLU has previously called for the Attorney General to appoint outside special counsel to investigate the torture and abuse of detainees held in U.S. custody overseas; to

investigate the National Security Agency's warrantless wiretapping program; and to investigate the destruction of Central Intelligence Agency interrogation videotapes. [13] Attorney General Mukasey did assign an Assistant United States Attorney from Connecticut to investigate the CIA's destruction of interrogation tapes, but this is not the type of independent investigation required under the regulation.[14] Moreover, the investigation is improperly limited to illegal activity surrounding the destruction of the tapes, rather than the illegal interrogation methods they depict. The three-prong test for appointing an outside special counsel is met in each of these matters, and we urge Congress to join us in renewing the call for the Attorney General to appoint special counsel to investigate these potential violations of law. President Obama should order Attorney General Eric Holder to appoint outside special counsel regarding all of these matters, to ensure independence from any possible political influence.

CONCLUSION

It is now widely known around the world that since 9/11 the United States government authorized its agents and employees to conduct international kidnappings, indefinitely detain people without judicial process, often in secret prisons, and engage in cruel, inhuman and degrading treatment of those detainees – including the use of techniques most reasonable people recognize as torture. It is difficult to understand how a nation founded on the ideals articulated by Thomas Paine and Thomas Jefferson could have allowed such things to happen, but understand we must. We are at a crossroads. Unless we render a full accounting and create an accurate record of how top officials discarded our core principles, we will never be able to find our way back to that high road that made America a symbol of liberty, equality, and justice around the world. The ACLU remains confident, as we have since our founding in 1920, that the rule of law will ultimately prevail. But it is up to Congress, as the elected representatives of the American people, to provide this full accounting; to hold individuals accountable where appropriate; to reform the checks and balances that were designed to keep our government in equilibrium; and to restore the rule of law over the government of the United States.

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[1] Thomas Jefferson, First Inaugural Address, Washington, DC, (Mar. 4, 1801), *available at* http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm.

[2] Thomas Paine, Common Sense, (1776).

[3] *See, Current and Projected National Security Threats*: *Hearing before the Senate Select Comm. on Intelligence*, 110th Cong. (Feb. 5, 2008); *Annual World-wide Threat Assessment: Hearing before the House Permanent Select Comm. on Intelligence*, 110th Cong. (Feb. 7, 2008).

[4] *See*, El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. 2006); Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9thCir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd* 507 F.3d 1190 (9th Cir. 2007); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).

[5] Frederick M. Kaiser and Walter J. Oleszek, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS,5 (Jan. 3, 2007).

[6] 273 U.S. 135, 174-175 (1927).

[7] *See*, Kate Martin, CENTER FOR NATIONAL SECURITY STUDIES, CONGRESSIONAL ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION, (March 2007), *available at* http://www.openthegovernment.org/documents/congressional_paper.pdf.

[8] *See*, Senator Jay Rockefeller, Letter to Vice President Cheney Concerning NSA Wiretapping Program (Jul. 17, 2003), *available at* http://www.talkingpointsmemo.com/docs/rockefeller-letter/; *and*, Greg Miller and Rick Schmitt, *Letter Said CIA Image to Suffer if Tapes Trashed*, LOS ANGELES TIMES, (Jan. 4, 2008), *available at* http://articles.latimes.com/2008/jan/04/nation/na-ciatapes4.

[9] *See*, Alfred Cumming, CONGRESSIONAL RESEARCH SERVICE, STATUTORY PROVISIONS UNDER WHICH CONGRESS IS TO BE INFORMED OF INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTION, (Jan. 18, 2006), *available at* http://epic.org/privacy/terrorism/fisa/crs11806.pdf.

[10] *See*, Project on Government Oversight, Congressional Tip Sheet on Access to Classified Information, (Oct. 2007), http://pogoarchives.org/m/cots/cots-october2007a.pdf.: "The House rule allowing declassification by the House Permanent Select Committee on Intelligence can be found in Rules of the 109th Congress, U.S. House of Representatives, Rule X. Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to declassify."

[11] *See*, *Trial on CIA Rendition Resumes in Italy*, ASSOCIATED PRESS, (Mar. 19, 2008); *and* Don Van Natta, Jr. and Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N. Y. TIMES, (Jan. 9, 2005).

[12] 28 C.F.R. part 600.1 et seq. Any effort to restore the rule of law in the United States requires that serious allegations of illegal behavior by government agents be investigated thoroughly by a competent authority and, if sufficient evidence of criminal violations is established, prosecuted in criminal courts. When Justice Department officials cannot pursue investigations due to real or perceived conflicts of interest, the Attorney General should appoint an outside special counsel to conduct an independent investigation.

[13] *See*, American Civil Liberties Union, Letter to Attorney General Alberto Gonzales, Requesting Appointment of Outside Special Counsel for Investigation and Prosecution of Civilian Violation, or Conspiracy to Violate, Criminal Laws Against Torture or Abuse of Detainees (Feb. 15, 2005), *available at* http://www.aclu.org/safefree/general/17582leg20050215.html; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting Investigation of Possible Perjury by General Ricardo A. Sanchez; Renewal of Request for an Outside Special Counsel to Investigate and Prosecute Violations or Conspiracies to Violate Criminal Laws Against Torture or Abuse of Detainees (Mar. 30, 2005), *available at* http://www.aclu.org/safefree/general/17554leg20050330.html; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting the Appointment of Outside Special Counsel for the Investigation and Prosecution of Violations, or Conspiracy to Violate, Criminal Laws Against Warrantless Wiretapping of American Persons (Dec. 21, 2005), *available at* http://www.aclu.org/safefree/general/23184leg20051221.html; *and* American Civil Liberties Union, Letter to Attorney General Michael Mukasey, Requesting the Appointment of Outside Special Counsel for the Investigation into the Destruction of CIA Interrogation Tapes, (Jan 7, 2008) *available at* http://www.aclu.org/images/general/asset_upload_file88_33530.pdf.

[14] Congressman John Conyers, Jr., *Conyers Demands that DOJ Appoint Real Special Counsel*, Statement (Jan. 2, 2008), http://judiciary.house.gov/news/010208.html.