A CALL TO COURAGE

RECLAIMING OUR LIBERTIES

TEN YEARS AFTER 9/11

ACLU

AMERICAN CIVIL LIBERTIES UNION

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CONTENTS

4 **Introduction**

CHAPTER I
9 **An Everywhere and Forever War**

CHAPTER II
15 **A Cancer on Our Legal System**

CHAPTER III
20 **Fracturing Our "More Perfect Union"**

CHAPTER IV
26 **A Massive and Unchecked Surveillance Society**

32 **Endnotes**

INTRODUCTION

On the evening of September 11, 2001, President Bush addressed the nation. "Our country is strong," he stated. "Terrorist acts can shake the foundation of our biggest buildings, but they cannot touch the foundation of America."[1]

Those few words precisely captured the nature and scope of the challenge our country faced. The tragedy of the lives lost that horrific day was seared deeply into our hearts and our consciousness. The attacks had shown that even the world's most powerful nation could not be completely secure from the threat of terrorism. But President Bush delivered a message of resilience and resolve: America's "foundation"—its core values and founding principles—was strong enough to withstand this threat, just as it had withstood many others. To allow that foundation to be undermined would be to deliver to terrorists the victory they were incapable of achieving on their own.

Ten years later, as we remember and mourn those who died on September 11th, our nation still faces the challenge of remaining both safe and free. Our choice is not, as some would have it, between safety and freedom. Just the opposite is true. As President Obama recognized in a 2009 speech, "our values have been our best national security asset—in war and peace; in times of ease and in eras of upheaval."[2] Yet, our government's policies and practices during the past decade have too often betrayed our values and undermined our security.

Ten years ago, we could not have imagined our country would engage in systematic policies of torture and targeted killing, extraordinary rendition and warrantless wiretaps, military commissions and indefinite detention, political surveillance and religious discrimination. Not only were these policies completely at odds with our values, but by engaging in them, we strained relations with our allies, handed a propaganda tool to our enemies, undermined the trust of communities whose cooperation is essential in the fight against terrorism, and diverted scarce law enforcement resources. Some of these policies have been stopped. Torture and extraordinary rendition are no longer officially condoned. But most other policies—indefinite detention, targeted killing, trial by military commissions, warrantless surveillance, and racial profiling—remain core elements of our national security strategy today.

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We also could not have predicted that the unity and resolve of that September night would give way so quickly to the fear and fear-mongering of the next ten years. A decade after 9/11, our political leaders continue to permit the fear of terrorism to dominate our political and legal discourse. Terrorism has existed throughout history in various forms, and its threat persists today. But, by defining the struggle against terrorism in existential terms—as a "war" without geographical or temporal limits—our leaders are asking us to accept a permanent state of emergency in which core values must be subordinated to ever-expanding demands of "national security."

The ten-year anniversary of the 9/11 attacks provides an auspicious moment to pause and reflect on where we have come and where we are headed. This report is our attempt to invigorate that critical national conversation. We have titled it "A Call to Courage," because we believe that a defining element of our national identity—embodied in our national anthem's pairing of "the land of the free" with "the home of the brave"—has been imperiled by our leaders' promotion of (or capitulation to) a politics of fear. We have seen Congress and the courts—which are intended to act as checks on executive overreach—fail to perform their constitutional oversight, standing down rather than standing up to the exaggerated demands of an unchecked executive. Indeed, Congress has too often actively stoked the politics of fear, passing statutes that claim to be tough on terror but in fact make us less safe. Our nation can and must do better.

Rather than working to allay public fear, our political leaders (with few exceptions) have manipulated it, to the point where it can be difficult to determine whether their expressions of alarm are genuine or merely opportunistic. Is it possible that many members of Congress actually believe that U.S. prisons are not secure enough to hold terrorism suspects? (And is it remotely conceivable that a member of Congress believes his own warning that if Khalid Sheikh Mohamed is brought to the United States for trial, he might be released on a technicality, granted asylum, and be on a path to citizenship?) These are arguments based on cynicism, not strength or resolve.

And that cynicism is emboldened by a political discourse that rewards those who inflate the terrorist threat and marginalizes those who accurately describe it. Thus, those who proclaim that Muslim terrorists represent an unprecedented threat to our way of life; that our existing laws, courts, and institutions—even our prisons—are inadequate in the face of this threat; that we have no choice but to dispense with core principles—including even the prohibition against torturing prisoners—to defeat this ruthless enemy; that, in short, "9/11 changed everything"—are extolled as hard-nosed realists, warriors who are willing to "take the gloves off." By contrast, those who defend the vitality and viability of our constitutional system, who insist that our existing institutions are equal to the challenges posed by transnational terrorism; who demand that we abide by core principles, including fair trials for and humane treatment of prisoners, even if that means that terrorism suspects must be released and political leaders must be prosecuted; who, in short, do *not* believe that the threat of terrorism requires us to abandon our core principles—are dismissed as weak and naïve.

Confronting the threat of transnational terrorism unquestionably involves *both* military and law-enforcement resources. The question is where to draw the appropriate line between the two."

This dynamic of our political discourse has been driven in part by a wholly contrived "debate" over whether the threat of terrorism calls for a "military" or "law enforcement" response, with the former depicted as muscular and the latter anemic. According to this view, punishing terrorists as the criminals they are is derided as a reflection of a "pre-9/11 mindset," while aggrandizing them as the warriors they claim to be is celebrated as taking the threat "seriously." But this debate says more about the self-image of the would-be warriors than it does about any realities of counter-terrorism. Confronting the threat of transnational terrorism unquestionably involves *both* military and law-enforcement resources. Certainly no one advocated deploying the New York Police Department to Kandahar in 2001 to battle Al-Qaeda-trained militias; by the same token, no one (or almost no one) would advocate that Navy Seals conduct a night raid in Brooklyn to capture or kill a U.S.-citizen terrorism suspect. The question is not *whether* to employ a military or law-enforcement response, but rather where to draw the appropriate line between the two. And in the last decade, we have allowed the superficial rhetoric of a "war on terror" to solidify into a set of policies that have degraded the rule of law.

Thus was an American citizen seized by the military from a New York jail, branded by President Bush as an "enemy combatant," and locked away in a Naval brig without charge or trial. Thus did President Bush, claiming war powers, secretly assert the authority to violate congressional prohibitions and ignore the need for judicial authorization in ordering the electronic sur-

veillance of American citizens. Thus has President Obama claimed the unchecked authority to use lethal force against a United States citizen, far from any battlefield, on the basis of his own unilateral determination that the citizen poses a threat to the nation. And thus has Congress passed laws intended to detain prisoners at Guantanamo indefinitely, even though the prison is a blight on our nation's conscience and history and a recruiting tool for our enemies.

In a much-cited lecture delivered near the end of the Cold War, the late Supreme Court Justice William J. Brennan, Jr., reflected on "the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security." Justice Brennan noted the cyclical nature of the nation's response to traumatic events: after each crisis had abated, the country had "remorsefully realized that the abrogation of civil liberties was unnecessary." While Justice Brennan hoped that the nation might develop a jurisprudence of civil liberties that would be able to withstand the "crucible of danger" and prevent the cycle from repeating itself, there was comfort at least in the recognition that our system of government was self-correcting over time.

The unique danger inherent in trying to articulate a war against terrorism, or even a war against Al-Qaeda, is that the "end" of such a conflict is a distant abstraction, not an actual event. We may not have known *when* prior wars would end, but we knew how. With many of our leaders now claiming that we are in a war that takes place everywhere and lasts forever, can we share Justice Brennan's confidence that constitutional equilibrium will be restored? Ten years have passed since the event that launched this "war"; Al Qaeda's leader and many of his deputies have been killed; counter-terrorism experts report that Al Qaeda's capabilities have been crippled. At a time when the nation should be ratcheting down its war footing, many of our political leaders insist instead on doubling down: a majority of the House of Representatives recently voted to authorize a worldwide war without end; if passed by the Senate, this legislation would effectively hand over unchecked war authority to any future President. In other words, there is a very real danger that this last decade will break the mold of Justice Brennan's cycles, and that unless the American people object loudly and continuously, we will witness the enshrinement of a permanent national security state.

This report examines major trends in the expansion of that state. Our goal is not to provide a checklist of policies, or to critique in detail the civil liberties records of the Bush and Obama administrations, both of which we have covered in numerous publications over the last ten years;[3] it is to discuss key themes. The first chapter addresses the "global war" paradigm and explores the major domestic and international ramifications of the militarization of counter-terrorism. The second chapter explores the direct—and less direct—consequences of the United States' criminal embrace of torture following 9/11, and looks in particular at how our failure to reckon with that legacy has contaminated our legal system. The third chapter discusses the stigmatization of Americans on the basis of religion and ideology, and examines how the unifying gesture of a President visiting mosques could give way, a decade later, to the grotesque spectacle of Americans protesting mosques. Finally, the fourth chapter examines

the growth of a vast government surveillance apparatus and the simultaneous contraction of critical oversight mechanisms, and discusses how those twin developments constitute a stealth threat to democratic government.

We look to our leaders and our institutions, our courts and our Congress, to guide us towards a better way, and it is now up to the American people to demand that our leaders respond to national security challenges with our values, our unity—and yes, our courage—intact. Our country *is* strong. And it is our fundamental values that are the very foundation of our strength and security.

CHAPTER I

AN EVERYWHERE AND FOREVER WAR

On May 26, 2011, a majority of the U.S. House of Representatives voted to give President Obama—and all future presidents—more war authority than Congress gave to President Bush two days after the 9/11 attacks: under the House bill, a president would no longer have to show a connection to 9/11, or even any specific threat to America, before using military force anywhere in the world that a terrorism suspect may be found—including within the United States.

The House vote was a discordant spectacle because it sought to place the nation on a permanent war footing at a time when responsible policy-making called for the opposite. The vote took place just days after Osama bin Laden had been killed and, as Defense Secretary Leon Panetta would soon confirm, we were "within reach of strategically defeating Al Qaeda";[4] before the vote, in what can fairly be described as an understatement, the Obama administration had told the House that the executive branch already had all the war powers it needed. Finally, ten years after 9/11, our nation is exhausted by the high cost in blood and treasure of two wars begun with the stated goal of combating terrorism. Yet, instead of pausing to consider whether the time had come to ratchet down the nation's war against terrorism, 243 members of the House voted to expand and entrench it.

The vote was also a singular abdication of Congress's role in our system of checks and balances. War powers are awesome powers. Once given to the executive, they vest largely unchecked authority in the president to unleash the coercive power of the state to kill or imprison individuals without affording them traditional procedural protections. In order to ensure that war powers are exercised with wisdom and restraint, our Constitution assigns to Congress its most important and fundamental responsibility: "to declare War" by specifying enemies, defining clear objectives, and setting limits that keep the executive's war powers within bounds. Yet, the scope of the conflict that the House approved is so expansive that, if approved by the full Congress (so far, the Senate has not gone along with the House), it would be the single largest hand-over of unchecked war power to the executive branch in American history.

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Why would so many in the House be so willing to cede such vast and unnecessary war powers—which could last for generations—to the executive?

The answer lies in the unrelenting drumbeat by some of our political leaders to force the nation into a military response to *any* act or even threat of terrorism anywhere in the world. That drumbeat draws no distinction between combatants in Kandahar—against whom a military response may be lawful and necessary—and suspected terrorists in Kentucky—against whom it is neither. It is a drumbeat that ignores our strengths and promotes our failures: it rejects a criminal justice system that has successfully prosecuted hundreds of suspected terrorists safely and in accordance with our laws, for a discredited military commissions system that has prosecuted six controversial cases and that violates our Constitution and international law. It is a drumbeat, in short, that falsely posits terrorism as an existential threat that requires us to reject our fundamental values of due process, fairness, and justice, in favor of indefinite military detention, unfair military trials, and unlawful killing.

Of course, it is not only some in Congress who have embraced a worldwide war against terrorism. Since 9/11, there has been no more dramatic or consequential development than the contention by both the Bush and Obama administrations that the United States is engaged in a global armed conflict against loosely defined terrorist entities and undefined "associated forces." The most concrete policies that have followed from this problematic construct are the indefinite military detention and lethal targeting of civilians far from any conventional battlefield or theater of war.

Guantanamo, which from its inception was a laboratory for unlawful military interrogation, detention, and trials, remains an enduring symbol of indefinite military detention. Before President Obama came to office, he rightly declared that the Bush administration had "compromised our most precious values" in creating Guantanamo.[5] When the President announced on his second full day in office that he would close the prison, Americans responded with relief that a shameful episode in our history would come to an end. To its discredit, Congress subsequently passed laws seeking to keep Guantanamo open by restricting the release or transfer of Guantanamo prisoners, including those who are undeniably innocent and who are still being held there ten years after 9/11.

But President Obama's pledge to close Guantanamo was undermined by his own May 2009 announcement of a policy enshrining at Guantanamo the principle of indefinite military detention without charge or trial.[6] Supporters of the Guantanamo principle, both in the White House and Congress, insist that indefinite military detention is necessary because Guantanamo houses a handful of apparently committed terrorists who intend to do us harm, but who cannot be prosecuted in federal court, either because we do not have the evidence to try them, or because our courts cannot be trusted to convict them. These are arguments based not on facts, but on fear-mongering.

Our system of laws provides ample authority for federal prosecutors to try individuals, including suspected terrorists at Guantanamo, for even the most attenuated terrorism-related activities. Federal "material support" and conspiracy statutes allow the government to secure convictions without having to show that any specific act of terrorism has taken place, or is being planned, or even that a defendant intended to further terrorism.[7] Both the Bush and the Obama administrations have successfully prosecuted al Qaeda and Taliban members for supplying funds or equipment, and for attending, or trying to attend, terrorist training camps. Indeed, "material support" laws are so expansive that they have been interpreted to criminalize even conduct and speech that is protected by the First Amendment.[8] The courts are also well able to protect any secrecy interest the government has in the evidence supporting these prosecutions through a federal statute expressly enacted to permit the government to substitute unclassified summaries for classified information.[9] It is difficult, therefore, to imagine that the government could not prosecute any terrorism suspect under the extremely broad authority of our federal anti-terrorism laws. If the government does not have evidence that a person meets even the minimal material support threshold, it is harder still to imagine any possible justification for indefinitely detaining that person, possibly for years, possibly for life. It should go without saying that the government must not detain people without trial because its only "evidence" has been tortured out of them.

The real danger of the Guantanamo indefinite detention principle is that its underlying rationale has no definable limits. Military detention may be legitimate for those captured on an actual battlefield, as the Supreme Court recognized in *Hamdi v. Rumsfeld.*[10] But in the context of a war against terrorism without specified enemies and geographic or temporal limitations, it is simply not possible, let alone lawful, for us to detain indefinitely everyone who we think may, at some point, present a danger. And if we accept the rationale that our safety requires the detention of people who might be dangerous—even if we cannot prove that they violated any laws—then there is no limit to whom the government can imprison in the name of that safety. (Indeed, legislation now pending in Congress would expand, and in some cases make mandatory, indefinite military detention authority for U.S. citizens suspected of terrorism.)

The Obama administration and Congress may start out by seeking to limit the Guantanamo principle to suspected terrorists, but future political leaders would apply that principle's dubious rationale to transnational drug traffickers responsible for killings along our borders—or

to any other category of criminals who endanger our communities—but for whom the government does not have evidence to support prosecution. If we permit an indefinite detention system for people whom the government alleges (but has not proven) to be a threat, we create an incentive for it to circumvent the criminal justice system, with its burdens of proof and procedural safeguards; the inevitable result will be an erosion of our criminal justice system.

We need not project into the future to see the negative consequences now of a system premised on the assumption that anyone the executive considers to be dangerous must be subject to prolonged detention. President Obama's embrace of indefinite detention and Guantanamo military commission trials (even in their improved form) risks displacing our justice system with a three-tiered detention system, in which the outcome is preordained. Under this approach, the executive branch will be able to use our federal courts for terrorism cases if prosecutors determine, after looking at the evidence, that they can obtain a conviction. It will be able to use the illegitimate military commissions if a terrorism case is likely to result in conviction, but there is enough uncertainty that the executive branch needs rules weighted to favor the prosecution. And it will be able to default to the indefinite preventive detention scheme if it determines that it does not have evidence that would withstand scrutiny in any kind of criminal process. If the government is seen to use federal courts only in the strongest terrorism cases, in which conviction is all but guaranteed, then the public's—and the world's—trust and faith in the fair administration of American justice is rightly undermined.

In the context of indefinite detention, executive branch mistakes can be cured, at least in theory, by federal courts reviewing *habeas corpus* petitions. In practice, the Court of Appeals for the D.C. Circuit, which oversees the Guantanamo *habeas* cases, has now so narrowly defined *habeas* rights in cases that defer excessively to the executive, that Guantanamo *habeas* review threatens to become a rubber stamp. And prisoners at Bagram air base in Afghanistan, who far outnumber detainees at Guantanamo, have received no judicial review at all: the courts have held that they will not permit *habeas* challenges even by prisoners who were captured outside of Afghanistan and brought by the U.S. military *into* a battle zone for indefinite detention. Still, as inadequate as judicial review of indefinite detention has been, at least *some* wrongly imprisoned detainees have been ordered released. With the Obama administration's so-called "targeted killing" program, there is no ability to correct what can be lethal errors.

No national security policy raises a graver threat to human rights and the international rule of law than targeted killing, because the government claims the unchecked authority to impose an extrajudicial death sentence on people—including U.S. citizens—located far from any battlefield. In an actual war, the government's use of lethal force may be lawful, of course, but outside of an armed conflict, the intentional killing of a civilian without prior judicial process is illegal, except in the narrowest and most extraordinary circumstances: as a last resort to prevent concrete, specific, and imminent threats that are likely to cause death or serious physical injury.

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Under the targeted killing program begun by the Bush administration and vastly expanded by the Obama administration, the government now compiles secret "kill lists" of its targets, and at least some of those targets remain on those lists for months at a time. By definition such targets cannot always pose "imminent" threats. At the same time, the government has refused even to disclose the legal criteria it uses to make its targeted killing decisions. There is no way for the American public to know whether the targeted killing program is lawful, let alone whether the specific people the government kills in the name of our security truly present an imminent threat to our nation. We do know, though, that in the decade since 9/11, the government has repeatedly labeled people as terrorists—including at Guantanamo—only for us to find out later (or for a court to find) that the government's evidence was exaggerated, wrong, or nonexistent. If we invest the government with unchecked authority to impose death sentences on people who are far from any battlefield and who have never been convicted of or even charged with a crime, it is inevitable that—despite the government's unverifiable claims to the contrary—innocent people will be executed.

In the last ten years, America has become an international legal outlier in invoking the right to use lethal force and indefinite detention against suspected terrorists outside battle zones. If we further entrench the militarization of our counter-terrorism efforts, our nation risks becoming a legal pariah, to the detriment of those efforts.

Our indefinite and overbroad military detention policy and our use of discredited military commissions are already obstacles to our allies' willingness to cooperate with us. Abiding by their own international and domestic law obligations, key allies have refused to extradite suspected terrorists to the United States for military detention or military prosecution, and require assurances that prosecution will take place only in our federal criminal justice system.[11] Some countries even refuse to provide intelligence information or other evidence if it will result in military detention or prosecution of a suspected terrorist already in U.S. custody.[12] In Afghanistan, where the Obama administration has continued the Bush administration's policy of detaining individuals for years without charge or trial based on secret evidence and without access to a lawyer, our NATO allies refuse to transfer captives to U.S. custody. If Congress makes military detention and trials mandatory for terrorism suspects, extraditions of those

suspects to America for trial, and our allies' willingness to provide us intelligence information, may come to a halt.

But the dangers of a war-based approach to terrorism extend beyond specific policies. In the name of national security, our leaders are undermining our more enduring security: the international legal framework that the United States helped to establish and that protects our long-term interests. Political leaders who insist that the laws of war permit our executive to treat as a battlefield any location where a terrorism suspect is located are giving a green light to other nations—including those with less respect for international legal institutions—to do the same. No nation has a stronger interest than we do in the existence of clear rules on when nations are engaged in war, and who can be killed or detained in that war. If the rules we apply are not clear, we compromise our ability to hold other countries to account for grave violations.

We have always believed ourselves to be a nation that turns to war only out of necessity, in conflicts that can be defined, and against enemies that can be identified. For Congress and the executive to commit us to an everywhere and forever war against all suspected terrorists everywhere turns those beliefs on their head. It also undermines values that define us in our own eyes and in the eyes of the world, and it sends the dangerous message that we are willing to give terrorists what they seek—the status of military warriors, not common criminals. Such a global war approach to counter-terrorism does not make us safer. It is not too late to chart a different course, but we, and our political leaders, need to show the courage, and the will, to do so.

CHAPTER II

A CANCER ON OUR LEGAL SYSTEM

On September 16, 2001, Vice President Dick Cheney appeared on NBC's "Meet the Press" and delivered a now infamous warning about the tactics the Bush administration would employ in its response to the 9/11 attacks:

> We also have to work, though, sort of the dark side, if you will. . . . A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. It's going to be vital for us to use any means at our disposal, basically, to achieve our objective.[13]

In hindsight, these words are ominous and chilling: even before the United States had captured a single terrorism suspect, a conspiracy to subvert the nation's longstanding prohibition against torture was being incubated at the highest levels of our government. We now know that a far-reaching and sadistic torture program was being justified by unscrupulous government lawyers, authorized by senior government officials, and carried out by military and intelligence officials. And we now know that hundreds of prisoners were tortured in U.S.-run detention facilities—at Guantanamo, at Abu Ghraib, at Bagram, in the CIA's "black sites," and elsewhere—and that many prisoners died from that abuse.

No policy or practice of the last decade has brought greater shame on America. But the stain of torture extends far beyond the damage to the nation's moral standing. The use of torture—and the failure to engage in any formal legal reckoning—has degraded the rule of law in ways that continue to metastasize. President Obama categorically disavowed torture when he came to office, and closed the secret CIA prisons where so much of the abuse took place.[14] But the President's political calculation that the nation must look forward and not backward leaves the door open to future abuses.

How could this have happened in America?

The answer to that question involves secrets and lies, moral cowardice and legal sophistry.

The Bush administration's torture program was developed in secret; the turn to the "dark side" was intended to leave the American people in the dark. Had it not been for a courageous Army reservist in a military prison with a devotion to decency, the world might never have seen visual evidence of the depravity of prisoner abuse, and the "torture debate"—to the extent that the wholly dishonest national conversation that followed can be so dignified—might never have occurred at all.

Indeed, even when those ghastly images were published, even when the appalling accounts of water torture and "stress positions" and sleep deprivation began to emerge, the architects of the torture program and their enablers responded with lies, evasions, and contradictions. We were told, first, that the United States "does not torture"; second, that any discussion of specific interrogation techniques or incidents was off limits because it would reveal "intelligence sources and methods"; and third, that coercive techniques were "necessary" in order to save lives and thus the absolute prohibition against torture in domestic and international law must now be read to include an exception. Sometimes these inherently contradictory explanations—the refuge of all of history's torturers—were provided at the same time.

Thus could the country's torture "debate" feature two utterly fictional and conflicting narratives: on the one hand, the "bad apples" of Abu Ghraib, rogue soldiers at a single facility who disgraced themselves and the nation by abusing prisoners; and on the other hand, the proverbial "ticking time bomb," in which a terrorist prisoner knows where and when a bomb will explode, and it goes without saying that we must use any available technique to obtain this information and save lives.

There is an inescapable conflict between these two narratives: in the first, torture is a shameful aberration; *we* don't torture. In the second, torture is a lesser evil; we have *no choice* but to "take the gloves off."

Of course, both narratives are utterly false: torture at the hands of the CIA and the United States military was systematic, not aberrational. And the majority of torture victims were innocent civilians, not bomb-planting terrorists.

Just as the public debate over the legality, morality, and efficacy of torture was warped by fabrication and evasion, so, too, were the legal and political debates about the consequences of the Bush administration's lawbreaking. Apart from the token prosecutions of Abu Ghraib's "bad apples," virtually every individual with any involvement in the torture program was able to deflect responsibility elsewhere. The military and intelligence officials who carried out the torture were simply following orders; the high government officials who authorized the torture were relying on the advice of lawyers; the lawyers were "only lawyers," not policymakers. This had been the aim of the conspiracy: to create an impenetrable circle of impunity, with everyone culpable but no one accountable.

Nor was this systematic passing of the buck confined to the perpetrators: the democratic institutions that should have provided a check on abuses and a remedy for the abused engaged in their own accountability shell game.

Khaled El-Masri's case is illustrative. In a notorious case of mistaken identity, El-Masri, a German citizen, was kidnapped by the CIA in Macedonia, "rendered" to a CIA black site in Afghanistan, detained and tortured for several months, then released without apology or explanation. When a German reporter asked Secretary of State Condoleezza Rice whether the United States would provide redress for its horrific abuse of El-Masri, she responded: "When mistakes are made, we work very hard to rectify them. I believe that this will be handled in the proper courts, here in Germany and if necessary in American courts as well."[15]

El-Masri sought to bring his claims to those "proper courts," both in the United States and in Germany. But this was a bait and switch: rather than "handle" El-Masri's claims, the American courts told El-Masri, at the insistence of the executive, that he had come to the wrong place. "If El-Masri's allegations are true or essentially true," wrote a federal judge, "then all fair-minded people . . . must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear . . . that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch."[16] We now know—through documents released by Wikileaks—that Secretary Rice's State Department expended considerable diplomatic resources in seeking to terminate El-Masri's judicial proceedings in Germany, as well.[17]

El-Masri was not alone. When five other victims of the CIA's extraordinary rendition program sought judicial redress against a government contractor that had knowingly profited from arranging their torture flights, the court told them, in effect, to look elsewhere: "Our holding today is not intended to foreclose—or to prejudge—possible *nonjudicial* relief, should it be warranted for any of the plaintiffs."[18] The *executive* branch, the court insisted could "determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights." And if that didn't work, "Congress also has the power to enact private bills."[19] This was doubly absurd: Congress, of course, had already enacted *public* bills prohibiting torture—the very laws that the executive had violated and the courts had disregarded. Needless to say, neither Congress nor the executive has offered these torture victims—or any others—any remedy.

Jose Padilla encountered a different version of the accountability shell game: two courts pointing the finger at each other. Padilla, an American citizen, was seized by the military from a New York jail, unilaterally designated an "enemy combatant" by the President, detained incommunicado without charge or trial in a Naval brig in Charleston, and subjected to vicious interrogations, chilling sensory deprivation, and total isolation. After three years and eight months of illegal military detention, Padilla was returned to the civilian justice system and prosecuted for crimes wholly unrelated to his dubious "enemy combatant" designation. When

Padilla sued his torturers, seeking one dollar in compensation as well as recognition that his rights had been violated, he was told, remarkably, that he had *already had* ample opportunity to air his grievances. "It is not as if the American judicial system has failed to afford [Padilla] significant opportunities to vindicate his legal rights," opined the judge.[20] In particular, Padilla "was allowed in his criminal proceeding to raise issues of his detention in support of his motion to dismiss the criminal charges."[21] But the judge declined to mention that when Padilla had attempted to raise those issues in his criminal case, he was told that he was in the wrong venue, and that he was "free to institute . . . an action for monetary damages or any other form of redress that he is legally entitled to pursue."[22]

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Similar examples abound. The result is a state of affairs that should be a source of shame to all Americans: not a single victim of the Bush administration's torture regime has had his day in court. And not a single court that was faced with a torture suit has addressed the core question of whether the victims' legal rights were violated.

This is, of course, a tragedy for the victims, who must live with the twin traumas of having been tortured by the state and turned away by its courts. But it is also a grave threat to the rule of law. Without definitive adjudication of the legality of torture we face the risk that our future leaders will turn once again towards the dark side.

Over time, there have been significant efforts to provide forms of accountability. We have seen, for example, both chambers of Congress pass measures to end the use of torture and cruel treatment, and congressional and executive branch investigative reports have exposed many aspects of the Bush torture program's illegality. But these efforts, while important, are not enough. Still today, the architects and enablers of the torture regime continue to extol the efficacy of "enhanced" techniques. Some have even claimed vindication with the contention that the intelligence leading to Osama bin Laden's safe house was derived in part from waterboarding sessions eight years earlier, an assertion clearly refuted by intelligence experts and political leaders from both parties. We need criminal accountability to ensure that those who authorized, and now defend, the indefensible, are never successful in reviving it.

The haunting possibility that we have not seen the last of unconscionable interrogation techniques is not the only dangerous consequence of our failure to reckon with the legacy of torture. There can be little doubt that torture is the principle reason for the astonishing fact that, ten years after 9/11, the alleged perpetrators of those attacks—though in U.S. custody for several years—have not been brought to justice. And it is the principle reason for the development, and perpetuation, of an illegitimate military commission system for trying terrorism suspects, and a regime of indefinite detention that provides no trials at all.

How this came to pass is the story of how a legally and morally disastrous decision can be transformed into a self-fulfilling prophecy.

First, the proponents of torture contended that our existing legal mechanisms were "quaint," "obsolete," and inadequate to address the unique threat of terrorism. Second, when terrorism suspects—including the alleged perpetrators of the 9/11 attacks—were captured, they were not brought to trial but were disappeared into a network of secret prisons and brutally tortured. Third, when the question of trials arose, the torture proponents insisted that because federal courts might exclude evidence derived from brutal interrogations, our existing legal system was "incapable" of accommodating terrorism trials. Finally, they demanded the creation of a new legal regime that would stack the rules in favor of the prosecution, or permit "long-term" detention *without* trial, because fair trials were too risky, and dangerous suspects could not be released under any circumstances.[23]

This is how torture can contaminate a legal system—how a single moral catastrophe can multiply into a chain of corrupting policies and practices.

There is only one way to break that chain: to enforce the law. So far, America's institutions have utterly failed to do so, depriving victims of remedies and cloaking perpetrators with impunity. What's more, our nation's official record of this era will show numerous honors to those who authorized torture—including a Presidential Medal of Freedom—and no recognition for those, like the Abu Ghraib whistleblower, who rejected and exposed it.

But this story is far from over. Already, foreign prosecutors and magistrates are undertaking the investigations that our own legal institutions have refused to conduct, and they are shrinking the world for America's torturers. We can choose, through silence and inaction, to allow our city on a hill to become an island of impunity, as foreign courts attempt to clean up a mess of America's making. Or we can turn away firmly away from the dark side of torture and fully embrace justice and accountability. The choice is ours.

CHAPTER III

FRACTURING OUR "MORE PERFECT UNION"

A week after the 9/11 attacks, President Bush visited an Islamic Center in Washington, DC, to warn that the acts of a fringe terrorist group could not and should not be ascribed to an entire religion. "America counts millions of Muslims amongst our citizens, and Muslims make an incredibly valuable contribution to our country," he said. "Those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior."[24]

For a brief moment, it seemed that President Bush's call for tolerance and unity in the face of tragic adversity could head off the unjustified stigmatization and backlash that has been the norm in past national security crises. But even as President Bush spoke, his administration was devising and implementing detention, interrogation, and surveillance programs that disproportionately impacted—and in some cases expressly targeted—innocent citizens and immigrants of Muslim, Arab, and South Asian descent.

No area of American Muslim civil society was left untouched by discriminatory and illegitimate government action during the Bush years. In violation of its own policies, the Department of Justice publicly smeared as terrorism co-conspirators America's most prominent Muslim civil rights groups, membership organizations, activists, and community leaders, based on unproven allegations of attenuated and often decades-old association with groups that were not designated as terrorists at the time. The Departments of Justice and Treasury severely limited Muslims' charitable giving by shutting down or freezing the nation's 15 largest Muslim charities without notice or due process, based on secret evidence, and without providing the charities any meaningful opportunity to defend themselves. To the familiar "driving while black" profiling phenomenon, we added the analogous "flying while Muslim," as Muslims or those who appeared to be Muslim were targeted by border agents for questioning about their religious beliefs and political views when returning home from abroad.

In short, the Bush administration used religious, racial, and national-origin profiling as one of this nation's primary domestic counter-terrorism tools, even though experienced intelligence and law-enforcement officials agree that it is ineffective, inefficient, and counter-productive.[25]

> By allowing—and in some cases actively encouraging—the fear of terrorism to divide Americans by religion, race, and belief, our political leaders are fracturing this nation's greatest strength: its ability to integrate diverse strands into a unified whole on the basis of shared, pluralistic, democratic values."

To an alarming extent, the Obama administration has continued to embrace profiling as official government policy.

By allowing—and in some cases actively encouraging—the fear of terrorism to divide Americans by religion, race, and belief, our political leaders are fracturing this nation's greatest strength: its ability to integrate diverse strands into a unified whole on the basis of shared, pluralistic, democratic values. Just a few examples give a flavor of the wave of bigotry that is now an ugly feature of our national political landscape:

- An anti-"Sharia" legislation craze is sweeping through states, as politicians stoke unfounded fears that American Muslims—who comprise less than 1 percent of our total population—are poised to impose Islamic law on this country.[26]

- Local officials across the country are opposing the building or expansion of mosques and Islamic centers, and some of their constituents are acting on the officials' biases, with vandalism of Muslim places of worship on the rise.[27] Opponents of the Park51 community center and prayer room proposed to be built several blocks from the World Trade Center site in New York mischaracterized it as the "Ground Zero Mosque" and are disgracefully calling it "The Second Wave of the 9/11 Attacks."[28]

- With a menacing echo of the McCarthy era, Congress has held hearings to examine whether American Muslims are becoming "radicalized"—focusing on religious beliefs rather than violent or criminal conduct—and whether they have proven their loyalty to this country by denouncing potential terrorists presumed to be in their midst.

- A Congressman has defended anti-immigrant legislation on the ground that it would prevent terrorists from sending pregnant women to America to have "anchor" babies who "could be raised and coddled as future terrorists."[29]

Our union has never been perfect on matters of race, ethnicity, or religion. Especially during times of national crisis, our leaders have broken our Constitution's promise of equality for all. But by the end of the twentieth century, a clear national consensus had developed that profil-

ing is unacceptable, even in times of crisis, because its fundamental assumption—that race, religion, or national origin can predict criminal conduct—is quite simply untrue.[30]

In 1988, for example, President Reagan apologized on behalf of the nation to Japanese Americans singled out for internment during World War II. In February 2001, President Bush forcefully told Congress that profiling is "wrong and we will end it in America."[31] And in the summer of 2001, Congress was heading in that historic direction as it considered passage of the End Racial Profiling Act, landmark legislation that minority communities across America had long sought. After 9/11, the national consensus against profiling swiftly unraveled as the government once again turned to investigations based on prejudice, this time in the name of "forward-looking" terrorism prevention.

Because the 9/11 attack was committed by Arab Muslims, profiling Muslims for special investigation may have seemed seductively rational. But the Bush administration's extensive domestic detention and interrogation programs targeting Muslim, Arab, and South Asian men showed once again just how wrong—and ineffective—profiling is. Under those programs, federal agents swept through immigrant communities to pick up and detain men for questioning, the FBI conducted "voluntary interviews" of citizens and immigrants, and the Immigration and Naturalization Service required "Special Registration" of immigrants and visitors. All told, tens of thousands of Muslims were questioned, thousands were deported for civil immigration infractions, and hundreds were subjected to secret and arbitrary detention and abusive interrogation.[32] Yet not a single person was arrested or publicly prosecuted for a terrorism-related crime as a result of any of these programs.

Attorney General Ashcroft failed to learn from the profiling failures and abuses on his watch. Instead, even as he issued guidelines in 2003 that acknowledged "America's moral obligation to prohibit racial profiling," that "profiling is discrimination," and that "stereotyping certain races as having a greater propensity to commit crimes is absolutely prohibited," he specifically permitted racial, religious, and ethnic profiling in national security investigations.[33] The Obama administration also admits profiling is wrong, but permits it anyway.[34] In the view of the government, profiling in the name of national security apparently trumps effectiveness, the law, and morality.

Profiling in the national security context carries the same risk that it does in other contexts: law enforcement will miss threats from those who do not fit within the profile. Richard Reid, the "shoe bomber" is a British citizen of Jamaican descent; Bryant Neal Vinas, an al-Qaeda recruit who admitted conspiring to kill American soldiers, is Hispanic American; Colleen LaRose, who is charged with conspiring to kill a cartoonist, is a green-eyed blonde from Philadelphia; Umar Farouk Abdulmuttallab is an African from Nigeria. Terrorist groups can easily infer law enforcement profiling criteria and seek out recruits who do not fit racial, national-origin, or religious profiles.

> **Profiling-based counter-terrorism investigations are doomed to failure because they are predicated on the false assumption that Muslims are more likely to engage in terrorism than other groups. This assumption is not just wrong, it is deeply unfair to the millions of American Muslims who are a law-abiding, diverse, and integral part of our nation."**

Fundamentally, profiling-based counter-terrorism investigations are doomed to failure because they are predicated on the false assumption that Muslims are more likely to engage in terrorism than other groups. This assumption is not just demonstrably wrong, it is deeply unfair to the millions of American Muslims who are a law-abiding, diverse, and integral part of our nation.

Terrorism is not a "Muslim" phenomenon. Extremist violence can come from a variety of sources: in February 2010, Andrew Joseph Stack III of Texas flew a plane into an IRS building in Austin leaving behind an anti-government rant against taxes;[35] anti-abortion activists have killed a number of abortion providers over the years;[36] and in 2005, the FBI declared eco-terrorists the country's biggest domestic terrorist threat.[37] It would be ludicrous for law enforcement to target all who oppose taxes or abortions or who support environmentalism because of the bad acts of a few. The recent and tragic killing of 77 people in Norway by a man described as an anti-Muslim right-wing fundamentalist Christian also serves as a strong caution for law enforcement in America. Targeting the American Muslim community for counterterrorism investigation is counterproductive because it diverts attention and resources that ought to be spent on individuals and violent groups that actually pose a threat.

Treating terrorism as a "Muslim" phenomenon creates incentives for law enforcement to seek out or manufacture threats where none exist, inevitably resulting in abuses. There are increasing reports that the FBI is using Attorney General Ashcroft's loosened profiling standards, together with broader authority to use paid informants, to conduct surveillance of American Muslims in case they *might* engage in wrongdoing. For more than 14 months between 2006 and 2007, for example, FBI agents planted an informant in mainstream mosques in Orange County, California. The informant posed as a convert to Islam and collected names, telephone numbers, e-mails, and other information on hundreds of American Muslims who were not suspected of wrongdoing.[38] Predictably, this dragnet surveillance did not result in a single terrorism conviction. Equally predictably, "[t]he community feels betrayed," according to Muslim leaders.[39] Improper and unfair FBI practices do not make us safer. Instead, they risk alienating American Muslims from their own government and harming cooperation with law enforcement.

Still, some of our political leaders and law enforcement agencies persist in equating Muslims with a propensity to violence. But what is this association based on, and what do government attempts to equate religious belief with terrorism look like in practice? The answer is found in a 2007 New York Police Department report, *Radicalization in the West: The Homegrown Threat*, which is the basis for the Muslim "radicalization" theory that has now gained traction with some members of Congress and the White House.

The NYPD report purports to identify a four-step "radicalization process" through which Muslim terrorists progress. Among the "markers" the NYPD identifies are: growing a beard; becoming involved in social activism and the community; giving up cigarettes, drinking, gambling, and hip-hop clothing; trying to find the "meaning of life"; and thinking about "the greater good."[40] Places the NYPD identified as "[r]adicalization incubators" include mosques, cafes, student associations, butcher shops, gyms, and bookstores.[41]

Each of the steps the NYPD describes involves constitutionally protected religious and associational conduct through which millions of people, including Muslims and non-Muslims, may progress without ever committing an act of violence. (Its conclusions are also based on just five terrorism cases, a statistically insignificant sample from which to draw such sweeping conclusions.) The NYPD report should be dismissed as the junk science that it is; instead, it is being taken seriously by some policy-makers.[42]

"Radicalization" has no more validity than cruder forms of discredited profiling, but because it cloaks that profiling in a pseudo-scientific "theory," it has the potential to do deeper damage. Actual scientific studies show that there is no single identifiable pathway to terrorism and that marginalization, racism, and alienation from society (rather than religious belief) create vulnerabilities that potentially make people receptive to extremist violence.[43] Government profiling only deepens those vulnerabilities.

American policymakers need to acknowledge the reality that counter-terrorism profiling of Muslims and its sister evil, the "radicalization" theory, directly undermine America's greatest strengths. Unfairly targeting American Muslims will serve only to alienate them from their government and law enforcement. It also sends the message that our government views prejudice against Muslims as acceptable. Inevitably, segments of our society have internalized that message and have demonized, and even committed violence against, Muslims and those perceived to be Muslim.[44] To be sure, the First Amendment protects the right of private individuals and public officials alike to express even hateful views on matters of public concern. But in making policy, government officials should avoid nurturing the devastatingly harmful myth that the actual 9/11 terrorists sought to promote: that of an existential conflict between Islam and the West.

Not all of our political and civic leaders have been complacent (or worse) in the face of bigotry. Some have demonstrated noteworthy courage and leadership. Even in the worst days of John

Ashcroft's detention and interrogation sweeps, some law enforcement officials protested what they saw as biased and counter-productive profiling.[45] Today, other officials continue to protest profiling—and to voice their support for the American Muslim community.[46] New York's Mayor Bloomberg gave a rousing defense of Muslims' freedom to worship and their place in this country at the height of the Park51 ugliness. Congressman Mike Honda, a Japanese American who was interned as a child during World War II, spoke out against a Congressional hearing on "radicalization," warning that "millions of [Muslim] Americans have become the new enemy, with no cause and no crime" and "our country is now, within my lifetime, repeating the same mistakes from our past. The interned 4-year-old in me is crying out for a course correction so that we do not do to others what we did unjustly to over 100,000 Japanese-Americans."[47]

It is now up to our political leaders to end profiling of Muslim, South Asian, and Arab American citizens and immigrants, and to speak out against efforts to demonize them. And it is up to the rest of us to ensure that our leaders do so, in order for our nation to return to the consensus against profiling that emerged ten years ago. America's communities of color and religious minorities are still waiting for a law that will end government policies and practices based on bias—a law that will bring us one step closer to the perfect union to which we all aspire.

CHAPTER IV

A MASSIVE AND UNCHECKED SURVEILLANCE SOCIETY

On the evening of March 10, 2004, a secret executive branch showdown nearly resulted in the resignation of some of the nation's senior-most law enforcement officials. Top Justice Department lawyers had concluded that a post-9/11 domestic spying operation by the National Security Agency (NSA) was illegal. White House officials were furious, and President Bush dispatched his chief of staff and White House counsel to the hospital sickbed of Attorney General John Ashcroft to demand that he re-authorize the program. But Acting Attorney General James Comey and FBI Director Robert Mueller raced to the hospital first, and together with Ashcroft, they refused White House demands. At a meeting the following day, Comey informed President Bush that Comey and other Justice Department officials would resign unless the illegal program was modified. After the President agreed to modifications, the immediate crisis was averted.

It took courage for those top Justice Department officials to stand up to the President of the United States. But seven years later, we still do not know the extent and limits of their courage. We do not know what NSA surveillance activities so alarmed these officials that they nearly resigned en masse—or what changes placated them. We do know that the activities must have been extreme to provoke such a reaction from the conservative lawyers of Ashcroft's Justice Department.

Another brand of bravery is responsible for what little we know about the NSA's post-9/11 spying operations. Government whistleblowers have stepped forward at the risk of their careers—and criminal charges—to expose the fact that the NSA has engaged in unconstitutional and illegal domestic eavesdropping and data mining operations against innocent Americans.[48] Because of whistleblowers, we now know that in the immediate aftermath of 9/11, the NSA tapped directly into major American communications hubs, with the cooperation of U.S. telecommunications companies that operate them, to access billions of American e-mails, phone calls and other communications, which the agency then combed through for people it deemed "suspicious."[49]

In the face of these massive surveillance programs, Congress and the courts have failed to fulfill their critical role in our system of checks and balances. Although NSA's warrantless wiretapping program brazenly violated an act of Congress, for example, Congress responded not with oversight but with a blank check. It legalized the NSA's eavesdropping activities—and authorized more. And when American scholars, journalists, and non-profit groups went to court to challenge the legality of the NSA's eavesdropping because they feared their communications had been targeted, the Sixth Circuit Court of Appeals dismissed the suit. Even though the court acknowledged that the NSA's surveillance was conducted in secret, it decided that the plaintiffs could not sue because they could not prove that the NSA had spied on them—insulating the NSA's program from judicial review.[50] The Supreme Court refused to hear an appeal of the case.

These stories contain key elements of our post-9/11 national "surveillance society." The executive branch has taken advantage of our society's technological revolution—on which Americans increasingly rely for the benefits and conveniences it brings to every aspect of our personal and professional lives—to monitor us without any suspicion of wrongdoing. Every day, the NSA (which is just one of 16 major intelligence agencies in the United States) is now able to intercept and store 1.7 billion e-mails, phone calls, and other communications.[51] Today, the government is able to spy on our speech and actions through our mobile smartphones, GPS location tracking, and search engines, to name a few. Congress has not only failed to curb the executive's violations, it has ratified them. Courts have, for the most part, refused to review the legality of executive authorities or violations, dismissing challenges on procedural grounds. And the American public is left almost entirely in the dark.

Together, these elements constitute a profound threat to democratic government. Because citizens cannot object to clandestine governmental activities about which they are systematically deceived, checks and balances are particularly critical. When the government institutions that are responsible for providing those checks fail to do so, the result is a national surveillance society in which Americans' right to privacy is under unprecedented siege.

Privacy rights in America are based on the fundamental principle that our government must have *actual suspicion* that someone is breaking the law or actively preparing to do so before monitoring Americans in our daily activities. It is not enough for government to decide to spy on us *just in case* we are engaged in wrongdoing. And just as importantly, usually a judge has to agree with the justification and authorize the surveillance *before* it begins. Put simply, our Constitution protects us from unwarranted government intrusion into our private lives.

But under pressure from the executive branch to fight terrorism, Congress has weakened Americans' privacy protections—and profoundly altered our relationship to our government. In the atmosphere of widespread fear that followed 9/11, the Bush administration asked Congress to loosen critical constraints on surveillance under which the intelligence community and law enforcement agencies had long operated—without ever demonstrating that those

constraints contributed to the attacks. After barely any debate, Congress granted the Bush administration the authority it sought in the form of the USA Patriot Act. Using Patriot Act authority, the Bush Administration started—and the Obama Administration has continued—to conduct wholesale "preventive" surveillance of innocent Americans without judicial review.

For example, the Patriot Act expanded the FBI's authority to use "National Security Letters" (NSLs) to secretly demand telecommunications, credit, and financial information from private companies about not just suspected terrorists, but anyone the FBI deemed "relevant" to an FBI investigation. Before 9/11, the FBI already had the authority to use NSLs to obtain information about suspected spies or international terrorists, but the Patriot Act's significant change was to remove the requirement that the FBI actually suspect that a person about whom it collected information was engaged in wrongdoing. Without that key constraint, the FBI engaged in flagrant violations of law. And Congress has been complicit in those violations because it has exercised its oversight authority enough to be on notice that violations are occurring, but not enough to curb them.

Thus, in 2005, when Congress was debating whether to extend expiring provisions of the Patriot Act, it called Attorney General Alberto Gonzales and FBI Director Robert Mueller to testify about the FBI's use of its authorities; both stated that there were no "substantiated" allegations of abuse.[52] Because the FBI exercised its Patriot Act powers in complete secrecy, often enforced through unconstitutional gag orders,[53] Congress had no way to verify these claims, so it reauthorized the Patriot Act, but ordered an audit of the FBI's use of its powers. The Department of Justice Inspector General released five damning audit reports, revealing thousands of violations of law and policy.[54] Despite the evidence of the FBI's widespread and years-long misuse of its Patriot Act authority, Congress has failed to retract any of the sweeping powers it granted and has repeatedly re-authorized all expiring Patriot Act provisions without narrowing them in any way.

The Obama administration, like the Bush administration before it, has used excessive secrecy to hide possibly unconstitutional surveillance. Two members of Congress have been ringing alarm bells about the government's use of Patriot Act authorities, urging additional congressional oversight—to no avail. Hobbled by executive claims of secrecy, Senators Ron Wyden and Mark Udall have nevertheless warned their colleagues that the government is operating under a "reinterpretation" of the Patriot Act that is so broad that the public will be stunned and angered by its scope, and that the executive branch is engaging in dragnet surveillance in which "innocent Americans are getting swept up."[55] History threatens to repeat itself. But the American public deserves more than another secret showdown; and we should not have to rely on government whistleblowers to come forward at the risk of criminal prosecution, to act as a check and balance on an unaccountable executive.

> Government data mining is based on the dubious and unproven premise that 'terrorist patterns' can be ferreted out from the enormous mass of American lives, which, of course, are quirky, eccentric, and may be riddled with what look like suspicious coincidences but are actually innocent activities."

Nothing exemplifies the risks our national surveillance society poses to our privacy rights better than government "data mining." Data mining is based on the dubious and unproven premise that "terrorist patterns" can be ferreted out from the enormous mass of American lives, which, of course, are quirky, eccentric, and may be riddled with what look like suspicious coincidences but are actually innocent activities.

In 2002, for example, the American public found out that the Pentagon was working on a project to gather information from thousands of government and commercial databases worldwide, covering every facet of our lives, with the goal of aggregating our personal information into one giant database that military and law enforcement officials could search for "suspect activity" related to terrorism. That program was called, aptly enough, "Total Information Awareness" (TIA), and it remains the paradigm for how new technology may be used to bring us closer to the nightmare of routine mass government surveillance of our daily activities. After TIA became public, Americans from across the political spectrum raised their voices in opposition, and Congress shut the program down. But Congress then ignored the public's demand for privacy protections and allowed key data-mining elements of TIA to be perpetuated under the secret umbrella of the NSA, where we cannot monitor their use.[56]

Government data mining is now being replicated in a variety of other programs at the federal, state, and local levels, to spy on Americans in virtually complete secrecy. So-called "Suspicious Activity Reporting" programs, for example, maintain that innocuous and commonplace behavior like photography and note taking about public buildings could be preparation to conduct terrorist attacks, and that the government should collect and retain information about Americans who engage in these activities. The range and number of these programs is breathtaking and their names Orwellian. Programs such as eGuardian, "Eagle Eyes," "Patriot Reports," and "See Something, Say Something" are now run by agencies including the Director of National Intelligence, the FBI, the Department of Defense, and the Department of Homeland Security. State and local law enforcement agencies often have their own, similar programs.[57] And once the government collects data about "suspicious" activity, it can retain it for a lifetime, even when the information shows the person is not a threat.

Without effective oversight, security agencies are now also engaged in a "land grab," rushing into the legal vacuum to expand their monitoring powers far beyond anything seen in our history. Each of the over 300 million cell phones in the United States, for example, reveals its location to the mobile network carrier with ever-increasing accuracy, whenever it is turned on,[58] and the Justice Department is aggressively using cell phones to monitor people's location, claiming that it does not need a warrant. With thousands of government requests coming to private telecommunications carriers every month, Sprint Nextel even set up a dedicated Web site so that law-enforcement agents can access our location records from their desks.

Yet for all the privacy we have relinquished in the name of preventing terrorism, and for all the national treasure spent on surveillance, we are no safer. Our political leaders urge the necessity of surveillance and data mining programs by posing a false choice between our privacy and our safety. Each time Congress is due to re-examine expiring Patriot Act provisions, for example, government officials warn in the direst tones that without secret surveillance and data collection, our nation's security will be jeopardized. We cannot fully evaluate these warnings because of secrecy constraints, but internal investigations make clear that the warnings are infused with baseless fear-mongering. For example, a combined review of the NSA's secret wiretapping by inspectors general at key security agencies was unable to turn up any evidence that the program made us safer, despite its unprecedented scope.[59] The same is true for National Security Letters. From 2003 to 2005, the FBI made close to 150,000 NSL requests. But the FBI Inspector General documented only one conviction in a terrorism case using data from NSLs during the three-year period, and found no instance in which an NSL request helped to prevent an actual terrorist plot.[60]

As governmental surveillance has become easier and less constrained, security agencies are flooded with junk data, generating thousands of false leads that distract from real threats. In the name of finding the terrorist needle in a haystack, our government has built the biggest haystack in history—and it is growing all the time."

There is thus little or no evidence of additional plots foiled, arrests made, or lives saved as a result of data mining and mass surveillance programs.[61] The reality is that as governmental surveillance has become easier and less constrained, security agencies are flooded with junk data, generating thousands of false leads that distract from real threats. In the name of find-

ing the terrorist needle in a haystack, our government has built the biggest haystack in history—and it is growing all the time.

Too often, post-9/11 government surveillance has targeted people for expressing political opinions or protesting government policies. The ACLU has documented examples of political spying, monitoring, and harassment of Americans based on their First Amendment-protected activities by federal, state, and local officials in at least 33 states and the District of Columbia.[62] The government has spied on racial and religious minority groups and community organizations, college groups, military reservists calling home to their families, journalists, aid workers, political activists, and many others.[63]

It is not too late to strengthen our laws, to take back our data, and to ensure that government surveillance is conducted under effective and reasonable constraints, subject to meaningful oversight. But we have to speak up now, before our surveillance society is irrevocably entrenched and we find that we have permanently sacrificed our essential values. Otherwise, we risk changing our national character and surrendering one of the key freedoms we strive to protect—our right to privacy and our ability to speak, dissent, exchange ideas, and engage in political activity without the chilling fear of unwarranted government intrusion.

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