

Drastic [REDACTED] [REDACTED] Measures [REDACTED] [REDACTED] Required:

CONGRESS NEEDS TO OVERHAUL U.S. SECRECY LAWS AND INCREASE OVERSIGHT OF THE SECRET SECURITY ESTABLISHMENT

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I. INTRODUCTION

American democracy has a disease, and it's called secrecy.

Since 2001 the United States Government has spent well over a trillion dollars attempting to secure the nation from terrorist attacks and other physical threats to the well-being of the American people.¹ But the excessive secrecy that hides how the government pursues its national security mission is undermining the core principles of democratic government and injuring our nation in ways no terrorist act ever could. Government secrecy kills public accountability and cripples the government's system of checks and balances, two essential elements of our constitutional democracy. As former Secretary of State Colin Powell put it, terrorists "are dangerous criminals, and we must deal with them," but "the only thing that can really destroy us is *us*."²

It is time for Congress to make the secrecy problem an issue of the highest priority, and enact a sweeping overhaul of our national security establishment to re-impose democratic controls. Congress has considerable powers to monitor and regulate the executive branch's national security activities, but it must sharpen these tools and use them more effectively.

Simply put, government secrecy is incompatible with a healthy democracy, as James Madison, the "Father of our Constitution," explained:

A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own governors must arm themselves with the power, which knowledge gives.³

Yet today much of our government's business is conducted in secret. We have a multitude of secret agencies, secret committees of Congress, a secret court—and even secret laws.⁴ For decades presidents have praised the virtues of government transparency in public, while wielding secret powers to gain political advantage behind closed doors. A 2010 *Washington Post* exposé called "Top Secret America" documented the explosive growth of government agencies and private contractors dedicated to national security since 9/11, which has outpaced the ability of senior government officials to know or understand the scope of their activities.⁵ This sprawling—and growing—secret security establishment presents an active threat to individual liberty and undermines the very notion of government of, by and for the people.

1 Stephen Daggett, *Costs of Major U.S. Wars*, Cong. RESEARCH SERV., June 29, 2010, available at <http://centerforinvestigative-reporting.org/files/June2010CRScostofuswars.pdf>.

2 Walter Isaacson, *GQ Icon: Colin Powell*, GENTLEMAN'S QUARTERLY, Interview with Colin Powell, in Alexandria, Va., Oct. 2007, available at <http://www.gq.com/news-politics/newsmakers/200709/colin-powell-walter-isaacson-war-iraq-george-bush>.

3 Letter from James Madison to W.T. Barry (Aug. 4, 1822), available at http://www.constitution.org/jm/18220804_barry.htm.

4 See *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the S. Judiciary Comm. Subcomm. on the Constitution*, 110th Cong. (2008), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3305>.

5 Dana Priest and William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>.

Certainly some level of secrecy regarding military weaponry, tactical movements and defensive plans is necessary for protecting the nation from potential enemies. But even where secrecy is needed, it must be recognized as a necessary evil, and effective checks against error, abuse and corruption must be re-established. History—including recent history—has often shown that secrecy does great harm to the nation by depriving policy makers and the public of crucial information before decisions are made and by fostering illegality, inefficiency and ineffectiveness in the agencies charged with our protection.

Congress has the power to fix the problem

Fortunately, the framers of our Constitution established a system of checks and balances among separate, co-equal branches of government to curb abuses of power and suppress the natural tendency of government to encroach on individual rights. Our current national security secrecy regime threatens to destroy this careful balance. The power to hide government actions from public accountability is simply too great an invitation to abuse. Congress has the power and the duty under our Constitution to remedy this situation. The American people depend upon their elected representatives in Congress to oversee and regulate the government's activities on their behalf and for their benefit. In 1885, future President Woodrow Wilson described Congress's obligation to the people:

It is the duty of a representative body to look diligently into every affair of government and to talk about much of what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.⁶

The Constitution arms Congress with broad authority to investigate executive branch activities, including national security programs, and the tools to regulate them. But when the Senate Select Committee to Study Governmental Operations (the Church Committee) undertook its first comprehensive review of U.S. intelligence activities in 1976, it found that “[t]he Constitutional system of checks and balances has not adequately controlled intelligence activities,” in part because “Congress has failed to exercise sufficient oversight, seldom questioning the use to which its appropriations were being put.”⁷ Yet reforms enacted by Congress to strengthen oversight of secret government operations in response to the Church Committee report have proven ineffective in controlling the national security establishment. Today, the problem is worse than ever.

This paper reviews the crisis of secrecy facing our nation, and the sweeping steps Congress must take to overhaul U.S. secrecy laws and restore a healthy balance between the branches of government.

⁶ WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1885).

⁷ S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. No. 94-755, at 6 (1976), available at <http://www.archive.org/details/finalreportofsel02unit>.

“...we overclassify very badly.”

—Porter Goss, former Chairman of the House Intelligence Committee
and former CIA Director.⁸

II. THE PRESIDENT'S SECRECY PROBLEM

Secrecy run amok

Excessive government secrecy is obviously not a new phenomenon. Nearly every entity commissioned to study classification policy over the last sixty years, from the Coolidge Committee in 1956 through the Moynihan Commission in 1997, has reached the same conclusion: the federal government classifies far too much information, which damages national security and destroys government accountability and informed public debate.⁹ Despite the results of these studies, reform has proven elusive and we are now living in an age of government secrecy run amok:

- According to the *Washington Post*, there are 1,271 government organizations and 1,931 private companies working on programs related to counterterrorism, homeland security and intelligence, and an estimated 854,000 people hold top-secret security clearances.¹⁰
- In 2009, the Government Accountability Office estimated that about 2.4 million Department of Defense civilian, military and contractor personnel hold security clearances at the confidential, secret and top secret levels.¹¹ Remarkably, this figure does not include personnel at intelligence agencies like the Central Intelligence Agency and Federal Bureau of Investigation. The Intelligence Authorization Act of 2010 required the Director of National Intelligence (DNI) to calculate and report the aggregate number of security clearances for

⁸ *Public Hearing Before the Nat'l Comm'n on Terrorist Attacks Upon the U.S.*, 108th Cong. (2003), available at http://www.9-11commission.gov/archive/hearing2/9-11commission_hearing_2003-05-22.htm#panel_two.

⁹ See, e.g., CHARLES A. COOLIDGE, ET AL., REPORT TO THE SECRETARY OF DEFENSE BY THE COMMITTEE ON CLASSIFIED INFORMATION (1956) (Coolidge Committee Report), available at http://bkofsecrets.files.wordpress.com/2010/07/coolidge_committee.pdf; OFFICE OF THE DIR. OF DEF. SCI. RESEARCH AND ENG'G, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON SECRECY (1970), available at <http://www.fas.org/sgp/othergov/dsrep.pdf> [hereinafter *Defense Science Board Report*]; COMM'N TO REVIEW DEPT' OF DEF. SEC. POLICIES AND PRACTICES, KEEPING THE NATION'S SECRETS: A REPORT TO THE SECRETARY OF DEFENSE (1985) (Stilwell Commission Report), available at <http://www.fas.org/sgp/library/stilwell.html>; JOINT SEC. COMM'N, REDEFINING SECURITY: A REPORT TO THE SECRETARY OF DEFENSE AND THE DIRECTOR OF CENTRAL INTELLIGENCE (1994), available at <http://www.fas.org/sgp/library/jsc>; Comm'n on Protecting and Reducing Gov't Secrecy, S. Doc. No. 105-2, 105th Cong. (1997), available at <http://www.fas.org/sgp/library/moynihan/index.html> [hereinafter *Moynihan Commission Report*]; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <http://www.gpoaccess.gov/911/index.html> [hereinafter *9/11 Commission Report*].

¹⁰ Dana Priest and William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, available at <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>.

¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, PERSONNEL SECURITY CLEARANCES: AN OUTCOME-FOCUSED STRATEGY IS NEEDED TO GUIDE IMPLEMENTATION OF THE REFORMED CLEARANCE PROCESS, at 18 (May 2009), available at <http://www.fas.org/sgp/gao/gao-09-488.pdf>.

all government employees and contractors to Congress by February 2011, but the DNI has so far failed to produce this data.¹²

- According to the Information Security Oversight Office (ISOO), the government made a record 76,795,945 classification decisions in 2010, an increase of more than 40% from 2009. ISOO changed the way it counted electronic records in 2009 so exact year-to-year comparisons are not possible, but this figure is more than eight times the 8,650,735 classification decisions recorded in 2001.¹³ One-fourth of the security classification guides the government used in 2010 had not been updated within five years as required.
- “Derivative classification” in particular has exploded. Fully 99.7% of classification decisions are not made by the government’s trained “original classification authorities” (OCAs), but by other government officials or contractors who may have received little or no training and wield a classification stamp only because they work with information *derived* from documents classified by OCAs.¹⁴
- Document reviews conducted by ISOO in 2009 discovered violations of classification rules in 65% of the documents examined, with several agencies posting error rates of more than 90%.¹⁵ Errors which put the appropriateness of the classification in doubt were seen in 35% of the documents ISOO reviewed in 2009, up from 25% in 2008.¹⁶ A similar analysis was not included in the 2010 ISOO report.
- The cost of protecting these secrets has also skyrocketed over the last several years. ISOO estimated security classification activities cost the executive branch over \$10.17 billion in 2010, a 15% increase from 2009, and cost industry an additional \$1.25 billion, up 11% from the previous year.¹⁷ A meager 0.5% of this amount was spent on declassification. The government spent only \$50.44 million on declassification in 2010, which is \$182.74 million less than it spent in 1999.¹⁸ The fact is, there are significant physical costs associated with protecting our secrets, and unnecessary classification wastes security resources.

12 See, Steven Aftergood, *Total Number of Security Clearances Still Unknown*, SECRECY NEWS, May 27, 2011, http://www.fas.org/blog/secrecy/2011/05/total_clearances.html.

13 INFO. SEC. OVERSIGHT OFFICE, 2010 REPORT TO THE PRESIDENT 2010, at 12 [Apr. 15, 2011], <http://www.archives.gov/iso/iso/reports/2010-annual-report.pdf>.

14 Id. at 8-11.

15 INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2009, at 18 [Mar. 31, 2010], <http://www.archives.gov/iso/iso/reports/2008-annual-report.pdf>

16 Id. See also INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2008, at 22 [Jan. 12, 2009], <http://www.archives.gov/iso/iso/reports/2008-annual-report.pdf>.

17 INFO. SEC. OVERSIGHT OFFICE, 2010 COST REPORT [Apr. 29, 2011], <http://www.archives.gov/iso/iso/reports/2010-cost-report.pdf>. The actual cost to government is likely much higher because these figures do not include security classification expenses incurred by the CIA, NSA, Defense Intelligence Agency, Office of the Director of National Intelligence, National Geospatial-Intelligence Agency, and National Reconnaissance Agency are classified, and not included in this total. Even without the costs these agencies incur, total security classification cost estimates for 2009 were \$8.81 billion within the government, and 1.12 billion within industry. Id. at 2

18 Id. at 4.

Obama's Promised Era of Openness Yields Mixed Results

On January 21, 2009, one day after taking office, President Barack Obama issued a memorandum to the heads of every executive agency detailing his administration's commitment to "creating an unprecedented level of openness in Government."¹⁹ The President declared his belief that increasing the public trust through transparency, public participation, and collaboration will "strengthen our democracy and promote efficiency and effectiveness in government."²⁰ The President ordered all federal agencies responding to public requests for information under the Freedom of Information Act (FOIA), to institute a "presumption in favor of disclosure," reversing the so-called "Ashcroft doctrine" that had governed during the Bush administration.²¹ The administration funded a FOIA ombudsman and required agencies to release some information proactively and in formats useable by the general public.²²

On May 27, 2009 President Obama reiterated his commitment to openness by ordering a review of Executive Order 12958, which governed classification policy.²³ The administration actively solicited public comment on these reviews by requesting input from open government advocates, holding open meetings with the Public Interest Declassification Board and hosting online forums on "Declassification Policy" And "Transforming Classification."²⁴ These efforts, and the fact that the President identified open government one of his administration's foremost priorities were positive steps that deserve praise.

Reality has not always lived up to the rhetoric, however. Over the months since this promising start, the Obama administration:

- Embraced the Bush administration's tactic of using overbroad "state secrets" claims to

19 Memorandum from Barack Obama, President of the U.S. to the Heads of Executive Dep't and Agencies on Transparency and Open Gov't (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

20 *Id.*

21 Memorandum from Barack Obama, President of the U.S. to the Heads of Executive Dep't and Agencies on the Freedom of Information Act (Jan. 26, 2010), available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

22 See Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), available at <http://www.fas.org/irp/offdocs/eo/13526fr.pdf>. See also Memorandum from Peter Orszag, Dir. of the Office of Mgmt. and Budget, Executive Office of the President to the Heads of Executive Dep't and Agencies on the Open Government Directive (Dec. 8, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf; Steve Bagley, *FOIA Ombudsman Promises Sunshine*, MAIN JUSTICE, Oct. 14, 2009, <http://www.mainjustice.com/2009/10/14/foia-ombudsman-promises-sunshine-eventually/>.

23 Memorandum from Barack Obama, President of the U.S. to the Heads of Executive Dep't and Agencies on Classified Information and Controlled Unclassified Information (May 27, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information/.

24 See TOM KALIL AND REGINA DUGAN, EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF SCIENCE AND TECHNOLOGY POLICY BLOG, CROWD SOURCING THE RENAISSANCE OF MANUFACTURING (June 24, 2011), <http://blog.ostp.gov/category/declass/>. See also Press Release, Nat'l Archives and Records Admin., Public Interest Declassification Board Blog Challenges the Public on Secrecy Suggestions (May 9, 2011), available at <http://www.archives.gov/press/press-releases/2011/nr11-128.html>.

block lawsuits challenging government misconduct.²⁵

- Fought a court order to release photos depicting the abuse of detainees held in U.S. custody and supported legislation to exempt these photos from FOIA retroactively. Worse, the legislation gave the Secretary of Defense sweeping authority to withhold any visual images depicting the government's "treatment of individuals engaged, captured, or detained" by U.S. forces, no matter how egregious the conduct depicted or how compelling the public's interest in disclosure.²⁶
- Threatened to veto legislation designed to reform congressional notification procedures for covert actions.²⁷
- Aggressively pursued whistleblowers who reported waste, fraud and abuse in national security programs with criminal prosecutions to a greater degree than any previous presidential administration.²⁸
- Refused to declassify information about how the government uses its authority under section 215 of the Patriot Act to collect information about Americans not relevant to terrorism or espionage investigations.²⁹

Moreover, when opportunities for taking bold measures to attack unnecessary secrecy arose, the administration failed to act or chose timid and incremental steps instead.

Continuing Misuse of the State Secrets Privilege

The state secrets privilege is a common-law evidentiary rule that permits the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."³⁰ The Department of Justice (DOJ) under George W. Bush DOJ radically expanded

²⁵ See Press Release, American Civil Liberties Union, Obama Administration Seeks to Keep Torture Victims from Having Day in Court (June 12, 2009), available at <http://www.aclu.org/safefree/torture/39843prs20090612.html>. See also Eric Holder, Att'y Gen., Dep't of Justice, Statement of Attorney General Eric Holder on Assertion of the State Secrets Privilege in Shubert v. Obama (Oct. 30, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091030.html>; and Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184-86 (2009).

²⁶ See Press Release, American Civil Liberties Union, Government Asks Supreme Court To Hear Torture Photo Case (Aug. 7, 2009), available at <http://www.aclu.org/safefree/torture/40654prs20090807.html>.

²⁷ Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy on H.R. 2701 – Intelligence Authorization Act for Fiscal Year 2010 (July 8, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr2701r_20090708.pdf. See also Letter from Peter Orszag, Dir., Office of Mgmt. & Budget, Executive Office of the President to Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence regarding S. 1494 and H.R. 2701, The Intelligence Authorization Acts for 2010 (Mar. 15, 2010), available at <http://www.fas.org/irp/news/2010/03/omb031610.pdf>.

²⁸ See Glenn Greenwald, *War on Whistleblowers Intensifies*, SALON, May 25, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/05/25/whistleblowers.

²⁹ Charlie Savage, *Senators Say Patriot Act is Being Misinterpreted*, N.Y. TIMES, May 26, 2011, available at <http://www.nytimes.com/2011/05/27/us/27patriot.html>.

³⁰ Ellsberg v. Mitchell, 709 F.2d 51, 56 [D.C. Cir. 1983] (emphasis added). See also United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 [6th Cir. 2004].

the way it used the state secrets privilege, demanding not just exclusion of particular pieces of classified evidence, but dismissal of entire cases based on the government's claimed secrecy needs. This procedure effectively transforms the privilege into an alternative form of immunity that shields the government and its agents from accountability for systemic violations of the law.

Privacy and civil rights organizations challenging illegal government policies of warrantless surveillance, extraordinary rendition, and torture have faced government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence has been produced or requested.³¹ And too often in these cases, courts accept government claims about the potential risk to national security as absolute, without independently scrutinizing the evidence or seeking alternative methods to give plaintiffs or victims an opportunity to discover non-privileged information with which to prove their cases.

As a candidate, President Obama had criticized the Bush state secrets policy.³² Open government advocates and victims of illegal government policies eagerly anticipated an announcement of reforms that would limit the Obama administration's use of the privilege. But they were met with disappointment when the new guidelines simply required additional levels of executive branch review before DOJ could seek dismissal of cases based on state secrets.³³ Indeed, in the first case in which the new guidelines were implemented, a challenge to warrantless wiretapping, Attorney General Holder supported an assertion of the state secrets privilege every bit as broad as those made under the Bush administration in requesting dismissal of the case.³⁴ The Obama DOJ again invoked state secrets in seeking dismissal of a case challenging his administration's asserted authority to carry out "targeted killings" of U.S. citizens located far from any armed conflict zone.³⁵

The misuse of the privilege by the executive branch, coupled with the failure of the courts to assess these claims independently, has allowed serious, ongoing abuses of executive power to go unchecked. And it has undermined our constitutional system of checks and balances by allowing the executive to evade accountability for illegal actions in court, leaving victims of government

31 See H.R. 984 the "State Secret Protection Act": Hearing Before the H. Judiciary Comm. Subcomm. on the Constitution, Civil Rights and Civil Liberties, 111th Cong. (2009) (statement of Ben Wizner, Nat'l Sec. Project Staff Att'y, American Civil Liberties Union), available at http://www.aclu.org/files/images/general/asset_upload_file593_39756.pdf.

32 See Obama '08 website, *Ethics*, <http://web.archive.org/web/20080731083937/http://www.barackobama.com/issues/ethics/> (last visited June 27, 2011). "The Bush administration has ignored public disclosure rules and has invoked a legal tool known as the "state secrets" privilege more than any other previous administration to get cases thrown out of civil court."

33 Editorial, *An Incomplete State Secrets Fix*, N.Y. TIMES, Sept. 28, 2009, available at http://www.nytimes.com/2009/09/29/opinion/29tue1.html?_r=1&hp.

34 Glenn Greenwald, *Obama's latest use of 'secrecy' to shield presidential lawbreaking*, SALON, Nov. 1, 2009, http://www.salon.com/news/opinion/glenn_greenwald/2009/11/01/state_secrets (last visited June 27, 2011). Prior to implementation of the new administration policy regarding invocation of the state secrets privilege, the Obama DOJ asserted the privilege in a pending claims, at times using arguments some commentators have suggested implied an even broader immunity doctrine than that advocated by the Bush administration. See John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009, available at <http://www.nytimes.com/2009/02/10/us/10torture.html?scp=2&sq=john%20schwartz&st=cse>; Tim Jones, *In Warrantless Wiretapping Case, Obama DOJ's New Arguments Are Worse Than Bush's*, ELECTRONIC FRONTIER FOUNDATION, Apr. 7, 2009, <http://www.eff.org/deeplinks/2009/04/obama-doj-worse-than-bush> (last visited June 27, 2011); and Glenn Greenwald, *New and Worse Secrecy and Immunity Claims From the Obama DOJ*, SALON, Apr. 6, 2009, http://www.salon.com/news/opinion/glenn_greenwald/2009/04/06/obama/index.html.

35 Ryan Devereaux, *Is Obama's Use of the State Secrets Privilege the New Normal?*, THE NATION, Sept. 30, 2010, available at <http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal>.

crimes without redress.

Prosecuting Whistleblowers

During his campaign, candidate Obama praised whistleblowers and committed to making sure they receive adequate protection.³⁶ The Obama-Biden plan published by the Office of the President-Elect included a whistleblower protection platform in its agenda:

Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance.³⁷

Rather than empowering whistleblowers, however, the administration has been prosecuting them—and doing so with more vigor and legal creativity than any previous administration.³⁸

- In a case the *Washington Post* called “overkill,” the Obama DOJ charged former National Security Agency official Thomas Drake with allegedly mishandling classified information, using an aggressive application of the 1917 Espionage Act even though there was clearly no intent to harm the United States or aid its enemies.³⁹ Drake had been reporting agency waste, mismanagement and abuse to his superiors, to the inspector general and to Congress, and was suspected of, but not charged with, leaking information to the press.⁴⁰ During this period the Baltimore Sun published several articles about NSA waste, mismanagement and abuse of Americans’ privacy.⁴¹ On the eve of trial, and after a five-year ordeal for Drake, the government dropped all felony charges in exchange for Drake plead-

36 See Obama for America response to the National Whistleblower Center Survey of the Candidates for President – 2008 [May 8, 2007], <http://www.whistleblowers.org/storage/whistleblowers/documents/obama.survey.scanned.pdf> (last visited June 27, 2011).

37 The Office of the President-elect, *The Obama-Biden Plan*, http://change.gov/agenda/ethics_agenda/ (last visited June 27, 2011).

38 Josh Gerstein, *Despite Openness Pledge, President Obama Pursues Leakers*, POLITICO, Mar. 7, 2011, available at <http://www.politico.com/news/stories/0311/50761.html>.

39 Editorial, *A Case that Could be Overkill Against a Whistleblower*, WASH. POST, June 5, 2011, available at http://www.washingtonpost.com/opinions/a-case-that-could-be-overkill-against-a-whistleblower/2011/06/03/AG2DemJH_story.html.

40 See Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, THE NEW YORKER, May 23, 2011, available at http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer. See also Ellen Nakashima, *Former NSA official Thomas Drake may pay a high price for media leak*, WASH. POST, July 14, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071305992.html>.

41 See, e.g., Siobhan Gorman, *NSA Killed System that Sifted Phone Data Legally*, BALTIMORE SUN, May 18, 2006, available at <http://www.commondreams.org/headlines06/0518-07.htm>. See also Siobhan Gorman, *Management Shortcomings Seen at NSA*, BALTIMORE SUN, May 6, 2007, available at <http://www.baltimoresun.com/news/nation-world/bal-nsa050607,0,1517618.story>.

ing guilty to a misdemeanor charge of “exceeding authorized use of a computer.”⁴²

- FBI linguist Shamai Leibowitz received 20 months in prison after pleading guilty to charges of leaking classified information to an unnamed blogger. Though what he divulged remains unknown even to the sentencing judge, Leibowitz stated that, “[t]his was a one-time mistake that happened to me when I worked at the FBI and saw things that I considered a violation of the law.”⁴³
- The Obama DOJ charged former CIA officer Jeffrey Sterling with leaking classified information about failures in the CIA’s Iranian operations to a reporter, widely believed to be James Risen of the New York Times. Sterling’s previous racial discrimination lawsuit against the CIA was dismissed after a Bush administration invocation of the state secrets privilege.⁴⁴ The Sterling prosecution is disturbing on two additional counts. First, because the FBI reportedly collected Risen’s credit reports, telephone and travel records, and issued a subpoena to compel him to testify about the sources for his reporting, threatening First Amendment press freedoms.⁴⁵ Second, in addition to Espionage Act violations, Sterling is charged with “unauthorized conveyance of government property” and “mail fraud” for providing government information to a reporter. Such charges, if this case is successful, could later be used against someone who leaks even unclassified government information to a reporter.⁴⁶
- The Obama DOJ charged Bradley Manning, a 22-year-old Army intelligence analyst, with “aiding the enemy” for allegedly providing a large cache of classified information to WikiLeaks, a website devoted to revealing government secrets⁴⁷ Manning was reportedly motivated by a desire to expose secret government activities to public scrutiny.⁴⁸ And while the data cache was so large the leaker was unlikely to have known all its contents, the materials did reveal significant evidence of U.S. and other government abuse and cor-

42 Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST, June 9, 2011, available at http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html?hpid=z3.

43 Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO, May 26, 2010, available at <http://dyn.politico.com/printstory.cfm?uuid=CC9C4ECD-18FE-70B2-A805B0934464FF46>.

44 Warren Richey, *Former Covert CIA Agent Charged with Leaks to Newspaper*, THE CHRISTIAN SCI. MONITOR, Jan. 6, 2011, available at <http://www.csmonitor.com/USA/Justice/2011/0106/Former-covert-CIA-agent-charged-with-leaking-secrets-to-newspaper>.

45 See, Josh Gerstein, *Feds Spy on Reporter in Leak Probe*, POLITICO, Feb. 24, 2011, available at <http://www.politico.com/news/stories/0211/50168.html>; see also Charlie Savage, *Subpoena Issued to Writer in CIA-Iran Leak Case*, N.Y. TIMES, May 24, 2011, available at <http://www.nytimes.com/2011/05/25/us/25subpoena.html>.

46 Grand Jury Indictment, U.S. v. Jeffrey Alexander Sterling, No. 1:10CR485(LMB) (E.D. Va. Dec. 22, 2010), (see counts 8 and 9, p. 26-27), available at <http://cryptome.org/0003/sterling-sterling-001.pdf>.

47 Ellen Nakashima, *Bradley Manning, WikiLeaks’ Alleged Source, Faces 22 New Charges*, WASH. POST, Mar. 22, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030206272.html>.

48 See *Bradley Manning in His Own Words: ‘This Belongs in the Public Domain,’* GUARDIAN, Dec. 1, 2010, available at <http://www.guardian.co.uk/world/2010/dec/01/us-leaks-bradley-manning-logs>.

ruption.⁴⁹ Indeed, U.S. diplomatic cables leaked to WikiLeaks are credited with instigating the democratic revolt in Tunisia, which became a catalyst for the “Arab Spring” movements across the Middle East and North Africa.⁵⁰ And despite government claims of severe damage done to national security, the government has yet to identify any specific person harmed because of the leaks, and Defense Secretary William Gates reported that no sensitive intelligence sources or methods had been revealed.⁵¹ Gates also called the later leak of diplomatic cables “embarrassing” and “awkward,” but said the consequences for U.S. foreign policy were “fairly modest.”⁵² Yet the government subjected Manning to uncharacteristically harsh and clearly retaliatory conditions of pre-trial confinement that a State Department spokesman called “ridiculous and counterproductive and stupid.”⁵³

- The Obama DOJ charged State Department contractor Stephen Kim with leaking rather innocuous information about North Korea’s expected reaction to new economic sanctions to Fox News.⁵⁴

The fact is, government officials leak classified information all the time—to influence policy, take

49 Among the important revelations in the WikiLeaks documents are:

- That Obama administration official pressured European countries not to prosecute Bush officials for illegal rendition and torture: <http://www.humanrightsfirst.org/2010/12/02/wikileaks-cables-reveal-obama-administration-tried-to-thwart-torture-prosecutions/>;
- That the State Department ordered U.S. diplomats to spy on their foreign counterparts: <http://www.dailymail.co.uk/news/article-1333920/WikiLeaks-Hillary-Clinton-ordered-U-S-diplomats-spy-UN-leaders.html>; http://articles.cnn.com/2010-12-02/world/afghanistan.wikileaks_1_ambassador-karl-eikenberry-cables-afghan-president-hamid-karzai?_s=PM:WORLD;
- That the U.S. was aware of widespread corruption of Afghan officials it supported: http://articles.cnn.com/2010-12-02/world/afghanistan.wikileaks_1_ambassador-karl-eikenberry-cables-afghan-president-hamid-karzai?_s=PM:WORLD;
- That despite claims to the contrary, the U.S. military tracked civilian deaths in Afghanistan and Iraq, and knew they were greater than published estimates it publicly disputed: <http://abcnews.go.com/Politics/wikileaks-iraqi-civilian-deaths-higher-reported/story?id=11953723> (Iraq), and <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7913088/Wikileaks-Afghanistan-suggestions-US-tried-to-cover-up-civilian-casualties.html> (Afghanistan);
- That U.S. troops were ordered to turn detainees over to Iraqi troops despite evidence of torture: <http://www.hrw.org/en/news/2010/10/24/iraq-wikileaks-documents-describe-torture-detainees>;
- That the U.S. knew many detainees imprisoned in Guantanamo Bay were not threats to the U.S.: <http://www.bbc.co.uk/news/world-us-canada-13184845>;
- That State Department officials misled Americans about U.S. military involvement in Yemen: http://www.politico.com/blogs/joshgerstein/1210/WikiLeaks_shed_light_on_Obamas_secret_war.html?showall.

50 Peter Walker, *Amnesty International Hails WikiLeaks and Guardian as Arab Spring ‘Catalysts’*, GUARDIAN, May 5, 2011, available at <http://www.guardian.co.uk/world/2011/may/13/amnesty-international-wikileaks-arab-spring>.

51 See Nancy A. Yousef, *Officials May Be Overstating the Danger from WikiLeaks*, McCCLATCHY NEWS SERV., Nov. 28, 2010, available at <http://www.mcclatchydc.com/2010/11/28/104404/officials-may-be-overstating-the.html>. See also Steven Aftergood, *DoD Sees No Intelligence Compromise From WikiLeaks Docs*, SECRECY News, Oct. 18, 2010, http://www.fas.org/blog/secrecy/2010/10/no_intel_compromise.html (last visited June 27, 2011).

52 Josh Gerstein, *Gates Shrugs Off WikiLeaks Cable Dump*, POLITICO, Nov. 30, 2010, available at http://www.politico.com/blogs/joshgerstein/1110/Gates_shrugs_off_Wikileaks_cable_dump.html.

53 Alex Spilius, *Bradley Manning’s Treatment ‘Ridiculous,’ says Hillary Clinton’s Spokesman*, TELEGRAPH, Mar. 11, 2011, available at <http://www.telegraph.co.uk/news/worldnews/wikileaks/8377603/Bradley-Mannings-treatment-ridiculous-says-Hillary-Clintons-spokesman.html>. See also Press Release, American Civil Liberties Union, *ACLU Calls Military Treatment of Accused WikiLeaks Supporter Pfc. Manning Cruel and Unusual* (Mar. 16, 2011), available at <http://www.aclu.org/national-security/aclu-calls-military-treatment-accused-wikileaks-supporter-pfc-manning-cruel-and-un>.

54 Steven Aftergood, *Another Leak Prosecution*, SECRECY News, Aug. 30, 2010, http://www.fas.org/blog/secrecy/2010/08/another_leak.html (last visited June 27, 2011).

credit or deflect blame—yet few are investigated, much less prosecuted.⁵⁵ That leaks exposing internal wrongdoing or failures of government policy are aggressively investigated and prosecuted while other potentially more damaging leaks are not only adds to the perception that these prosecutions are simply another form of whistleblower retaliation. For example, in September 2009, Bob Woodward of the Washington Post obtained a leaked copy of a confidential military assessment of the war in Afghanistan that included General Stanley McChrystal's opinion that more troops were necessary to avoid mission failure.⁵⁶ The purpose of this leak was undoubtedly to manipulate the policy debate by putting public pressure on President Obama to comply with the commanding general's preferred strategy. Amid the mountains of innocuous and illegitimately classified documents the government produces each year, this leak involved one of the small categories of documents that are appropriately kept secret: a war planning document. Yet, the Pentagon showed little interest in discovering who was responsible for leaking the war plans—even as prosecutors relentlessly hounded critics of the national security policies for revealing much less harmful information.⁵⁷ The failure to investigate or prosecute the vast majority of officials who leak classified information demonstrates the arbitrary and discriminatory fashion in which the Justice Department is now prosecuting whistleblowers.

Secret Laws

In 2008 the Constitution Subcommittee of the Senate Judiciary Committee held a hearing to examine what its then-Chairman, Senator Russ Feingold, called the “increasing prevalence in our country of secret law.”⁵⁸ Examples of this “particularly sinister trend” included secret opinions of the Justice Department’s Office of Legal Counsel (OLC), Foreign Intelligence Surveillance Court (FISC) opinions, and President Bush’s claimed authority to ignore or violate Executive Orders without amending them.

In his first months in office, President Obama agreed to release OLC memos and other documents

55 Steven Aftergood, *Steven Kim Leak Defense Cites Overclassification*, SECRECY News, Feb. 7, 2011, http://www.fas.org/blog/secrecy/2011/02/kim_leak_defense.html.

56 Bob Woodward, *McChrystal: More Troops or Mission Failure*, WASH. POST, Sept. 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/20/AR2009092002920.html>.

57 See Department of Defense News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, (Jul. 8, 2010), available at <http://www.fas.org/sgp/news/2010/07/dod070810.html> (last visited June 28, 2011):

“Q. Can I ask you a memo follow? Of all the litany of things you laid out -- your frustrations about having to call back an officer who misspoke overseas and all these other media-military foibles -- you didn’t mention Bob Woodward’s leak, the McChrystal report that he got in September. There was no leak investigation convened here. There was no threat to prosecute. There was a deafening silence. Why did you not go after that at the time, sir? Because that was classified, every page. That was typical of what you want to avoid. But the silence was deafening here. And why -- I just want to know why not -- why didn’t --

SEC. GATES: Because I was never convinced that it leaked out of this building.

Q. What steps did you take to track that down?

SEC. GATES: I’ve got a lot of experience with leak investigations over a lot of years. (Laughter.) And I was very cautious in calling for leak investigations, especially when lots of people have access to documents.”

58 *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the S. Judiciary Comm. Subcomm. on the Constitution*, 110th Cong., (Apr. 30, 2008) (statement of Russ Feingold, Chairman of the S. Judiciary Comm. Subcomm. on the Constitution), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da139cdb5&wit_id=e655f9e2809e5476862f735da139cdb5-0-0.

relating to the Bush administration's torture program that the ACLU and other public interest organizations had long sought under the Freedom of Information Act. The decision to release these documents has historic importance, and allows Americans to evaluate the legal justifications for the torture program and decide for themselves whether the architects of this program acted legally and in good faith.

Unfortunately, his administration has not been as forthcoming on other issues. The public debate over the Patriot Act reauthorization, for example, has been hampered by excessive secrecy surrounding the manner in which the executive branch interprets and implements its provisions, particularly Section 215, the so-called "library records" provision, which amended the Foreign Intelligence Surveillance Act (FISA) to allow the government to obtain secret FISC orders to seize "any tangible thing" the government claims is relevant to a terrorism or espionage investigation. Congress has repeatedly requested that DOJ declassify "key information" pertaining to the government's use of Section 215 so that the public can understand the "true scope" of the Patriot Act, to no avail.⁵⁹ During the 2011 Patriot Act reauthorization debate, Senators Ron Wyden (D-OR) and Mark Udall (D-CO), who each sit on the Senate Intelligence Committee and have access to classified information regarding how the government interprets the law, introduced an amendment that would have required the Justice Department to reveal its secret interpretation of its intelligence collection authorities under FISA.⁶⁰ Senator Wyden gave his colleagues an ominous warning: "When the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and they will be angry."⁶¹ The amendment failed, and the Patriot Act provisions were extended until 2015.

Also, in 2010, the Obama DOJ issued a secret OLC opinion that re-interpreted the Electronic Communications Privacy Act (ECPA) to allow the FBI to ask telecommunications companies to provide them with certain telephone records on a voluntary basis, even where there is no emergency and no legal process, such as a Grand Jury subpoena, National Security Letter or court order.⁶² Ironically, the FBI sought the OLC opinion after the DOJ Inspector General criticized the FBI for using "exigent letters" and other informal requests to illegally obtain communications records in violation of ECPA. The IG report said, "we believe the FBI's potential use of [REDACTED] to obtain records has significant policy implications that need to be considered by the FBI, the Department, and the Congress."⁶³ Unfortunately, DOJ has not released the OLC opinion, so the public has no

59 See Press Release, S. Ron Wyden, Senators Press Holder to Declassify Key Facts About Patriot Act (Nov. 17, 2009) available at <http://wyden.senate.gov/newsroom/press/release/?id=dee00e95-6825-442a-bafe-ef66a84b2a86>.

60 See Press Release, S. Ron Wyden, Amendment Requires Government to End Practice of Secretly Interpreting Law, (May 25, 2011), available at: <http://wyden.senate.gov/newsroom/press/release/?id=f9f288a5-d438-4e30-8c62-7071f1f0d33b>

61 Charlie Savage, *Senators Say Patriot Act is Being Misinterpreted*, N.Y. TIMES, May 26, 2011, available at <http://www.nytimes.com/2011/05/27/us/27patriot.html>.

62 See OFFICE OF INSPECTOR GENERAL, DEPT OF JUSTICE: A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 264, (Jan. 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>. While the IG report reveals the existence of this secret OLC opinion, it is redacted in a manner that masks the provision of law in question, the types of telephone records the FBI seeks access to, and the legal arguments supporting its interpretation. The OLC opinion has not been released. In a letter denying a McClatchy News FOIA request for the OLC opinion, DOJ may have revealed the provision of law that is being reinterpreted. See also Marisa Taylor, *Obama Assertion: FBI Can Get Phone Records Without Oversight*, McCLATCHY NEWSPAPERS, Feb. 11, 2011, available at <http://www.mcclatchydc.com/2011/02/11/108562/obama-assertion-fbi-can-get-phone.html#ixzz1DmEP4etk>.

63 *Id.* at 265.

way of understanding how the government can obtain their telephone records without legal process.

Obama's Executive Order 13526: The Good, the Bad, and the Ugly

President Obama's December 2009 Executive Order (EO) on classification was a laudable attempt to address longstanding problems in classification policy.⁶⁴ It incorporated many of the promising ideas generated through the administration's public outreach efforts, but it avoided a dramatic overhaul of classification policy such as that called for by the Moynihan Commission and many others, and included a few provisions that might actually increase secrecy.

Some measures in the new EO were designed to improve accountability to reduce improper classification in the near term. These include provisions:

- strengthening accountability over original classifiers, including requiring suspensions of OCAs who skip mandatory annual training;⁶⁵
- requiring derivative classifiers, for the first time, to identify themselves on documents they classify and receive mandatory bi-annual training;⁶⁶ and
- making the reclassification of previously released material more arduous and the process more accountable.⁶⁷

Other helpful provisions are not designed to produce immediate results necessarily, but rather to identify problems and improve practices over time, and possibly drive even more comprehensive reform efforts in the future. Examples include provisions establishing a National Declassification Center and requiring a Fundamental Classification Guidance Review at each agency authorized to classify information, both of which have been long sought by open government advocates.⁶⁸

Elsewhere in the Obama Executive Order, new provisions that could be extremely helpful were somewhat diluted by other measures. For example:

- A positive provision ended the power of the CIA to veto declassification decisions by the Interagency Security Classification Appeals Panel (ISCAP), the body that adjudicates

⁶⁴ Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), available at <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

⁶⁵ *Id.*, sections 1.3, 1.3(d).

⁶⁶ *Id.*, section 2.1.

⁶⁷ *Id.*, section 1.7(c).

⁶⁸ See Meredith Fuchs, *Obama Executive Order on Classification: Reflects Public's Comments, Makes a Commitment to Declassify Hundreds of Millions of Pages of Historical Materials, Sets the Stage for Reduction in Classification*, NATIONAL SECURITY ARCHIVE, Dec. 30, 2009, updated Jan. 4, 2010, <http://nsarchive.wordpress.com/2009/12/30/obama-executive-order-on-classification-reflects-public%E2%80%99s-comments-makes-a-commitment-to-declassify-hundreds-of-millions-of-pages-of-historical-materials-sets-the-stage-for-reduction-in-ove/>; and, Steven Aftergood, *New Executive Order Expected to Curb Secrecy*, SECRECY NEWS, Jan. 4, 2010, http://www.fas.org/blog/secrecy/2010/01/new_executive_order.html.

challenges to agency classification decisions. However, this provision is weakened by new provisions that give the CIA and the Director of National Intelligence voting seats on ISCAP (where only four votes are necessary to decide a declassification issue), and allow the CIA to appeal the Panel's decisions to the National Security Advisor.⁶⁹

- A new provision states that “no information may remain classified indefinitely” but sections governing automatic declassification of records at 25 years retain broad exemptions—some of which are actually expanded under the new EO, allowing more material to remain classified for longer periods.⁷⁰
- Requirements that records meeting those exemptions automatically declassify at 50 and then 75 years have *further* exemptions and a caveat allowing agency heads to prevent declassification even then.⁷¹ The possibility of disclosure 25, 50 or 75 years hence is an unlikely deterrent to abuse, as those responsible would likely be retired from government service or dead before evidence of abuse is declassified.

Even more troubling, the EO authorizes the Attorney General and Secretary of Homeland Security to establish highly classified Special Access Programs.⁷² This provision is particularly threatening to the civil liberties of U.S. persons, given that these agencies primarily focus on domestic rather than foreign threats and are therefore more likely to include programs targeting citizens and residents of the United States for investigation and prosecution.

The EO has been in effect for over a year, and the early indicators regarding its success in curbing unnecessary secrecy are not positive. The Defense Department missed a deadline for producing regulations to implement the Fundamental Classification Guidance Review required in the EO, potentially delaying the reform process.⁷³

As for the Obama administration’s declassification efforts, they are simply being overwhelmed by the pace at which new secrets are being produced. President Obama requested \$5.1 million in the FY 2011 budget to fund the National Declassification Center established in his EO.⁷⁴ This figure represents a significant commitment, but it is a pittance compared to the billions it costs to secure the government’s secrets, and the task before the NDC is already daunting. There were over 400 million documents in a backlog of material that was scheduled for automatic declassification on Dec. 31, 2009 under a Clinton-era executive order.⁷⁵ Obama’s EO pushed the deadline for releas-

69 Exec. Order No. 13526, 75 Fed. Reg. 707, Sec. 5.3 (Dec. 29, 2009), available at <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

70 *Id.*, at sections 1.5(d) and 3.3.

71 *Id.*

72 *Id.*, at section 4.3.

73 Steven Aftergood, *Obama Classification Effort Fails to Take Hold*, SECRECY NEWS, Apr. 12, 2011, http://www.fas.org/blog/secrecy/2011/04/fcgr_stalled.html.

74 See Lee White, *Cuts Proposed for History-Related Projects in Federal Budget for FY 2011*, PERSPECTIVES ON HISTORY, Mar. 2010, <http://www.historians.org/Perspectives/issues/2010/1003/1003nch1.cfm>.

75 National Archives and Records Administration, Frequently Asked Questions About the National Declassification Center, <http://www.archives.gov/declassification/faqs.html> (last visited June 28, 2011).

ing the backlogged materials to the end of 2013 but it also created new automatic declassification requirements for material 25, 50 and 75 years old, so an increasing number of new documents will become eligible for declassification each year as the NDC works against the backlog.⁷⁶ While the NDC evaluated an impressive 83 million documents by December 31, 2010, only 12 million were released to open shelves at the National Archives and the backlog remained at over 334 million documents.⁷⁷ Other government declassification programs declassified an additional 29.1 million documents, which represents a slight increase over last year, but it pales in comparison to the 204 million documents declassified in 1997.⁷⁸ The Kyl-Lott Amendment to the 1999 Defense Authorization Act adds to this burden by requiring an arduous document-by-document review of every record scheduled for automatic declassification to ensure nuclear weapons information is not inadvertently disclosed.⁷⁹ Declassification efforts that require such painstaking review cannot hope to keep up with the volume of new secrets being produced.

If Obama's Executive Order is effectively enforced, it could begin to rein in some of the worst abuses of classification. But the lack of enforcement of classification policy within a system devoid of independent oversight has always been a major part of the over-classification problem, as the multitude of secrecy studies since 1956 confirm. With 76 million new classification decisions being made each year, it is clear that more drastic measures are required. To his credit, President Obama recognized that more needed to be done. In a Presidential Memorandum accompanying the EO, he directed the National Security Advisor to conduct a study "to design a more fundamental transformation of the security classification system."⁸⁰

Drastic Measures are Required

Fixing our government's secrecy problem requires sweeping reform and cannot be the responsibility of the President alone. As a co-equal branch of government, Congress has an obligation to ensure that national security programs and policies—like all government programs and policies—are lawful, effective and accountable to the public. Too often, presidents have misused their classification authority to thwart congressional oversight and legal accountability, undermining the constitutional checks and balances that ensure the effective operation of our government. And too often Congress and the courts have let this happen by failing to properly exercise their Constitutional powers to effectively check this executive abuse. Our democracy—and our security—have suffered as a result.

76 Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), available at <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

77 NAT'L ARCHIVES AND RECORDS ADMIN., BI-ANNUAL REPORT ON OPERATIONS OF THE NATIONAL DECLASSIFICATION CENTER, REPORTING PERIOD: JANUARY 1, 2010 – DECEMBER 31, 2010, at 4 (2011), available at <http://www.archives.gov/declassification/reports/2010-biannual-january1-december31.pdf>.

78 Info. Sec. Oversight Office, *supra* note 13, at 14.

79 STROM THURMOND NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1999, H. Rpt. 105-736 (1998), available at <http://www.fas.org/sgp/congress/hr3616am.html>. See also Steven Aftergood, *The December 2009 Deadline: What Didn't Happen*, SECRECY NEWS, Jan. 4, 2010, http://www.fas.org/blog/secrecy/2010/01/declass_deadline.html.

80 Presidential Memorandum from the White House Office of the Press Sec'y, Implementation of the Executive Order, "Classified National Security Information" (Dec. 29, 2010), available at: <http://www.fas.org/sgp/obama/wh122909.html>.

Congress needs to take leadership on this issue, and to its credit the 111th Congress passed important, though modest reforms in the Intelligence Authorization Act of 2011, over veto threats from the President. But clearly more needs to be done.⁸¹ The practice of excessive secrecy is deeply embedded in the culture of government and will be difficult to correct in the short term, but the long-run consequences of allowing it to persist are severe.

⁸¹ Alexander Bolton, *Pelosi, Feinstein Deal Releases Intel Hold*, THE HILL, Sept. 28, 2010, <http://thehill.com/homenews/senate/121331-pelosi-feinstein-close-to-intel-deal>.

III. HOW SECRECY HARMS AMERICA

Unnecessary secrecy harms America in at least six significant ways.

1. Secrecy undermines democracy

Unnecessary secrecy forfeits the greatest advantages of a free society: the open and unfettered communication of ideas and discoveries, which lead inevitably to greater mutual understanding, increased accountability and the development of new and better modes of thinking.⁸² Democracy suffers whenever the public cannot engage in informed debate because unnecessary classification obscures the full picture of an issue.⁸³ Even Executive Order 12958, which governs classification policy, plainly states: “[o]ur democratic principles require that the American people be informed of the activities of their Government.”⁸⁴

The Bush administration’s torture scandal provides an example of how secrecy can undermine core democratic principles by squelching debate on an issue of grave national importance and subverting public accountability. In April 2004, Americans were shocked and dismayed to learn that U.S. military personnel were abusing detainees in Iraq’s Abu Ghraib prison.⁸⁵ But documents uncovered by the ACLU and others would later reveal that hundreds of detainees in U.S. custody in Iraq, Afghanistan, Guantanamo Bay, Cuba and secret prisons around the globe had been abused, tortured and even killed by government agents using coercive interrogation tactics that a handful of Bush administration officials had secretly authorized, relying on highly classified Department of Justice (DOJ) legal opinions as justification.⁸⁶ Senior Bush administration officials adopted this illegal interrogation policy despite strong internal opposition from the military,⁸⁷ from the Department of State,⁸⁸ and from experienced counterterrorism agents at the Federal Bureau of Investigation.⁸⁹ Subsequent review determined the secret legal opinions to be so professionally inad-

82 See Defense Science Board Report, *supra* note 9, at 6 - 9.

83 See Moynihan Commission Report, *supra* note 25, at xxi.

84 Exec. Order No. 12,958, 3 C.F.R. 333 (1995), as amended by Exec. Order No. 13,292, 3 C.F.R. 196, 196 (2004).

85 See, Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS News 60 MINUTES, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

86 See American Civil Liberties Union, Accountability for Torture, <http://www.aclu.org/accountability/> (last visited June 28, 2011).

87 See, e.g., Memorandum from Gen. Counsel of the Navy, Dep’t of the Navy to the Inspector Gen., Dep’t of the Navy on Office of Gen. Counsel Involvement in Interrogation Issues (July 7, 2004), available at <http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf>.

88 See, e.g., Memorandum from Colin L. Powell, Sec’y of State, to Counsel to the President and the Assistant to the President on Nat’l Sec. Affairs on the Draft Decision Memorandum for the President on the Application of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>. See also Memorandum from William H. Taft, IV, Legal Advisor, Dep’t of State, to the Counsel for the President on Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), available at http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf.

89 See, e.g., *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the S. Judiciary Comm. Subcomm. on Admin. Oversight and the Courts*, 111th (2009), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7906.

equate that DOJ had to repudiate them.⁹⁰ The torture scandal has been an unmitigated disaster for U.S. counterterrorism efforts because it undermined potential prosecutions of accused terrorists by compelling false and/or inadmissible testimony, provided a propaganda victory and recruiting tool for America's enemies, and alienated our allies.⁹¹

The decision to use torture as an anti-terrorism method after 9/11 violated our nation's most cherished values and will continue to influence the way that much of the world perceives the United States for years to come. Torture has long been outlawed, and the President and a small group of executive branch officials had no right to seek to abrogate the law in secret. Indeed, it is almost unimaginable that these officials would have chosen to institutionalize such an illegal, inhumane and counter-productive policy had they been required to engage in an open debate on the issue with Congress and the American public before it was implemented.⁹² This episode exposes the catastrophic decision-making that can occur when public accountability is removed as a check against government error and abuse.

Congress needs to acknowledge the heavy toll excessive secrecy takes on public engagement with a sweeping re-evaluation of the role it plays in national security policy.

"You'd just be amazed at the kind of information that's classified—everyday information, things we all know from the newspaper... We're better off with openness. The best ally we have in protecting ourselves against terrorism is an informed public."

—Thomas Kean, Chairman of the 9/11 Commission and a former Republican governor of New Jersey.⁹³

90 See OFFICE OF PROFESSIONAL RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>. See also, Daniel Klaidman, *The Law Required It*, NEWSWEEK, Sept. 8, 2007, available at <http://www.newsweek.com/id/42694>.

91 See Bob Woodward, *Detainee Tortured, says U.S. Official*, WASH. POST, Jan. 14, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html?hp=1&wpid=topnews>.

92 See William Leonard, former Dir., Info. Sec. Oversight Office, "Classification: Radical, Let Alone Incremental, Reform Is Not Enough!", INFORMED CONSENT, Aug 9, 2009 (on file with author). "None of these [DOJ legal opinions] would have been written in the manner they were, and used to support the policies they did, unless the authors could be assured of the memos' secrecy and the public's continuing ignorance of their content."

93 See Scott Shane, *Official Secrecy Reaches Historic High in the U.S.*, N.Y. TIMES, July. 4, 2005, available at <http://www.nytimes.com/2005/07/03/world/americas/03iht-secrets.html>.

“Conversely, when too little information is made public, the public lacks the facts for informed judgment, and support for policies is shallow. Those controlling information are tempted to use it to control the debate. Malfeasance in the shadows of government is not ferreted out, and constructive input—from the media, academia, and citizens—is less probable. In short, secrecy leaves us less prepared to face the great challenges of the day.”

—Lee H. Hamilton, Vice-Chairman 9/11 Commission and Democratic Congressman.⁹⁴

2. Secrecy undermines constitutional checks and balances

Our nation’s Founders feared the corrupting influence of power in the hands of an absolute monarch, so they deliberately limited and distributed governmental authority among the three separate branches of government, giving each the tools to check abuse by the others.⁹⁵ Yet the modern executive’s claimed authority to exclusively and unilaterally decide what information is classified and what is not is upsetting the Constitution’s delicate balance, depriving Congress and the courts of the ability to examine executive branch activities and fulfill their constitutional obligations to rein in abuse.⁹⁶ Congress’s and the courts’ failure to assert their independence as co-equal branches of government in examining, challenging and, when necessary, overriding the executive’s national security secrecy claims contribute to the problem.

This breakdown of checks and balances has been disastrous for our national security policy and the rule of law. Over the last several years the executive branch secretly and unilaterally initiated extra-judicial detention programs and cruel, inhuman and degrading interrogation methods that violated both international treaties and domestic law.⁹⁷ It engaged in “extraordinary renditions”—international kidnappings—in violation of international law and the domestic laws of our allied nations.⁹⁸ It conducted warrantless wiretapping within the United States in violation of the Foreign

94 Lee H. Hamilton, *When stamping ‘secret’ goes too far*, CHRISTIAN SCI. MONITOR, Feb. 22, 2006, available at <http://www.csmonitor.com/2006/0222/p09s01-coop.html>.

95 See THE FEDERALIST No. 47-51 (James Madison).

96 See, Louis Fisher, *Congressional Access to National Security Information*, 5 HARV. J. ON LEGIS. 219, 221 (2008), available at http://www.loc.gov/law/help/usconlaw/pdf/45_HarvJ_on_Legis.pdf. Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress, argues that executive claims of exclusive authority are historically inaccurate and based on “faulty generalizations and misconceptions about the President’s roles as Commander and Chief, head of the Executive Branch and ‘sole organ’ of the nation in its external relations.”

97 INSPECTOR GENERAL, CENT. INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 – OCTOBER 2003) (2004), available at <http://documents.nytimes.com/c-i-a-reports-on-interrogation-methods#p=1>.

98 See Scott Horton, *New CIA Docs Detail Brutal ‘Extraordinary Rendition’ Process*, HUFFINGTON POST, Aug. 28, 2008, http://www.huffingtonpost.com/2009/08/28/new-cia-docs-detail-bruta_n_271299.html.

Intelligence Surveillance Act and the Fourth Amendment of the Constitution.⁹⁹

Under a shroud of secrecy the executive ignored laws duly passed by Congress and thwarted congressional oversight through non-disclosure, or by intentionally providing incomplete and misleading testimony to the intelligence committees.¹⁰⁰ The few members of Congress who were briefed on these controversial programs felt so handcuffed by restrictions on what they could do with the highly classified information they received, they thought their only recourse was to file secret letters of concern or protest.¹⁰¹ Representative Jane Harman, who as a former Ranking Member of the House Intelligence Committee regularly received classified briefings from executive agencies, described the current practice of congressional notification:

...as far as notes go, you - I suppose one could take some notes but they would have to be carried around in a classified bag, which I don't personally own. You can't talk to anybody about what you've learned, so there's no ability to use committee staff, for example, to do research on some of the issues that are raised in these briefings. And the whole environment is not conducive to the kind of collaborative give and take that would make for much more successful oversight.¹⁰²

Notice from the executive branch regarding covert actions and other intelligence activities is of little value if congressional leaders cannot share the information they obtain with colleagues and the public as they pursue legislative reforms.¹⁰³

Meanwhile, the courts are also being neutralized as a check on illegal executive branch activities. Victims of these secret programs have been denied the opportunity to challenge the government's misconduct in U.S. courts through the government's over-broad use of state secrets privilege claims, which is clearly designed not to protect sensitive evidence but to avoid judicial rulings that the challenged activities are illegal.¹⁰⁴ The Obama administration continues this practice, denying justice and eliminating the courts as an effective check against executive lawbreaking.¹⁰⁵

99 Eric Lichtblau and James Risen, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html>.

100 Jared Allen, *Democrats Say CIA May Have Misled Congress on Interrogations 5 Times*, THE HILL, Oct. 27, 2009, <http://thehill.com/homenews/house/65111-dems-say-cia-may-have-misled-congress-5-times>.

101 See Letter from Sen. Jay Rockefeller to Vice President Dick Cheney (July 17, 2003), available at <http://www.talking-pointsmemo.com/docs/rockefeller-letter/>. See also Greg Miller and Rick Schmitt, *Letter Said CIA Image to Suffer if Tapes Trashed*, L.A. TIMES, Jan. 4, 2008, available at <http://articles.latimes.com/2008/jan/04/nation/na-ciatapes4>.

102 Renee Montagne, *House Committee to Probe Ruin of CIA Tapes* [Radio Interview with Jane Harman], NAT'L PUBLIC RADIO, Jan. 16, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=18137722>.

103 See Letter from Sylvester Reyes, Chairman, H. Permanent Select Comm. on Intelligence, to Cent. Intelligence Agency (Apr. 29, 2009), available at <http://video1.washingtontimes.com/video/CIAletter.pdf>.

104 H.R. 984 the "State Secret Protection Act of 2009": Hearing Before the House Judiciary Comm. Subcomm. on the Constitution, Civil Rights and Civil Liberties, 111th Cong. (2009) (statement of Ben Wizner, Staff Att'y, American Civil Liberties Union), available at http://www.aclu.org/files/images/general/asset_upload_file593_39756.pdf.

105 Michael Isikoff, *Obama Secrecy Watch II: A State Secrets Affidavit Straight from the Bush Era*, NEWSWEEK, Nov. 2, 2009, available at <http://blog.newsweek.com/blogs/declassified/archive/2009/11/02/obama-secrecy-watch-ii-a-state-secrets-affidavit-straight-from-the-bush-era.aspx>.

Our constitutional system is crippled when excessive secrecy deprives Congress and the courts of the information necessary to fulfill their oversight responsibilities.

3. Secrecy undermines security

The whole purpose and justification of laws permitting the U.S. government to hide information from the people they are working for—the American people—is national security. Yet, when secrecy is imposed beyond the very narrow circumstances where it is truly justified, it tends to diminish, not increase, the security of the American people.

- Secrecy prevents effective information sharing.**

State and local law enforcement, emergency response personnel, other government and private sector entities, and the general public all need access to timely and accurate information about realistic threats to their communities and the appropriate methods for effectively addressing such threats. Excessive classification forces federal government officials to withhold crucial information not only from each other, but also from these other stakeholders.

Local law enforcement's ability to play a significant role in stopping terrorism is seriously hampered by the over-classification of intelligence by the federal government.... the classification process has been a substantial roadblock to our capacity to investigate terrorism cases and work hand-in-hand with [the] federal agencies.

—Commander Michael Downing, Counter-Terrorism/Criminal Intelligence Bureau, Los Angeles Police Department.¹⁰⁶

Rather than reducing the classification of terrorism-related intelligence that might affect our local communities so that it can more easily be shared with state and local law enforcement and first responders, the federal government has instead developed programs to increase the number of state and local officials that receive federal security clearances. But receipt of information by a cleared officer does not solve the problem because the information still cannot be shared with other stakeholders inside and outside government. Washington, D.C. Metropolitan Police Chief Cathy Lanier explained, “[i]t does a local police chief little good to receive information—including classified information—about a threat if she cannot use it to

¹⁰⁶ Over-classification and Pseudo-classification: The Impact of Information Sharing: Hearing Before the H. Homeland Sec. Comm. Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment, 110th Cong. (2007) (statement of Michael P. Downing, Assistant Commanding Officer Counter-Terrorism/Criminal Intelligence Bureau, Los Angeles Police Dep'tl, available at <http://homeland.house.gov/SiteDocuments/20070322121640-78392.pdf>).

help prevent an attack.”¹⁰⁷ Simply increasing the number of cleared officers, though expensive, does little to remedy the problem of over-classification of terrorism intelligence.

- **Secrecy produces flawed intelligence and undermines effective policy.**

Excessive secrecy means that policymakers are often not fully informed of important developments or key pieces of information implicating the reliability of official intelligence estimates.¹⁰⁸ Investigations into the intelligence failures regarding the presence of weapons of mass destruction (WMD) in Iraq prior to the U.S. invasion, for example, found the intelligence community made significant efforts to validate the separate pieces of information it received, but in the end its “finished” intelligence was wrong.¹⁰⁹ This failure was not the result of a lack of information; rather it was the natural product of a fatally flawed analytic process. The intelligence process is flawed because it relies on a closed analytical system that compartmentalizes information, strips it of key details regarding the sources and methods by which it is obtained (which often provide the best clues as to its reliability) and then limits its distribution, preventing scrutiny from outside experts. When the Iraq WMD intelligence estimates were finally made public, they revealed that the intelligence community had relied on an untrustworthy source named “Curveball” despite ample warnings that he was a fabricator.¹¹⁰ Likewise, policymakers failed to heed dissenting opinions within the intelligence community about whether aluminum tubes Iraq purchased were designed for use in a nuclear centrifuge.¹¹¹ Vigorous and open debate tends to uncover such critical errors in fact or analysis before poor decisions are made. A secret analytic system that obscures critical facts and opinions will inevitably produce unreliable information.

¹⁰⁷ Over-classification and Pseudo-classification: The Impact of Information Sharing: Hearing Before the H. Homeland Sec. Comm. Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment, 110th Cong. (2007) (statement of Cathy Lanier, Acting Chief of Police, Gov’t of the D.C. Metro. Police Dep’t), available at <http://www.fas.org/sgp/congress/2007/032207lanier.pdf>.

¹⁰⁸ See Moynihan Commission Report, *supra* note 3, at xxi.

¹⁰⁹ See S. REP. No. 108-301(2004), available at <http://www.gpoaccess.gov/serialset/creports/iraq.html>; S. REP. No. 109-331, Phase II Report (2006), available at <http://intelligence.senate.gov/phaseiiaccuracy.pdf>.

¹¹⁰ Bob Drogan and Greg Miller, *Curveball Debacle Reignites CIA Feud*, L.A. TIMES, Apr. 2, 2005, available at <http://articles.latimes.com/2005/apr/02/nation/na-intel2>.

¹¹¹ David Barstow, William J. Broad, and Jeff Gerth, *How the White House Embraced Disputed Arms Intelligence*, N.Y. TIMES, Oct. 3, 2004, available at <http://www.nytimes.com/2004/10/03/international/middleeast/03tube.html>.

"As a former sheriff, I have vivid memories of the federal government telling me that I could not access information that I needed to do my job because it was classified or otherwise restricted."

—Congressman David G. Reichert (R-WA).¹¹²

- **An informed public enhances security.**

Reducing the secrecy surrounding terrorist threats and counterterrorism efforts will provide the public with the information necessary to quell inappropriate bias, put threats into proper perspective and respond appropriately. Widespread knowledge and a prepared citizenry are two of our greatest strengths—and they are both stymied by the excessive classification and compartmentalization of national security information. Eleanor Hill, Staff Director of Congress's investigation into 9/11, called "an alert and informed American public" the intelligence community's "most potent weapon,"¹¹³ and the 9/11 Commission concluded that publicity about the increased terrorism threat reporting during the summer of 2001 might have actually derailed the 9/11 plot.¹¹⁴ Yet too often the government's public information campaigns mislead more than they enlighten, spreading fear and sowing suspicion rather than providing timely, accurate and reliable information the public can use.¹¹⁵

4. Secrecy lets the executive branch mislead and manipulate Congress and the American people, often to achieve political rather than security objectives

Secrecy also allows executive branch officials to mislead members of Congress and the American public by selectively withholding information, or releasing (either through leaks or declassification) incomplete or erroneous information. For example:

- During the 2004 presidential campaign, when concerns over increased domestic spy-

112 *Over-classification and Pseudo-classification: The Impact of Information Sharing: Hearing Before the H. Homeland Sec. Comm. Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment*, 110th Cong. (2007) (statement of Rep. David G. Reichert, at 3), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35279/pdf/CHRG-110hhrg35279.pdf>.

113 *Joint Inquiry into the Terrorist Attacks of September 11, 2001: Hearing Before the H. Permanent Select Comm. on Intelligence and the S. Select Comm. on Intelligence*, 107th Cong. (2002) (statement of Eleanor Hill, Staff Dir. of Cong. Investigation into 9-11, at 5), available at http://ftp.fas.org/irp/congress/2002_hr/10170hill.pdf.

114 9/11 Commission Report, *supra* note 9, at 276. See also *id.* n.107 ("Had KSM known that Moussaoui had been arrested, he would have cancelled the attacks").

115 See American Civil Liberties Union Spyfiles website, More About Suspicious Activity Reporting (June 29, 2010), <http://www.aclu.org/spy-files/more-about-suspicious-activity-reporting> (last visited June 29, 2011). See also *Protecting Civil Liberties and National Security: Strategies for Terrorism Information Sharing: Hearing Before the S. Judiciary Comm. Subcomm. on Terrorism and Homeland Sec.*, 111th Cong. (2009) (statement of Caroline Fredrickson, Director, Washington Legis. Office, American Civil Liberties Union), available at [http://judiciary.senate.gov/pdf/09-04-21Fredicksontestimony.pdf](http://judiciary.senate.gov/pdf/09-04-21Fredricksontestimony.pdf); BENJAMIN H. FRIEDMAN, JIM HARPER AND CHRIS PREBLE, TERRORIZING OURSELVES: WHY U.S. COUNTERTERRORISM POLICY IS FAILING AND HOW TO FIX IT, (Cato Inst. 2010), available at <http://www.cato.org/store/books/terrorizing-ourselves-why-us-counterterrorism-policy-failing-how-fix-it-hardback>.

ing became an issue, President George W. Bush declared, "Any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed."¹¹⁶ This statement was untrue. In December 2005, the New York Times revealed that shortly after 9/11 President Bush had authorized a warrantless domestic wiretapping program in violation of the Foreign Intelligence Surveillance Act and the Fourth Amendment.¹¹⁷ Citing national security concerns, Bush administration officials pressured the Times' editors to delay publication of the article reporting the existence of this illegal program for over a year, until after the 2004 presidential election.¹¹⁸

- In 2005, when Congress was debating whether to extend expiring provisions of the Patriot Act, Attorney General Alberto Gonzales and FBI Director Robert Mueller testified before key intelligence committees that there had been no "substantiated" allegations of abuse of Patriot Act authorities.¹¹⁹ Congress had no way to verify these claims, as the FBI exercised its Patriot Act powers in complete secrecy, often enforced through unconstitutional gag orders.¹²⁰ In the absence of evidence of abuse, Congress reauthorized the Patriot Act in 2006 but ordered an audit of the FBI's use of National Security Letters. The resulting audits by the Department of Justice Inspector General revealed thousands of violations of law and policy.¹²¹ The audits also revealed that Gonzalez and Mueller were likely aware of at least some of these violations at the time of their testimony.¹²²
- In 2006, an ACLU Freedom of Information Act request exposed inappropriate FBI spying on political activists, including surveillance of a peaceful anti-war protest by the Thomas Merton Center for Peace and Justice in Pittsburgh, Pennsylvania.¹²³ To deflect criticism,

116 President George W. Bush, Buffalo, N.Y., April 24, 2004. Bush continued, "When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."

117 James Risen and Eric Lichtblau, *Bush lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200>.

118 Eric Lichtblau, *The Education of a 9/11 Reporter*, SLATE, Mar. 26, 2008, <http://www.slate.com/id/2187498/pagenum/all/>; see also Tim Grieve, *What the Times knew, and when it knew it*, SALON, Aug. 14, 2006, http://www.salon.com/news/politics/war_room/2006/08/14/times/index.html.

119 USA PATRIOT Act of 2001: Hearing Before the S. Select Comm. on Intelligence, 109th Cong. 97, 100 (2005) (statements of Alberto R. Gonzales, Att'y Gen., Dep't of Justice, and Robert S. Mueller, III, Dir., Fed. Bureau of Investigation).

120 *Doe v. Mukasey*, No. 07-4943-cv (2nd Cir. Dec. 15, 2008).

121 See OFFICE OF INSPECTOR GENERAL, DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

122 The audits revealed that between 2003 and 2005 the FBI had self-reported 19 possible legal violations regarding its use of National Security Letters to the President's Intelligence Oversight Board. The *Washington Post* reported that Attorney General Gonzales received at least six reports detailing FBI intelligence violations, including misuse of NSLs, during the three months prior to his Senate testimony. Yet neither AG Gonzales nor FBI Director Mueller mentioned these violations in their testimony. Though misleading, their testimony was technically accurate because, as they likely knew, President Bush's Intelligence Oversight Board never met to "substantiate" any reported violations until the spring of 2007. See John Solomon, *Gonzales was told of FBI violations*, WASH. POST, Jul. 10, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902065.html>; John Solomon, *In Intelligence World, a Mute Watchdog*, WASH. POST, July 15, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html>.

123 Press Release, American Civil Liberties Union, ACLU Releases First Concrete Evidence of FBI Spying Based Solely on Groups' Anti-War Views (Mar. 14, 2006), available at <http://www.aclu.org/national-security/aclu-releases-first-concrete-evidence-fbi-spying-based-solely-groups%E2%80%99-anti-war-vie>.

FBI officials concocted a false story claiming the surveillance was related to a separate, validly-approved terrorism investigation.¹²⁴ The FBI presented this false story to the public in press releases and to Congress through testimony by FBI Director Robert Mueller. When Senator Patrick Leahy requested documentation supporting the FBI's claims, the first false story fell apart and FBI officials developed a second false story which was sent to Sen. Leahy in statements for the record. When the IG investigated the matter, the FBI refused to provide internal e-mails that may have identified who in the FBI concocted the false stories.¹²⁵

- In December 2007, former CIA agent John Kiriakou told ABC News that CIA interrogators "broke" terror suspect Abu Zubaydah with just 30 to 35 seconds of waterboarding.¹²⁶ Two months later CIA Director Michael Hayden followed up with testimony that the CIA only waterboarded three detainees, and claimed in the media that the three provided reliable information afterward.¹²⁷ Such selectively-leaked information from seemingly reliable sources created the impression that waterboarding, no matter how painful, was narrowly applied, quickly effective, and didn't amount to torture.¹²⁸ Yet, DOJ documents later revealed that Zubaydah was actually waterboarded at least 83 times in August of 2002, while Khalid Sheikh Mohammed was waterboarded 183 times in March of 2003.¹²⁹ The repeated use of the torture techniques strongly suggests waterboarding was not as effective in eliciting reliable information as these "insiders" suggested. As does the subtitle of the CIA's April 2003 analysis of Mohammed's interrogations: "Precious Truths Surrounded by a Bodyguard of Lies."¹³⁰ An FBI agent who interrogated Zubaydah also contradicted the CIA's claims regarding the effectiveness of torture in testimony before Congress.¹³¹ Kiriakou later admitted he had no first-hand knowledge of Zubaydah's interrogation and was misled by other CIA officials.¹³² Secrecy prevented crucial facts from being known during the public debate.
- A classified CIA Inspector General report indicated the CIA lied to Congress and misled

124 See OFFICE OF INSPECTOR GENERAL, DEP'T. OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATION OF CERTAIN DOMESTIC ADVOCACY GROUPS, 35 – 59 (2010), available at <http://www.justice.gov/oig/special/s1009r.pdf>.

125 *Id.* at 53 (footnote 79).

126 Richard Esposito and Brian Ross, *Coming In From the Cold: CIA Spy Calls Waterboarding Necessary But Torture*, ABC News, Dec. 10, 2007, <http://www.abcnews.go.com/Blotter/story?id=3978231>.

127 Richard Esposito and Jason Ryan, *CIA Chief: We Waterboarded*, ABC News, Feb. 5, 2008, <http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1>.

128 See Brian Selter, *How ABC Interview Tilted a Torture Debate*, N.Y. TIMES, Apr. 27, 2009, available at <http://www.nytimes.com/2009/04/28/business/media/28abc.html?hp>.

129 Memorandum from the Office of Legal Counsel, Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, 41 (May 30, 2005), available at http://s3.amazonaws.com/propublica/assets/missing_memos/280LCmemofinalredact30May05.pdf.

130 9/11 Commission Report, *supra* note 9.

131 Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 22, 2009, available at <http://www.nytimes.com/2009/04/23/opinion/23soufan.html>. The title of the CIA's April 2003 analysis of KSM's interrogation, "Khalid Shaykh Mohammed's Threat Reporting—Precious Truths, Surrounded by a Bodyguard of Lies," belies the notion the CIA believed the March waterboarding produced reliable information. 9/11 Commission Report, *supra* note 9, at ch. 7, footnote 4.

132 Jeff Stein, *CIA Man Retracts Claim on Waterboarding*, FOREIGN POLICY, Jan. 26, 2010, http://www.foreignpolicy.com/articles/2010/01/26/cia_man_retracts_claim_on_waterboarding.

Justice Department criminal investigators about a secret drug interdiction operation in Peru in which a small plane was shot down, killing an American Baptist missionary and her 7 month-old child, in what Rep. Pete Hoekstra (R-MI) called “an active cover-up by the [intelligence] community.”¹³³

- In March 2009, as Congress once again addressed expiring provisions of the Patriot Act, Senator Benjamin Cardin (D-MD) asked Director Mueller for the Bureau’s recommendations for reauthorizing these provisions. Regarding the “lone wolf” provision, which allows the FBI to obtain secret Foreign Intelligence Surveillance Act wiretaps against individuals with no ties to foreign powers or international terrorist groups, Mueller testified that while no “lone wolf” had been indicted, “that provision is tremendously helpful.... [It] is a provision that has been, I believe, beneficial and should be reenacted.”¹³⁴ But the Department of Justice later admitted that the FBI has never used the lone wolf provision, making it difficult to imagine how the FBI could have found it “tremendously helpful.”¹³⁵
- A June 26, 2009 letter signed by seven Democratic members of the House Intelligence Committee revealed that CIA Director Leon Panetta admitted to them that the CIA had “concealed significant actions” and “misled” Congress since 2001.¹³⁶ In July 2009 Panetta ended a “very, very serious” covert program the CIA ran since the 9/11 attacks, but withheld from the Congressional Intelligence Committees, reportedly under direct orders from Vice President Richard Cheney.¹³⁷

133 Alex Kingsbury, *Internal Report Says CIA Lied About Plane Shootdown in Peru, GOP Congressman Says*, US NEWS AND WORLD REPORT, Nov. 20, 2008, available at <http://www.usnews.com/news/articles/2008/11/20/internal-report-found-cia-lied-about-plane-shootdown-in-peru-says-gop-congressman>.

134 *Oversight of the Federal Bureau of Investigation, Hearing Before the S. Judiciary Comm.*, 111th Cong. (2009) (testimony of Robert S. Mueller, III, Dir., Fed. Bureau of Investigation).

135 Letter from Ronald Weich, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Patrick Leahy, Chairman, Comm. on the Judiciary (Sept. 14, 2009), available at <http://judiciary.senate.gov/resources/documents/111thCongress/upload/091409WeichToLeahy.pdf>.

136 See Letter from Rep. Anna G. Eschoo, et al, to Hon. Leon E. Panetta (June 26, 2009), available at <http://eshoo.house.gov/images/2009.06.26.panetta.pdf>.

137 See Lawmaker: Panetta Terminated Secret Program, ASSOCIATED PRESS, July 10, 2009, available at http://www.msnbc.msn.com/id/31849628/ns/politics-capitol_hill/; and, Scott Shane, *Cheney is Linked to Concealment of CIA Project*, N.Y. TIMES, July 12, 2009, available at <http://www.nytimes.com/2009/07/12/us/politics/12intel.html?emc=eta1>.

“Government secrecy just about guarantees the absence of an optimal decision on the part of our nation’s leaders, oftentimes with tragic consequences for our nation.”

—J. William Leonard, former Director, Information Security Oversight Office.¹³⁸

5. Secrecy enables and encourages incompetence, waste, fraud and abuse

Without the discipline of public scrutiny, the inevitable result is waste, mismanagement, abuse and illegality. Too often, secrecy is used not to protect national security, but to hide misconduct and to shield government officials and their agencies from embarrassment.¹³⁹ Examples are unfortunately plentiful:

- U.S. prosecutors in San Diego alleged that, shielded by secrecy, Kyle “Dusty” Foggo rose to the third-highest ranking position in the CIA despite a twenty-year history of official misconduct.¹⁴⁰ In 2009 the former CIA Executive Director was convicted in a years-long fraud and bribery scheme involving bottled water contracts for CIA agents in Iraq.
- A 2006 internal review of the secretive National Security Agency (NSA) found that the agency “lacks vision and is unable to set objectives and meet them.” The report described a “culture of distrust” among the staff and called for “fundamental change.”¹⁴¹ Though some of its contents were leaked to the news media, the report has not been publicly released.
- After the *New York Times* exposed the NSA’s warrantless wiretapping scandal in 2005, Congress expanded the government’s authority to eavesdrop on international communications without particularized suspicion. But a 2009 *Times* article revealed the NSA continued to secretly exceed even the expanded limits of the law.¹⁴²
- In 2001, the USA Patriot Act expanded the FBI’s authority to use National Security Letters (NSLs) to secretly demand telephone, credit and financial information from not just

138 Leonard, *supra* note 91.

139 See Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, WASH. POST, Feb. 15, 1989, at A25.

140 Matthew Barakat, *Feds: Misconduct by CIA’s Foggo Spanned Decades*, ASSOCIATED PRESS, Feb. 25, 2009, available at <http://www3.signonsandiego.com/stories/2009/feb/25/cia-bribery-022509/?zIndex=58301>.

141 Siobhan Gorman, *Management Shortcomings Seen at NSA*, BALTIMORE SUN, May 6, 2007, available at <http://www.baltimoresun.com/news/nation-world/bal-nsa050607,0,5202768,full.story>.

142 Eric Lichtblau and James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. TIMES, Apr. 15, 2009, available at <http://www.nytimes.com/2009/04/16/us/16nsa.html>.

suspected terrorists, but anyone the FBI deemed “relevant” to an FBI investigation.¹⁴³ Not surprisingly, through audits ordered by Congress in 2006, the Department of Justice Inspector General discovered widespread mismanagement, misuse and abuse of the new powers.¹⁴⁴ Twenty-two percent of the audited files contained unreported legal violations,¹⁴⁵ and more troubling, FBI supervisors used hundreds of illegal “exigent letters” to obtain telephone records without NSLs by falsely claiming emergencies.¹⁴⁶ Some of these illegal letters targeted American journalists writing about national security issues.¹⁴⁷

- In 2005, the CIA secretly destroyed videotapes depicting the “enhanced” interrogations of detainees in secret CIA prisons, in violation of a court order to preserve records related to an ACLU Freedom of Information Act lawsuit, and requests from Congress.¹⁴⁸
- On September 10, 2001, Defense Secretary Donald Rumsfeld said the Defense Department estimated it could not track \$2.3 trillion in transactions due to an antiquated financial and technological infrastructure.¹⁴⁹
- As of August 2007, there were 73 criminal investigations relating to contracting fraud and abuse in Afghanistan, Iraq and Kuwait, involving \$5 billion in contracts and \$15 million in bribes.¹⁵⁰ By March 2010 there were at least 58 convictions relating to fraud in Iraq reconstruction alone, according to Justice Department records.¹⁵¹
- A November 2007 audit by the Department of Defense Inspector General revealed that the Pentagon could not account for almost \$15 billion in goods and services paid to contractors engaged in Iraq reconstruction efforts.¹⁵² In addition, the audit showed that 12,712 of 13,508 weapons purchased for Iraqi forces—including machine guns and grenade launchers—could not be accounted for. Secrecy enables this waste, fraud and abuse.

143 The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272 (2001). The four NSL authorizing statutes include the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2000), the Right to Financial Privacy Act, 12 U.S.C. § 3401 (2000), the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2000), and the National Security Act of 1947, 50 U.S.C. § 436(a)(1) (2000).

144 OFFICE OF INSPECTOR GENERAL, DEPT OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

145 *Id.* at 84.

146 *Id.*, at 86-99.

147 OFFICE OF INSPECTOR GEN., DEPT OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS, 89 (Jan. 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>.

148 See Press Release, American Civil Liberties Union, Citing Destruction of Torture Tapes, ACLU asks Court to Hold CIA in Contempt (Dec. 12, 2007), available at <http://www.aclu.org/national-security/citing-destruction-torture-tapes-aclu-asks-court-hold-cia-contempt>. See also Eileen Sullivan, *Lawmaker Told CIA Not to Destroy Tapes*, ASSOCIATED PRESS, Jan. 3, 2008, available at http://www.usatoday.com/news/washington/2008-01-02-3648182359_x.htm.

149 Donald H. Rumsfeld, Sec’y of the Dep’t of Def., Remarks at the Pentagon on DOD Acquisition and Logistics Excellence Week Kickoff—Bureaucracy to Battlefield (Sept. 10, 2001), available at <http://www.defense.gov/speeches/speech.aspx?speechid=430>.

150 James Glanz and Eric Schmitt, *Iraq Weapons Are a Focus of Criminal Investigations*, N.Y. TIMES, Aug. 28, 2007, available at <http://www.nytimes.com/2007/08/28/world/middleeast/28military.html>.

151 James Glanz, *New Fraud Cases Point to Lapses in Iraq Projects*, N.Y. TIMES, Mar. 13, 2010, available at <http://www.nytimes.com/2010/03/14/world/middleeast/14reconstruct.html>.

152 Dana Hedgpeth, *Spending on Iraq Poorly Tracked*, WASH. POST, May 23, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/22/AR2008052203751.html>.

Despite our best intentions, the system is sufficiently dysfunctional that intelligence failure is guaranteed. Though the form is less important than the fact, the variations are endless. Failure may be of the traditional variety: we fail to predict the fall of a friendly government; we do not provide sufficient warning of a surprise attack against one of our allies or interests; we are completely surprised by a state-sponsored terrorist attack; or we fail to detect an unexpected country acquiring a weapon of mass destruction.

—Russ Travers, Deputy Director, National Counterterrorism Center, writing in 1997.¹⁵³

6. Secrecy Puts the Government Behind the Times in the Era of Open Information

Our current secrecy regime was built during the Cold War, to solve a vastly different problem in a very different world. Today, we are living in an era of open information, and advances in information technology have substantially shifted the costs and benefits of government secrecy—diminishing any advantage it once may have provided.

- **Secret techniques are less necessary and less effective.** Ultimately the purpose of our intelligence agencies is to provide policymakers with the information they need to make good decisions. When President Truman created the CIA, all he really wanted was an international news “clipping service” that would tell him what he needed to know about the events of the day.¹⁵⁴ Today, no secret intelligence techniques or covert actions are required to obtain detailed information from multiple sources around the world. Anyone with access to the Internet, e-mail, blogs and Twitter can now closely follow unfolding political and social events happening around the world—such as political protests in Tehran,¹⁵⁵ demonstrations in the former Soviet republic of Moldova,¹⁵⁶ or the Chinese government’s latest attempts to censor critics.¹⁵⁷ Yet, Senator Dianne Feinstein (D-CA) alleged the CIA ignored open-source information in failing to properly warn policy-makers about the seriousness of the uprising in Egypt, which had been organized primarily on public websites:

153 Russ Travers, *The Coming Intelligence Failure: A Blueprint for Survival*, CENT. INTELLIGENCE AGENCY STUDIES IN INTELLIGENCE, Vol. 40, No. 5, SEMIANNUAL EDITION No. 1, 35 (1997), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA527323>.

154 TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 3 (Doubleday 2007).

155 See, e.g., Brad Stone and Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, June 15, 2009, available at <http://www.nytimes.com/2009/06/16/world/middleeast/16media.htm>.

156 See, e.g., Ellen Barry, *Protests in Moldova Explode, With Help of Twitter*, N.Y. TIMES, Apr. 7, 2009, available at <http://www.nytimes.com/2009/04/08/world/europe/08moldova.html>.

157 See, e.g., Lucy Hornby, *China blocks Twitter service ahead of anniversary*, REUTERS NEWS, June 2, 2009, available at <http://www.reuters.com/article/technologyNews/idUSTRE5512HT20090602> (citing Internet reports of China-based Internet users).

"I would call it a big intelligence wake-up ... Open source material has to become much more significant in the analysis of intelligence..."¹⁵⁸

- **Secret techniques are harder to keep secret.** Because of advances in technology, covert operations have become much harder to keep covert, reducing their effectiveness. Hobbyist "plane spotters" exposed extraordinary rendition flights by tracing the routes of CIA-chartered planes on the Internet.¹⁵⁹ Italian prosecutors used cell phone and credit card records to identify CIA operatives involved in the kidnapping of a Muslim cleric.¹⁶⁰ News and photographs of civilian casualties from U.S. operations in remote areas have quickly flashed around the world—and are often used as propaganda to fuel anti-American sentiment. In a time where the transfer of information is instant and irreversible, a secrecy regime based on a Cold War model for document security provides only a false sense of security that burdens our national security workforce with high costs and inefficiencies, yet too often fails to protect legitimate secrets from our enemies.¹⁶¹
- **Secrets hold their value for a shorter time.** When information about our world and what is going on within it is much more widely available, the temporary advantage that sometimes accrues to exclusive possession of information—whether technical data, economic forecasts, or political situations—inevitably shrinks. A 1970 Defense Department study found that classified scientific and technological information could only be expected to be kept secret for a few years—with one year being the most "reasonable" assumption.¹⁶² The report concluded that "more might be gained than lost if our nation were to adopt... a policy of complete openness in all areas of information." Technology advancements since 1970 only make these conclusions more valid and the advantages provided by secrecy more fleeting than ever.
- **The advantages of openness are greater.** In 2006, 9/11 Commission Vice-Chairman Lee Hamilton pointed out that when information is not made public, "constructive input—from the media, academia, and citizens—is less probable." Every year, this statement becomes more true with the continued emergence of the blogosphere—a vast community of attentive experts in almost every area of human knowledge sitting between paid professionals and the general public. In field after field, online communities have emerged as powerful fonts of "crowdsourced" intelligence, wisdom and expertise. The ability of such online

158 M. Alex Johnson, *Feinstein: We Got No Warning*, MSNBC BLOG, Feb. 8, 2011, http://worldblog.msnbc.msn.com/_news/2011/02/08/6011954-feinstein-we-got-no-warning. See also Greg Miller, *Senators Question Intelligence Agencies' Anticipation of Egypt Uprising*, WASH. POST, Feb. 4, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/03/AR2011020307014.html>.

159 Gerard Seenan and Giles Tremlett, *How planespotters turned into the scourge of the CIA*, GUARDIAN, Dec. 10, 2005, available at <http://www.guardian.co.uk/uk/2005/dec/10/usa.terrorism1>.

160 Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES, Nov. 4, 2009, available at <http://www.nytimes.com/2009/11/05/world/europe/05italy.html>.

161 See, e.g., *Navy Releases New Information on Presidential Security Leak*, WPXI.com, Feb. 28, 2009, available at: <http://www.wpxi.com/news/18818589/detail.html>.

162 Memorandum from the Office of the Dir. of Def. Research and Eng'g to the Sec'y of Def. on the Report of the Defense Science Board task Force on Secrecy ("Seitz Task Force") (July, 1970), available at <http://www.fas.org/sgp/othergov/dsbrep.html>.

communities to dissect, correct, augment and generally improve government information is greater than ever before. But of course, the nation only benefits if government information is released to the public.¹⁶³

Our government is perpetuating a Cold War secrecy regime that was widely recognized as deficient even then. The world around us has changed in ways that only increase the necessity for a radical reevaluation of our classification system, and not just piecemeal reforms.

The “Wikileaks” phenomenon, in which vast amounts of classified information can be anonymously leaked and almost immediately posted on the internet, highlights the ways in which our changing world has left the 1950s secrecy regime that our government perpetuates behind.¹⁶⁴ Today, a single cleared individual can now access a huge volume of secret documents, download them onto a small and easily transportable memory medium like a memory stick, and zap them around the world over the Internet—even as the amount of material labeled secret grows, and the number of people with security clearances reaches into the millions. That means that if the government is going to keep all that information bottled up, it is going to have to impose draconian security measures that put it increasingly at odds with the rest of modern society. The Pentagon’s predictable reaction to the leak has already been to impose a new regime of rules around the access to information and memory devices by those who access classified information around the world.¹⁶⁵ But in a world where many gigabytes of information can be stored on a memory stick smaller than a person’s thumbnail, our government needs more than ever to return to a narrow and well-defined vision of just what can and should be kept secret from the American people.

163 Lee H. Hamilton, *When Stamping Secret Goes Too Far*, THE CHRISTIAN SCI. MONITOR, Feb. 22, 2006, available at <http://www.csmonitor.com/2006/0222/p09s01-coop.html>.

164 Wikileaks is not the only website where leaked information is published. For example, Cryptome.org existed long before Wikileaks, and PublicIntelligence.net started shortly after Wikileaks did. In addition there are a multitude of internet journalism sites and weblogs, such as the Federation of American Scientists’ Secrecy News, as well as traditional media outlets that often reveal classified information.

165 Noah Shachtman, *Military Bans Disks, threatens Courts-Martial to Stop New Leaks*, WIRED, Dec. 9, 2010; available at <http://www.wired.com/dangerroom/2010/12/military-bans-disks-threatens-courts-martials-to-stop-new-leaks/>. On the misguidedness of the Pentagon’s stance toward information leaks, see Raffi Khatchadourian, *Chasing Wikileaks*, THE NEW YORKER, Aug. 5, 2010; available at <http://www.newyorker.com/online/blogs/newsdesk/2010/08/chasing-wikileaks.html>.

“...my experience has been... that there is a great deal of overclassification. Some of it, I think, is done for the wrong reasons, to try to hide things from the light of day. Some of it is because in our system there is no incentive not to do that. And there are plenty of penalties to do the reverse in case you get something wrong and don’t classify it. So I think we need to do fundamental work on the system.”

—Dennis Blair, Director of National Intelligence.¹⁶⁶

IV. CONGRESS HAS THE POWER TO CONQUER THE SECRECY REGIME

Congress must take the lead in challenging the laws and practices that have allowed excessive secrecy to become the dominant feature of our national security culture. We cannot expect the officials and agencies that benefit from lack of accountability to reform themselves. Confronting the secrecy regime will not be easy—but Congress has significant powers under the Constitution to accomplish this critical mission.

1. Congress Has Ample Constitutional Authority to Regulate the U.S. Military and other National Security Activities

The idea that the president has greater authority than Congress during a time of war or national emergency is inconsistent with history and unsupported by the law. At the time the Constitution was written, nearly all existing governments vested war powers exclusively with the executive. But our founding fathers rejected this model because they distrusted the ability of the executive to keep the interests of the people paramount or to restrain itself from military adventurism.¹⁶⁷ In Federalist No. 4 John Jay observed that,

...absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize

¹⁶⁶ Nomination of Admiral Dennis Blair to be Director of National Intelligence: Hearing Before the S. Select Comm. on Intelligence, 111th Cong. (2009), available at <http://intelligence.senate.gov/hearings.cfm?hearingId=3633> (emphasis added).

¹⁶⁷ See *Exercising Congress’s Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [statement of Louis Fisher], available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da11f02f2-1-4](http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da11f02f2&wit_id=e655f9e2809e5476862f735da11f02f2-1-4).

or support their particular families or partisans.¹⁶⁸

The framers sought to constrain the executive's natural inclination toward military conquest by giving ultimate control over decisions regarding war and peace to Congress, the direct representatives of the people.

2. The Constitution Gives Congress Superior Powers with Regard to National Security

Article I, Section 8, Clause 11 of the Constitution gives Congress alone the power to declare war.¹⁶⁹ But this isn't the only national security power given exclusively to Congress in the Constitution. Other relevant constitutional authorities include:¹⁷⁰

- "Power To lay and collect Taxes. . . and provide for the common Defence"
- The power to "grant Letters of Marque and Reprisal." This is the historical equivalent of the power to authorize military action short of war, or "low intensity conflict."¹⁷¹
- The power to "make Rules concerning Captures on Land and Water"
- The power to "raise and support Armies"
- The power to "provide and maintain a Navy"
- The power to "make Rules for the Government and Regulation of the Land and naval Forces"
- The power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"
- The power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States... and the Authority of training the Militia according to the discipline prescribed by Congress."
- In addition, the Framers gave Congress the power to "make all Laws which shall be necessary and proper for carrying [these powers] into Execution..."

But Congress's most decisive power over executive national security operations lies in Article I, section 9, clause 7: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." This "power of the purse" gives Congress the ultimate authority to authorize, restrict or prohibit the executive's ability to conduct military or intelligence operations. Indeed, Congress has exercised this power in the national security realm repeatedly—for example to reduce military force levels in Vietnam,¹⁷² to prohibit military assistance in Angola,¹⁷³ to end

168 THE FEDERALIST No. 4, para. 3 (John Jay).

169 The framers deliberately chose the phrase "to declare war" rather than "to make war" not to limit the powers of Congress, but simply to reserve for the Executive a defensive ability to repel sudden attacks. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (Rev. ed. 1937).

170 U.S. CONSTITUTION, art. I, § 8.

171 Charles Lofgren, *War-making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699–700 (1972).

172 Second Supplemental Appropriations Act for Fiscal Year 1973, P.L. 93-50, § 307 (1973); Continuing Appropriations Resolution for Fiscal Year 1974, P.L. 93-52, § 108 (1973); and Foreign Assistance Act of 1974, P.L. 93-559 § 38(f)(1) (1974).

173 Int'l Sec. Assistance and Arms Export Control Act of 1976, P.L. 94-329, § 404 (1976); and Foreign Assistance and Related Programs Appropriations Act of Fiscal Year 1976, P.L. 94-330 § 109 (1976).

U.S. support for Contra rebels in Nicaragua,¹⁷⁴ and to effectively end U.S. military operations in Somalia.¹⁷⁵

These exclusive powers give Congress a pre-eminent role in matters of national security, and the courts have consistently supported Congress's authority to limit and regulate the scope of a president's military and intelligence operations. Indeed, Chief Justice John Marshall plainly declared, "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry."¹⁷⁶ As a federal district court in Virginia explained in a Vietnam-era war-powers case:

It would be shortsighted to view Art. I, section 8, cl. 11 [i.e., the power to declare war] as the only limitation upon the Executive's military powers... it is evident that the Founding Fathers envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof.¹⁷⁷

And the Supreme Court has interpreted section 8 as bestowing upon Congress the power not only to declare war, but also to authorize the use of military forces in circumstances that fall short of war.¹⁷⁸

3. The Constitution Gives Congress Ample Tools to Investigate and Regulate Executive Branch Activities

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.¹⁷⁹ The Congressional Research Service's "Congressional Oversight Manual" lists six constitutional provisions authorizing Congress to investigate, organize, and manage executive branch activities.¹⁸⁰ Congress codified its right to obtain national security information, including classified information, through the Intelligence Oversight Act of 1980 (amending the National Security Act of 1947),¹⁸¹ and the Intelligence Community Whistleblower Protection Act of 1998.¹⁸² In addition, the Supreme Court has interpreted the constitutional grant of legislative power as giving Congress "broad" authority to

174 The Boland Amendment, PL 98-215 (1982).

175 Dep't of Def. Appropriations Act for Fiscal Year 1994, P.L. 103-335 § 8135 (1994).

176 Talbot v. Seeman, 5 U.S. 1, 28 (1801).

177 Davi v. Laird, 318 F. Supp. 478, 480 (W.D. Va. 1970).

178 Bas v. Tingy, 4 U.S. 37 (1800).

179 THE FEDERALIST No. 51, (James Madison). "In a republican government, the legislative authority necessarily predominates."

180 Frederick M. Kaiser, Walter J. Oleszek, T.J. Halstead, Morton Rosenberg, and Todd B. Tatelman, *Congressional Oversight Manual*, CONG. RESEARCH SERV., at 5 (May 1, 2007), available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>. Two non-government organizations dedicated to constitutional principles and effective government, the Constitution Project and the Project on Government Oversight, have produced detailed manuals on the authorities and mechanics of congressional oversight investigations. They may be found here: <http://www.constitutionproject.org/newsdetail.asp?id=397>.

181 See Pub. L. 96-450 (1981); Pub. L. No. 235, 80th Cong., 61 Stat. 496, 50 U.S.C. ch.15, (1947).

182 Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No: 105-272, Title VII (1998).

investigate—both to ensure that the laws it passes are effective, and to gather evidence to inform future legislation.¹⁸³

Congress is armed with many tools to compel compliance with its investigations, including the power of the purse, the confirmation power, and the impeachment power. Congress can use these powers to effectively leverage cooperation from the executive branch, but Congress can also directly compel compliance with congressional inquiries when necessary through its inherent power to hold uncooperative witnesses in contempt. “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,” the Supreme Court ruled in 1927, noting that the power to compel is necessary because “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.”¹⁸⁴

The framers of the Constitution intentionally gave Congress robust national security powers so that the legislature, as the direct representatives of the people and the more deliberative branch of government, would have firm control over the country’s most critical decisions regarding war and peace.

183 Watkins v. U.S., 354 U.S. 178, 187 (1957). “The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”

184 McGrain v. Daugherty, 273 U.S. 135, 174-175 (1927).

V. OBSTACLES TO EFFECTIVE CONGRESSIONAL OVERSIGHT

Much of the secrecy problem stems from a false perception that the executive branch has the authority to withhold national security information from Congress. For too long Congress has allowed this falsehood to take root through its own actions and inaction:

- **Limiting notification of “covert actions” to the “Gang of Eight.”** The National Security Act of 1947 imposes a statutory mandate on the president to ensure the congressional intelligence committees are kept “fully and currently informed” of U.S. intelligence activities (including any significant anticipated intelligence activity), but it limits congressional notification regarding “sensitive covert actions” to the “Gang of Eight”—the leaders of both houses and both parties and the chairmen and ranking members of the intelligence committees.¹⁸⁵ Congress is certainly within its rights to choose how it organizes its resources and how it regulates its members’ access to sensitive information. But giving the executive the discretion to limit congressional notification (particularly where the definitions of what constitutes “intelligence activities” versus “sensitive covert actions” are open to interpretation) invites abuse. Indeed the Bush administration waited years before notifying Congress about the NSA warrantless wiretapping program, and then notified only the Gang of Eight, despite the fact that the intelligence collection that characterized the program fit squarely within the statutory definition of “intelligence activities” which are required to be reported to the full intelligence committees.¹⁸⁶
- **Failing to share information within Congress.** The executive does *not* have the authority to tell members of the Intelligence Committees or the Gang of Eight they cannot share what they learn in these briefings with other members of Congress.¹⁸⁷ Gang of Eight members retain the authority to determine when and how to inform the other intelligence committee members what they learned in the secret briefings, and only the House and Senate’s own internal rules dictate how non-Intelligence Committee members can receive classified information from the Intelligence Committees. Yet uncertainty regarding when, how and with whom highly classified information may be shared often puts members in a legally and politically precarious position. When members of the Intelligence Committees and the Gang of Eight fail to exercise their authority to share information with other members of Congress (and ultimately with the public they serve), they cede power to the executive and abandon their responsibilities to check executive branch activities and defend the functioning of representative democracy.

¹⁸⁵ 50 U.S.C. § 413b(c)(2) (2004). See also Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of Intelligence Activities, including Covert Action*, CONG. RESEARCH SERV. (Jan. 18, 2006), available at <http://epic.org/privacy/terrorism/fisa/crs11806.pdf>.

¹⁸⁶ See Cumming, *supra* note 183.

¹⁸⁷ Alfred Cumming, *Sensitive Covert Action Notifications: Options for Congress*, CONG. RESEARCH SERV., (Jul. 30, 2009), available at <http://www.fas.org/sgp/crs/intel/R40691.pdf>.

- **Failing to exercise Congressional authorities to their fullest.** All members of Congress, by virtue of their election, have the right to access information necessary to accomplish their constitutional duties, including classified information.¹⁸⁸ The Intelligence Committees are not the exclusive means by which the executive branch must keep the Congress informed of national security and intelligence matters.¹⁸⁹ When Congress created the Intelligence Committees it drafted rules ensuring the other committees of Congress retained their powers to review intelligence activities and obtain “full and prompt access” to intelligence-related matters under their jurisdiction.¹⁹⁰ Even where a member may not be on a committee of jurisdiction, he or she may have a constituent who is harmed by a classified government program, and therefore require access in order to address the constituent’s needs. Congress can and should remedy this situation by rejecting executive branch attempts to limit access to intelligence information to the Intelligence Committees. Congress should also clarify and streamline the procedures by which Congress both protects national security information and ensures that all members of Congress and their staffs have adequate and timely access to information they need to perform their oversight, legislative and constituent service functions to enable more thorough, balanced and open oversight of intelligence activities.¹⁹¹
- **Failing to use inherent contempt powers.** The Supreme Court has recognized that Congress’s power to punish a refusal to respond to congressional demands for information is inherent to its legislative authorities granted in the Constitution.¹⁹² Yet Congress has not used this inherent contempt power since 1935, and has instead relied on the criminal contempt statute to prosecute contempt of Congress claims.¹⁹³ While we respect Congress’s self-restraint in exercising its power to deny people their personal liberty, the failure to compel compliance with congressional subpoenas when necessary has allowed recalcitrant executive branch officials to thwart congressional oversight by using unjustifiable delaying tactics, incomplete compliance, and outright refusal to cooperate based on specious claims of privilege and litigation.¹⁹⁴ The need to utilize the inherent contempt power was recently made more compelling when Attorney General Michael Mukasey refused to bring a contempt citation issued by the U.S. House of Representatives under the criminal

¹⁸⁸ Fredrick M. Kaiser, *Protection of Classified Information by Congress: Practices and Proposals*, CONG. RESEARCH SERV., at 4-6 (Jan. 10, 2010), available at <http://www.fas.org/sgp/crs/secrecy/RS20748.pdf>.

¹⁸⁹ Morton Rosenberg, *When Congress Comes Calling: A primer on the Principles, Practices and Pragmatics of Legislative Inquiry*, THE CONSTITUTION PROJECT, at 31-33 (2009), <http://www.constitutionproject.org/manage/file/175.pdf>.

¹⁹⁰ See House Rule X(11)(b)(3)(4); Senate Standing Order 79.13, §3(c) and (d).

¹⁹¹ See Frederick M. Kaiser, *Protection of Classified Information by Congress: Practices and Proposals*, CONG. RESEARCH SERV., Jan. 27, 2010, available at <http://www.fas.org/sgp/crs/secrecy/RS20748.pdf>.

¹⁹² *McGrain v. Daugherty*, 273 U.S. 135, (1927).

¹⁹³ 2 U.S.C. § 192, 194 (2000).

¹⁹⁴ See Morton Rosenberg and Todd B. Tatelman, *Congress’s Contempt Power: Law, History, Practice and Procedure*, CONG. RESEARCH SERV., updated Apr. 15, 2008, available at <http://www.fas.org/sgp/crs/misc/RL34097.pdf>.

contempt statute to a grand jury for indictment.¹⁹⁵ While the matter was ultimately resolved politically, the incident reflected a worrisome willingness by an Attorney General to ignore the requirements of the statute.¹⁹⁶ Once the threat of inherent contempt proceedings becomes real, Congress will likely find future presidents and executive officials more responsive to congressional requests for information.

- **Failing to use its own declassification authority.** Congress has the power under its own rules to declassify national security information, but it has never exercised this authority.¹⁹⁷
- **Failing to encourage responsible national security whistleblowers.** Efforts by Congress to protect responsible whistleblowers, beginning with the Civil Service Reform Act in 1978 and followed by the landmark Whistleblower Protection Act (WPA) in 1989, have been steadily undermined by an ineffective Merit Systems Protection Board and hostile decisions of the United States Court of Appeals for the Federal Circuit, which has a monopoly on federal whistleblower appeals.¹⁹⁸ Moreover, Congress exempted employees from the FBI, CIA, NSA and other intelligence agencies from protection under the WPA.¹⁹⁹ Intelligence community employees and contractors are the people the government trusts with our most critical national security missions and secrets, and they know how to appropriately handle this information when reporting waste, fraud, abuse and illegality within government agencies, to Inspectors General, to Congress and the courts. Yet they have the least protection when they do. Congress cannot perform effective oversight of the intelligence community unless informed federal employees and contractors are willing to tell

195 See Dan Eggen, *Mukasey Refuses to Prosecute Bush Aides*, WASH. POST, Mar. 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022903349.html>. The United States House of Representatives voted to approve statutory contempt citations (2 U.S.C. §192-194) against White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers for refusing to comply with congressional subpoenas regarding the firing of several United States attorneys (see H. Res. 982, 110th Cong., as passed by the House of Representatives Feb. 14, 2008. Recorded vote for H. Res. 982 is available at <http://clerk.house.gov/evs/2008/roll060.xml>). Attorney General Michael Mukasey refused to enforce the contempt citation so the House Judiciary Committee sued to compel compliance with the subpoenas. See *Committee on the Judiciary v Miers*, 558 F Supp 2d 53, 55-56 (DC 2008) (holding that the House Judiciary Committee can bring an action in a district court to compel an executive official to testify before the committee).

196 See Letter from Caroline Fredrickson, Dir., Wash. Legislative Office, American Civil Liberties Union, to Jeffrey A. Taylor, U.S. Att'y for the Dist. of Columbia (Feb. 19, 2008), available at http://www.aclu.org/files/images/general/asset_upload_file544_34154.pdf.

197 See Project on Government Oversight, Congressional Tip Sheet on Access to Classified Information (Oct. 2007), <http://pogoarchives.org/m/cots/cots-october2007a.pdf> (last visited June 30, 2011). "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."

198 See Protecting the Public from Waste, Fraud and Abuse: H.R. 1507, *The Whistleblower Protection Enhancement Act of 2009: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009) (statement of Michael German, Policy Counsel, American Civil Liberties Union), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/20090514German.pdf>.

199 See 5 U.S.C. § 2302(a)(2)(C)(ii) (1989), which states that a "covered agency" under the Act does not include, "the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." Congress ordered the FBI to establish regulations "consistent with the Whistleblower Protection Act," 5 U.S.C. §2303. For Regulations for Whistleblower Protection for FBI Employees, see 28 C.F.R §27 (1999), available at <http://www.fas.org/sgp/news/1999/11/fbiwhist.html>.

the truth about what is happening within these agencies. We can't expect them to come forward if it will cost them their jobs or result in prosecution. Studies show that insiders are often in the best position to identify problems early, but too often insiders don't report, at least in part out of fear of retaliation.²⁰⁰ Congress must create effective mechanisms for national security whistleblowers to report waste, fraud and misconduct without fear of persecution, and to protect them with independent due process rights when they do. When Congress fails to protect internal disclosures to appropriate government officials and overseers, anonymous leaking to the media becomes the safest route for whistleblowers to expose waste, fraud and abuse. Protecting these whistleblowers protects security.

James Madison argued that the balance of powers between the branches of government could only be maintained by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."²⁰¹ The Constitution provides ample tools for Congress and the courts to check executive abuses of authority. Their failure to effectively use these tools leaves these branches of government with much of the blame for the misguided national security policies the executive pursues in secret.

The Intelligence Authorization Act of 2010: Important Steps Toward Reform

After revelations that the intelligence community had failed to notify or actively misled Congress about U.S. intelligence activities, the 111th Congress fought to reform congressional notification procedures and defend its right to examine classified programs.²⁰² In 2009, the House Intelligence Committee approved a version of the bill containing provisions which would have eliminated the "Gang of Eight" procedures and instead forced the president to inform all members of the intelligence committees about sensitive covert actions.²⁰³ The Obama administration quickly issued a veto threat regarding this provision.²⁰⁴

Both the House and Senate agreed on modified language which would have expanded the president's Gang of Eight reporting requirements to include an explanation of the legal basis supporting the covert activity, and would have required the president to inform all intelligence committee members about the "general features" of the activity that was briefed to the Gang of Eight. These provisions drew a new veto threat.²⁰⁵ This second statement from the President also included a

200 A 2009 Department of Justice Inspector General survey found that 42 percent of FBI agents don't report all of the misconduct they see on the job, and 18 percent never report any. See OFFICE OF INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S DISCIPLINARY SYSTEM (May 2009), <http://www.justice.gov/oig/reports/FBI/e0902/final.pdf>.

201 THE FEDERALIST No. 51 (James Madison).

202 Allen, *supra* note 99.

203 See Alfred Cumming, *Sensitive Covert Action Notifications: Oversight Options for Congress*, CONG. RESEARCH SERV., at 10, Jul. 30, 2009, available at http://www.voltairenet.org/IMG/pdf/Sensitive_Covert_Action_Notifications.pdf.

204 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMIN POLICY, H.R. 2701 – INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010 (July 8, 2009), available at <http://static1.firedoglake.com/28/files//2009/07/sap-on-2701.pdf>.

205 Letter from Peter Orszag, Dir., Office of Mgmt. & Budget, to Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence (Mar. 15, 2010), available at <http://www.fas.org/irp/news/2010/03/omb031610.pdf>.

threat to veto the bills over provisions that would have clarified the authority of the U.S. Government Accountability Office (GAO) to audit intelligence programs. The GAO is the audit, evaluation, and investigative arm of Congress. It is the GAO's responsibility to investigate programs and activities of the U.S. government and make recommendations to Congress and the president regarding how these programs may be performed more efficiently. The GAO has broad statutory authority that encompasses "all matters" of federal government.²⁰⁶ Despite this broad mandate, for decades the FBI and the intelligence agencies have strongly and often successfully resisted GAO efforts to investigate and audit counterterrorism and intelligence activities.²⁰⁷

Congress fought to retain these provisions in spite of the veto threat and ultimately passed a modified version of the bill, which President Obama signed.²⁰⁸ The modified Gang of Eight provision gives the president 180 days to give all the members of the intelligence committees a general description of covert activities that are briefed to the Gang of Eight, including a description of the reason for the more limited notification.²⁰⁹ The president can extend the 180-day period in extraordinary circumstances, which must also be explained in writing.

The GAO provision was modified to require the DNI to issue a directive on GAO access to intelligence community information and provide it to Congress. An early draft of the directive was heavily criticized for giving the DNI too much discretion to decide whether to comply with GAO requests,²¹⁰ but the final directive published in May 2011 established a policy that the intelligence community will cooperate with GAO "to the fullest extent possible."²¹¹ The Comptroller General welcomed the DNI's directive as "a starting point" in improving GAO's access, but expressed concern about provisions that continue to limit GAO authority to audit "core national intelligence capabilities" and direct agencies not to provide GAO with "information on intelligence sources and methods."²¹² The intelligence community has too often interpreted such vague language over-broadly to limit oversight of and access to intelligence activities.

These provisions are modest but important steps toward reforming congressional oversight of

206 31 U.S.C. § 712, 716, and 717 (2010). See also Letter from Gene L. Dodaro, Acting Comptroller Gen., to Sen. Dianne Feinstein, et al (Mar. 18, 2010), available at <http://www.pogoarchives.org/m/co/dodaro-letter-to-intel-committees-20100318.pdf>.

207 See *Is the CIA's Refusal to Cooperate with Congressional Inquiries a Threat to Effective Oversight of the Operations of the Federal Government?* Hearing Before the H. Comm. on Gov't Reform, Subcomm. on Gov't Efficiency, Financial Mgmt. and Intergovernmental Relations, and Subcomm. on Nat'l Sec., Veterans Affairs and Int'l Relations, 107th Cong. (2001) (statement of Henry L. Hinton, Jr., Managing Dir. of Def. Capabilities and Mgmt., Gen. Accounting Office), available at <http://www.gao.gov/new.items/d01975t.pdf>; and Letter from Gene L. Dodaro, Acting Comptroller General, to Sens. Charles E. Grassley and Richard C. Shelby (June 15, 2010), available at <http://www.fas.org/sgp/gao/access.pdf>.

208 The Intelligence Authorization Act for Fiscal Year 2010, P.L. No. 111-259, 124 Stat. 2654 (2010).

209 Jeff Stein, *White House Agrees to Share Information About Covert Operations Information with More Members of Congress*, WASH. POST, Sept. 27, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706195.html?wpss=rss_world.

210 Steven Aftergood, *DNI Drags Heels on GAO Access to Intelligence*, SECRECY NEWS, Mar. 30, 2011, http://www.fas.org/blog/secrecy/2011/03/dni_gao_access.html.

211 OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 114, COMPTROLLER GENERAL ACCESS TO INTELLIGENCE INFORMATION (Apr. 29, 2011), available at <http://www.fas.org/irp/dni/icd/icd-114.pdf>.

212 Letter from Gene L. Dodaro, Comptroller Gen., to James R. Clapper, Jr., Dir. of Nat'l Intelligence (Apr. 28, 2011), available at <http://www.fas.org/irp/gao/cg042811.pdf>.

intelligence activities. Perhaps more significant than the substance of these reforms is the fact that Congress used many of the powerful tools at its disposal to pass this legislation in the face of stiff resistance from the executive branch, demonstrating that when Congress has the will to use it, it has all the authority it needs to overcome executive branch secrecy demands and perform its constitutional responsibilities to oversee and regulate national security programs.

But much more needs to be done.

VI. RECOMMENDATIONS FOR ACTION BY CONGRESS

Excessive secrecy is the most significant menace to accountability in government today, and Congress, the courts and the president must work together to address this problem in all its forms. A program to restore constitutional checks and balances must ensure the three branches of government are accountable to one another, and to the American public they serve.

Where President Obama has taken positive steps to reform executive branch practices through executive orders and presidential memoranda, Congress has the responsibility to cement such policies in statute so they cannot simply be reversed at the stroke of a pen by future presidents. And where such executive reforms fall short, Congress must impose effective reforms and compel compliance.

The heaviest burden falls on Congress, which is best positioned to take the drastic measures needed to cure the illness of out-of-control secrecy. Congress has the power and duty to act. It must empower the courts, sharpen its own oversight authorities, and limit the executive branch's authority to classify information.

1. State Secrets Privilege Reform

Unfortunately, as described above, the Obama administration has endorsed the Bush administration's expansive interpretation of the state secrets privilege as an alternative form of government immunity, and its 2009 guidelines offered only procedural reforms as an antidote to abuse.²¹³

It is up to Congress to mandate real reform. Congress must pass legislation to ensure private lawsuits challenging illegal and unconstitutional government practices can proceed in a manner that allows injured plaintiffs their day in court, while still protecting legitimate government secrets.

Specifically, Congress must:

- Restore the state secrets privilege to its common law origin as an evidentiary privilege, by prohibiting the dismissal of cases prior to discovery.
- Ensure independent judicial review of government state secrets claims by requiring courts to examine the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information would reasonably pose a significant risk to national security.
- In cases where evidence must be protected from disclosure for national security reasons,

²¹³ See Press Release, American Civil Liberties Union, Proposed State Secrets Guidelines Don't Relieve Need for Real Reform (Sept. 23, 2009), available at <http://www.aclu.org/national-security/proposed-state-secrets-guidelines-dont-relieve-need-real-reform>.

Congress should require courts to compel the government to produce non-privileged substitutes for privileged evidence and, if the government refuses to produce substitutes, allow the court to resolve the issue in favor of the non-government party. Such procedures would ensure the litigation can proceed to a just result unless the court determines the government is unable to present specific privileged evidence that establishes a valid defense.

Courts have long experience responsibly handling national security information in criminal cases involving terrorism and espionage, and there is no reason to suggest courts will not be just as reasonable in fulfilling their obligations in civil cases. These reforms would re-arm the courts as an effective check on executive power and provide a forum for holding the government accountable for abusive national security programs that cause real harm to innocent people.

2. Strengthen Congressional Oversight of National Security Programs and Policies

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, select committees established for specific purposes, or both.²¹⁴ It is critically important for Congress to do this work itself rather than to appoint an outside commission. Only by routinely exercising its investigative and oversight authorities—especially the power to compel timely production of documents and witnesses from the executive branch—will Congress be empowered to fulfill its role as an effective check against abuse of national security programs.

In addition to exercising its current powers under the Constitution more fully, Congress should enact legislation to sharpen and improve its oversight tools:

- **Reform Congressional Notification.** Congress can improve its regular oversight of intelligence activities by eliminating, or at least more significantly reforming, the “Gang of Eight” notification process. The 111th Congress began this process by passing the Intelligence Authorization Act of 2010, but the reforms were scaled back from earlier proposals in the face of a veto threat. Congress should continue to press for more significant reform, or elimination of the “Gang of Eight” procedures. In the meantime, Gang of Eight members should ensure other members of the Intelligence Committees, as well as other committees of jurisdiction, have timely knowledge of and access to intelligence information to the greatest extent possible so they can fulfill their oversight responsibilities.
- **Flex its muscle.** Congress should fully exercise its myriad powers under the Constitution

²¹⁴ In 2009 Reps. Barbara Lee (D-CA), John Conyers (D-MI), and Robert Wexler (D-FL) introduced H.Res. 383, Establishing a Select Committee to Review National Security Laws, Policies and Practices. Conyers also introduced H.R. 104, To Establish a National Commission on Presidential War Powers and Civil Liberties.

to ensure it can effectively oversee all national security programs and evaluate their effectiveness, efficiency and compliance with the law. The Intelligence Committees should hold open hearings to the greatest extent possible, and more fully describe closed hearings so that other members of Congress and the public at large can more fully evaluate their effectiveness. Other congressional committees should vigorously defend their right to obtain access to national security information within their areas of jurisdiction. Congress should demand timely and complete responses to requests for information or testimony from the military, law enforcement and intelligence communities, and punish officials who refuse to comply or provide false or misleading information to the fullest extent of the law. Congress should also use its power of the purse to de-fund illegal, wasteful or abusive programs, *or any program the President refuses to let Congress examine.*

- **Expose illegality.** Congress should simplify its rules for declassifying information and immediately declassify any information that reveals illegal government activities or violations of rights guaranteed under the Constitution or international treaties. Congress should release as much information to the public as possible, in a manner that does not disclose technical military information that could harm national security.
- **Protect whistleblowers.** The national security loophole for whistleblower protection is dangerous because our law enforcement and intelligence agencies carry a heavy responsibility and wield extraordinary power over ordinary Americans with very little public oversight or accountability. Waste, fraud and abuse occurring within these secretive agencies are most difficult to bring to light, so Congress and the American public have to rely on courageous and conscientious insiders who are willing to report misconduct. Congress must extend meaningful protection to the workforce that is charged with protecting us all by granting them full and independent due process rights when they blow the whistle on waste, fraud, and abuse within their agencies, enforced through jury trials in federal court once administrative measures are exhausted.
- **Ensure GAO access to intelligence agencies.** Congress should monitor the intelligence community's compliance with the DNI directive regarding GAO access to intelligence information to ensure long-standing resistance to GAO oversight is overcome.
- **Expand the powers of the PCLOB.** The Privacy and Civil Liberties Oversight Board (PCLOB) was created by Congress as an independent oversight agency in 2007 to ensure that government anti-terrorism activities are "balanced with the need to protect privacy and civil liberties."²¹⁵ This board has the potential to serve as a significant new source of oversight over the national security establishment. However, if it is to contribute effectively to such oversight, Congress must give the PCLOB a meaningful power to challenge agencies' classification authorities when they use them to cover up wrongdoing or incompetence or to prevent legitimate public debate. Otherwise, the executive branch will continue to mis-

²¹⁵ See Jay Stanley, *Enforcing Privacy: Building American Institutions to Protect Privacy in the Face of New Technology and Government Powers*, AMERICAN CIVIL LIBERTIES UNION, Nov. 2009; available at http://www.aclu.org/files/assets/ACLU_Report_-_Enforcing_Privacy_2009.pdf.

use classification to stymie PCLOB oversight, as the Bush administration did in 2007 by censoring an oversight report to exclude previously released material.²¹⁶ Congress should grant the PCLOB independent power to declassify information when it concludes that an agency has abused its classification authority or that the information cannot reasonably be expected to harm national security if disclosed. At the very least, Congress should give PCLOB an opportunity to appeal classification decisions to the ISCAP with notification to Congress. But the PCLOB can't function without members. To date, President Obama has nominated only two of the five members required to staff the PCLOB, demonstrating the executive branch's reluctance to submit the intelligence community to oversight and frustrating the will of Congress. Congress has already expressed its displeasure with the President's failure to make nominations to the board,²¹⁷ but it needs to increase the pressure by refusing to confirm other Presidential nominees and by withholding funding for intelligence programs until the PCLOB is fully staffed and functioning.

3. Enact legislation to limit and regulate the executive's classification authority

Congress must establish a statutory framework to govern the government's classification and declassification systems.

The last major study of our national security classification policy was conducted by the Commission on Protecting and Reducing Government Secrecy (known as the Moynihan Commission) from 1994 to 1997.²¹⁸ Congress established the Moynihan Commission "to reduce the volume of information classified and thereby to strengthen the protection of legitimately classified information." Its bipartisan findings and recommendations remain as relevant and necessary today as they were when they were published. The Commission identified the inherent instability of a classification regime governed by executive orders that change with each new administration as a major problem, and recommended that Congress establish a legislative framework to govern the government's classification and declassification systems. Congress should follow this recommendation.

216 The report that was censored was a product of a previous incarnation of the PCLOB, which did not have the independence from the White House that Congress gave the reformulated board in 2007. See Press Release, American Civil Liberties Union, ACLU calls White House Censoring of PCLOB a Farce (May 15, 2007), available at <http://www.aclu.org/national-security/aclu-calls-white-house-censoring-pclob-farce>.

217 Letter from Sens. Leahy and Specter to President Obama (Apr. 24, 2009), available at <http://judiciary.senate.gov/resources/documents/upload/111thCongress-Letters.pdf>; letter from Sen. Leahy to President Obama (Mar. 8, 2010), available at http://leahy.senate.gov/press/press_releases/release/?id=b93d4613-5d22-4dfb-abfa-32cad5887e2a; letter from Reps. Thompson, Dingell, Markey, Capuano, Clarke, Cleaver, Cuellar, DeFazio, Green, Grijalva, Holt, Lee, Lujan, Moore, Norton, Owens, Pascrell, Reyes, Richardson, Sanchez, Sanchez, and Shea-Porter to President Obama (Mar. 29, 2010), available at http://epic.org/privacy/oversight/Congressional_Ltr_President_Obama.pdf; and letter from Sens. Lieberman, Collins and Akaka to President Obama (Apr. 8, 2011), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=466A6908-5056-8059-76F5-DB2664D397D6.

218 Moynihan Commission Report, *supra* note 9. The Commission cited the Necessary and Proper Clause of Article I, section 8, of the Constitution as authority for Congress to enact legislation regulating the executive's classification authority, and highlighted statutory precedents such as the National Security Act of 1947, the Atomic Energy Act of 1954 and the Assassination Records Collection Act of 1992.

Specifically, Congress should:

A. Limit the types of information the executive may classify

The current classification rules (established in Executive Order 13526) include eight extraordinarily broad categories of information that may be classified. The categories include such sweeping and ill-defined terms as “foreign government information,” “foreign relations or foreign activities of the United States” and “economic matters relating to the national security.” This leaves far too much discretion in the hands of government classifiers to hide information from the public when disclosure could not reasonably harm the national security or foreign relations.

Congress should limit the types of information that may be classified and carefully define the terms used so that only information that truly must remain protected may be classified. This would include such specific areas as the technical details of weaponry that would benefit foreign nations if known, technical details of tactical military operations in a time of war, and defensive military contingency plans in response to attacks by foreign powers.

Congress should also more narrowly define terms that have historically been abused to justify over-classification, such as the term “methods,” from the phrase “intelligence sources and methods.” While the U.S. Supreme Court defined the term “sources” in *CIA v. Sims*,²¹⁹ there is no definitive judicial or statutory definition of “methods.” The statute should define an intelligence “method” to protect from disclosure only those activities that are lawful and authorized as part of an agency’s statutory mission, and then allow classification only if disclosure of the method can reasonably be expected to harm national security and is not already publicly known.

B. Shorten the length of time documents may remain classified

The simplest way for Congress to reduce unnecessary classification is to significantly shorten the length of time information may remain classified before it is automatically declassified. Specifically, we recommend that Congress shorten the current 10 to 25 year classification period to 3 to 10 years.²²⁰ Documents that must remain secret after this period could be reclassified if necessary, but only after undergoing a meaningful review to determine whether disclosure would harm national security under current circumstances.

Shortening the time in which a document may remain classified provides several benefits:

- Information that is only required to be secret for a short time would not remain secret for longer than necessary simply because of arbitrary time frames set out in an executive

219 Cent. Intelligence Agency v. Sims, 471 U.S. 159 (1985).

220 The Moynihan Commission recommended that information should not be classified for more than ten years without recertification based on current threat assessments, while the Seitz Task Force recommended 5 years for technical information.

order. Circumstances often change over time, so requiring an earlier review based on current security assessments would reduce the amount of unnecessarily classified material.

- Earlier review of classification decisions would more quickly identify improperly classified materials so that they could be declassified and remedial training could be provided to the individuals improperly marking these materials.
- If officials making classification decisions know their work will be reviewed by others while they are still working at the agency in question, rather than long after they retire, they will likely take more care in making classification decisions.
- Similarly, if government employees know that their activities are likely to be subject to public scrutiny during their government careers, rather than concealed under a veil of perpetual secrecy, they will be less likely to engage in abusive or illegal activities, or any other actions that will reflect poorly upon them.
- Finally, shorter classification periods would change the incentive structure that now allows agencies to put off declassification decisions for decades, which creates long-term societal and fiscal costs. By putting agency officials in the position of having to devote resources to the declassification review, they would be forced to incorporate those costs into their decisions up-front, rather than pushing them years into the future. Their incentive would then be to reduce classification to only that which is truly necessary.

C. Strictly limit the duration of derivatively classified information before review by an original classification authority

ISOO reports that more than 99% of classification actions are derivative classifications made not by trained “original classification authorities” (OCA), but by other agency employees who may be entirely untrained in and unfamiliar with classification policy. President Obama’s executive order requiring bi-annual training of derivative classifiers is a positive step, but Congress should go further. Congress should require by statute that derivatively classified materials be reviewed by a trained OCA within a reasonable amount of time (no longer than five years) to confirm such materials are properly classified.

D. Provide resources to enhance and expand declassification efforts

Congress should expand and adequately fund executive agency programs to declassify information more effectively and demand tangible results of these initiatives. Under the current classification structure, agencies often don’t recognize that resources devoted to declassification today will result in greater cost savings to their agencies over time, as needlessly classified information no longer needs protection.

Congress should expand government declassification efforts and allocate the resources necessary to allow the National Declassification Center to succeed in its mission. Repealing the Kyl-Lott Amendment would streamline the declassification process enormously, and bring down the costs. Other declassification efforts through the Public Interest Declassification Board, the mandatory declassification review process, ISCAP and individual agency initiatives should also be fully funded.

VII. CONCLUSION

Government secrecy is growing like a cancer in our democracy. Left unchecked, it will weaken the body politic from within. While Congress and the Obama administration have each taken steps to begin reforming the classification system, these efforts are insufficient to tackle a secrecy problem that has overwhelmed even the national security establishment. The administration should have the courage of its campaign convictions and take a far more aggressive posture in trusting the American public, respecting constitutional checks and balances, and putting an end to our government culture of secrecy. And Congress must act. Congress has the power to hold “Top Secret America” accountable to the American people, and it must use the tools the Constitution provides to expose and prevent the abuse of secrecy that harms our nation. Drastic measures are required.