Testimony of Nancy Talanian
Executive Director
Bill of Rights Defense Committee

"Restoring the Rule of Law"

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On behalf of the Bill of Rights Defense Committee, I thank Chairman Feingold for the invitation to submit written testimony to support the efforts of the next Congress and the next administration to restore the rule of law.

What Is the Bill of Rights Defense Committee (BORDC)? BORDC was established in 2002 as a community-based response to post-9/11 assaults on civil liberties, including the passage of the USA PATRIOT Act and the roundups and detention of approximately 5,000 immigrant men who had no connection to the terrorist attacks or Al Qaeda. The mission of the Bill of Rights Defense Committee is to promote, organize, and support a diverse, effective, national grassroots movement to restore and protect the civil rights and liberties guaranteed to all U.S. residents by the Bill of Rights. BORDC provides educational resources, strategies, and technical support to local coalitions that are concerned about laws and policies that threaten civil liberties and damage human rights.

Grassroots Response to Government Curbs on Civil Liberties and Violations of Human Rights. The new laws and policies, including unprecedented government secrecy and, increasingly, government abuses of individual rights have generated renewed interest nationwide in the Bill of Rights, the Constitution, and the Geneva Conventions and other international treaties the U.S. has signed. Hundreds of nonpartisan local and statewide coalitions across the United States have acted on their concerns and have used BORDC's educational resources to work for the passage of eight statewide resolutions and more than 400 local resolutions and ordinances opposing provisions of the PATRIOT Act or other civil liberties erosions, reaffirming constitutional rights and setting standards for local police conduct. The state and local jurisdictions that have enacted these resolutions have a combined population of 85 million. The City Council of the City of New York is among them. *(See attached list.)*

Failure to Prevent Terrorist Attacks Versus Government's Responses. There is no evidence that laws and policies promoting openness in government or protecting civil liberties were responsible for pre-9/11 intelligence failures. To the contrary, reports from several investigations have concluded that human failures and agency culture – notably turf wars and a failure to lawfully share information – contributed to the attacks. Nevertheless, the government's reaction has been to change the laws and policies to give increased discretion to the executive branch and to limit oversight by the other coequal branches. No proof has been offered that these new laws and policies were necessary or are likely to be effective in preventing terrorism. Policies that permitted the kidnapping and torture of detainees, for example, may have had the opposite effect. The low numbers of convictions and the high numbers of innocent

victims say otherwise: that government resources are being squandered prying into the lives of innocent Americans, especially those who choose to exercise their First Amendment right to dissent or to practice the Muslim religion. Journalists gathering information on government actions have also been under attack.

BORDC applauds Congress's steps taken so far to increase its oversight of the executive branch. Internal audit reports you have demanded have uncovered abuses and misuses of new powers such as the FBI's powers to issue national security letters. This is an excellent time to reconsider the need for and effectiveness of antiterrorism laws and policies and to work in a bipartisan manner to investigate government abuses and to restore constitutional checks.

This testimony outlines some of the more troubling laws and policies adopted since 9/11 and recommends that they be repealed or revised in order to ensure that they conform with the Constitution and Bill of Rights. Congress will have an opportunity next year to revisit a few of the laws that sunset on December 31, 2009, but it should not wait until then to restore the American people's rights and freedoms, nor should it limit its review and amendments to those few provisions that sunset. We have organized our recommendations according to the provisions of the U.S. Constitution.

ARTICLE I, SECTION 9: HABEAS CORPUS

Recommendations to Congress:

Restore Habeas Corpus for All Persons Detained by the U.S. Government. The majority of detainees designated "enemy combatants" have been released without any charges. The Guantánamo Bay detention center has become a symbol of shame and outrage for the U.S., exacerbated by Congress's support of the President's position that he can designate any person in the world an "unlawful enemy combatant" without court review or the right to bring a habeas corpus action in civilian court. The U.S. sets a poor example for other countries and helps recruit new terrorists by preventing alleged victims of U.S. violations of the Geneva Conventions from filing habeas corpus claims in U.S. courts.

Recommendation: Congress should repeal the Military Commissions Act to help restore the United States' reputation for respecting the rule of law, and by so doing, raising the international standard for the human rights and dignity of detainees to its previous level.

Recommendation to the President

End the CIA Extraordinary Rendition Program and CIA Ghost Detainees Program. The CIA's practice of turning over terrorism suspects to foreign countries that practice torture and of violating international laws regarding the holding and interrogation of detainees, including ghost detainees, has brought shame to our country and has made it more likely that other countries will follow the U.S.'s example of violating international laws established to protect detainees.

Recommendation: The new president should rescind all legal memos and orders that justify these programs and reassert the United States' adherence to U.S. laws and international treaties to which the U.S. is a signatory.

ARTICLE I: SEPARATION OF POWERS

Recommendation to the President

End Practice of Using Executive Signing Statements to Circumvent Laws Properly Enacted by Congress. The majority of President George W. Bush's signing statements have raised constitutional objections and indicated his intention to ignore legislation properly enacted by Congress. The American people have the right to rely on laws enacted by Congress for the people's benefit.

Recommendation: The new president should strictly adhere to the Constitution's provision that he faithfully execute the laws passed by Congress. The president has the power to veto bills of which he disapproves, but once he signs a bill into law, he should follow all of the provisions of that law.

FIRST AMENDMENT: FREEDOM OF RELIGION, SPEECH, PRESS, ASSEMBLY, AND DISSENT

Recommendation to Congress

Amend "gag orders" related to Section 215 and FBI national security letters. In 2006, when Congress reauthorized the USA PATRIOT Act, it set processes for appealing permanent gag orders that are heavily weighted toward the executive branch. Even after a national security letter recipient waits for a year to challenge the gag order within the letter, the government's assertion that there is a national security basis for the gag is conclusive, making the right to challenge the gag order theoretical rather than real. Given the steep obstacles, only three recipients have challenged their gag orders, and only two have succeeded.

Recommendation: Congress should change the law to give judges discretion to determine, case by case, whether the government's claims of national security requiring permanent gag orders are justified. Gag orders preventing third-parties from ever telling their customers that their records were given to the FBI should be lifted if no evidence is found linking the records with any wrongdoing.

Recommendations to the President

Call on the New Attorney General to Rescind Attorney General's May 30, 2002, guidelines. These guidelines replaced anti-COINTELPRO regulations by authorizing the FBI to monitor and conduct surveillance of religious and political groups without evidence of wrongdoing.

These guidelines have had a chilling effect on free speech, the practice of religion, and the right to dissent. They also permit agents and informants to attend meetings and gatherings of peaceful

groups as *agents provocateur*. Through these tactics, impressionable members of a group may be swayed towards talk of violence and peaceful individuals may be driven out or discouraged from joining a group.

Recommendation: In order to establish that his administration respects the First Amendment, the new president should call on the new Attorney General to rescind the guidelines.

Call on the Attorney General to rescind Freedom of Information Act (FOIA) Memorandum of October 12, 2001. Congress recognized the public's right to know what its government is doing and supported that right with the passage of FOIA. The Attorney General's memorandum now in place has allowed the government to cover up information the public requests, such as the identities of approximately 5,000 immigrant men who were detained without charges after the September 11th attacks, not one of whom was found to have any involvement in the attacks or with Al Qaeda.

Recommendation: The new president should direct that the Ashcroft FOIA memorandum be rescinded and replaced with new guidelines that emphasize openness, in the true spirit of the FOIA. Agencies should be directed to not assert exemptions for information requested through the FOIA unless the agency foresees disclosure would cause harm to a protected interest under that exemption.

End FBI use of Joint Terrorism Task Forces (JTTFs) to interfere with activities protected by the First Amendment. Several JTTFs have engaged in activities more likely to discourage First Amendment-protected dissent and free speech than to prevent terrorist attacks. The FBI spy files on peaceful protestors in Denver, the JTTF's subpoenas and gag orders related to a Drake University campus antiwar protest in 2003, and the case against art professor Steven Kurtz in Buffalo, New York, are a few examples.

Recommendation: The president should ensure that law enforcement officers engaged in JTTFs fulfill their obligations to uphold the Constitution. Therefore, the president should prevent the JTTF's resources from being used to spy on or interfere with First Amendment-protected activities.

Amend USA PATRIOT Act Section 805: Material Support for Terrorism. Currently the material support laws make it a crime to give anything of value, including voluntary humanitarian assistance, to an organization that the government names a terrorist organization. That, combined with the government's ability to use secret evidence presented behind closed doors to designate such an organization *(see Section 411 in "Fourth Amendment: Right to Privacy" below)*, makes the harmless association with organizations punishable by fines and imprisonment.

Recommendation. Congress should tighten the material support laws to prevent their continued interference with free speech, free exercise of religion, and association.

FOURTH AMENDMENT: RIGHT TO PRIVACY

Recommendations to Congress

Roll back the FBI's powers to issue national security letters (NSLs). The PATRIOT Act greatly expanded the FBI's ability to issue national security letters by eliminating the need for the FBI to show a connection between the records sought and a suspected terrorist. Congress also greatly expanded the types of private financial records that the FBI could obtain through NSLs. It also placed the bar for businesses challenging NSLs they receive too high. In order to win the challenge, the third-party holder of records must prove that the government acted in bad faith, and must do so without the advantage of knowing whether the government is using secret evidence.

Audits by the Department of Justice's Inspector General completed in 2007 and 2008 have revealed numerous abuses and misuses of this power, which Congress has thus far failed to address.

Recommendation: Congress should restore the previous standard for NSLs and require the FBI to show a connection between the records sought and a terrorist or foreign spy. In all other cases, NSLs should require the approval of either the FISA court or a magistrate judge. Congress should remove criminal penalties on businesses that do not comply with NSLs and should ensure that the right to challenge NSLs in court be made meaningful.

Restore court oversight for:

- **wiretapping calls, e-mails, and Internet activity involving U.S. residents (FISA Amendments Act of 2008)**
- **sharing criminal investigative information with the CIA (PATRIOT Act Section 203)**

The passage of the FISA Amendments Act eliminated the need for the government to obtain warrants to wiretap calls and e-mails to or from the U.S., provided there is some reason to believe that the person at the other end is outside the U.S. The Act violates the Fourth Amendment prohibition of unreasonable searches and the requirement for court-approved warrants. Moreover, Congress's support for retroactive immunity for companies that supported the warrantless program before it became law has prevented the courts from determining whether the government or the companies broke the law or whose rights were violated.

Court approval is no longer needed for the CIA to receive sensitive information gathered in criminal investigations, including wiretaps and information obtained by grand juries. Such information, which has traditionally been treated as extremely sensitive and may not be true, can now be freely shared with secret intelligence agencies and even with foreign governments with no safeguards against abuse.

Recommendation: Congress should restore meaningful court oversight in both cases.

Amend PATRIOT Act Section 206 to protect innocent bystanders from roving "John Doe" wiretaps. Under current FISA law, which sunsets on December 31, 2009, the FBI's roving

surveillance authority does not require the FBI, before it can tap a line, to ensure that the intended target is present at the location. That means the FBI may wiretap conversations of innocent bystanders who may be using the device.

Recommendation: In 2009, Congress should use the opportunity of the sunset to eliminate that loophole.

Amend PATRIOT Act Section 215 to restore standard for obtaining FISA court orders for seeking records and other items. Prior to the PATRIOT Act, the FBI could seek a court order for records on a suspected terrorist or foreign spy. The PATRIOT Act greatly expanded that authority so that the FBI need only show "reasonable grounds" that information sought is relevant to an ongoing investigation...to protect against international terrorism or clandestine intelligence activities." By radically weakening the standard, Congress places the privacy of innocent Americans in jeopardy and has made it nearly impossible for third-parties to whom the requests are made to challenge orders they believe to be inappropriate or unjust.

Recommendation. To prevent abuse of this power, Congress should restore the standard that the FBI seek warrants from magistrate judges unless the records sought belong to a suspected terrorist or foreign spy.

Amend PATRIOT Act Section 218 to restore the requirement that the government meet Fourth Amendment standards when conducting searches to obtain evidence of a crime. Under the PATRIOT Act, FBI agents may now conduct secret searches of homes and offices in order to investigate an individual for a crime. Secret searches are constitutionally suspect at a minimum, and the searches of the home and office of Portland, Oregon, attorney Brandon Mayfield shows why this authority is rife for abuse.

Recommendation. Congress should restore meaningful requirements to limit or prohibit secret searches of Americans' homes or offices to those few extraordinary circumstances where they are truly necessary.

Amend USA PATRIOT Act Section 411: Definitions relating to terrorism. Currently the Secretary of State is able to designate any foreign or domestic group a "terrorist organization" without prior notification and an opportunity to defend itself from the designation. The government's use of secret evidence, which is impossible to refute, has prevented groups thus named from prevailing in their appeals.

Recommendation. Congress should amend PATRIOT Act Section 411 to provide warning and a fair appeals process to foreign or domestic groups that the Secretary of State plans to designate as "terrorist organizations."

Pass a law limiting the executive branch's use of "data-mining." News reports on the executive branch's lists and databases indicate they are riddled with errors and that any American can be added to a list such as the DHS's Terrorist Watch List, often called the "no-fly list," now estimated to contain more than a million names, or to a database such as the FBI's Investigative Data Warehouse, which contains more than 700 million records, including personal

financial records. A person's inclusion in such a list or database can be detrimental and seemingly permanent, as there is no way to be taken off the list even after a person has been cleared of any involvement in wrongdoing. The usefulness of lists and databases in which false positives vastly outweigh the true suspects is doubtful, but they appear to be growing faster than individuals who do not belong in them are being removed.

Recommendation: Congress must set standards for counter-terrorism lists and databases to ensure that innocent individuals do not suffer undue consequences from being on the lists or in the databases. Congress should get complete information about each of these lists, assess their accuracy and usefulness, and exercise strict oversight over the collection, use, retention, and removal of names and other personal data in the lists and databases.

Recommendations to the President

Ensure strict standards for U.S. Customs and Border Protection (CBP) searches and retention of travelers' papers and electronic equipment. Without any judicial check or reason to suspect wrongdoing, travelers' computers and other electronic devices may be searched and phone records, business records, or possessions may be downloaded when they cross a U.S. border. Every traveler expects the government to search for and seize contraband. However, the government's assumed right to seize papers and data from cell phones or laptops violates a person's Fourth Amendment right to be free from unreasonable searches and seizures and from government abuses of First Amendment-protected free speech and association.

Recommendation: To prevent abuse of travelers' rights, the new president should ensure that the seizing or downloading of travelers' personal effects such as papers, private records, and possessions are subject to strict standards.

FIFTH AMENDMENT: DUE PROCESS, UNLAWFUL IMPRISONMENT, AND SELF-INCRIMINATION

Recommendations to Congress and the President

Prevent abuses of the state secrets privilege. The Bush administration has claimed state secrets, meant to protect national security, to prevent lawsuits brought by detainees, victims of extraordinary rendition, and others. Examples are German citizen Khaled el Masri, Canadian citizen Maher Arar, and several national security whistleblowers.

Recommendations:

- Congress should strengthen the law to guard against misuse of the state secrets doctrine by the government.
- The new president should reject the previous administration's invocation of state secrets and allow certain high-profile lawsuits to come to trial to signal the administration's commitment to Fifth Amendment guarantees.

SIXTH AMENDMENT: RIGHTS OF THE ACCUSED

Recommendations to the President

Close Guantánamo. The interrogation methods and treatment of detainees at Guantánamo have earned severe criticism from the International Committee of the Red Cross, the United Nations Special Rapporteur for (Human Rights), foreign governments, and U.S. residents.

Recommendations: Guantánamo has become such a symbol of injustice and human rights abuses that the new president should close the prison immediately and try the remaining detainees in U.S. federal courts. Such a move would signal the administration's commitment to U.S. and international law regarding the accused, including the ancient writ of habeas corpus.

End practice of closing immigration hearings on a blanket basis. Chief Immigration Judge Michael Creppy issued an order known as the "Creppy Memo," which bars the public and the press from all immigration hearings for "special interest" persons. Such secrecy makes it impossible for the public or an immigrant's family members to know whether an immigration hearing to decide the immigrant's fate was fair. In *Haddad v. Ashcroft*, the Sixth Circuit Court of Appeals ruled the Creppy Memo barring the public and the press from all immigration hearings for "special interest" persons to be unconstitutional. Senior Judge Damon Keith wrote, "Democracies die behind closed doors."

Recommendation: To help restore fairness, the president should rescind the Creppy Memo and restore the previous practice of leaving the decision as to whether an individual hearing must be closed in whole or in part to the judge hearing the case.

Conclusion

These recommendations are not comprehensive, but they represent an array of needed corrections to U.S. laws and policies that would signal to the American people and the world that the 111th Congress and the next president intend to protect both our nation's security and the rights, liberties and principles in which the American people take pride