

Statement of the Constitution Project
Submitted to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Judiciary Committee

Hearing on "Restoring the Rule of Law"

September 16, 2008

Thank you for providing the Constitution Project with the opportunity to submit testimony for the Subcommittee's hearing on "Restoring the Rule of Law." The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to encourage constructive dialogue and to promote consensus solutions to pressing constitutional issues. Four of the witnesses testifying before this Subcommittee today work with us on rule of law issues. Mickey Edwards, Harold Koh, John Podesta, and Suzanne Spaulding are all members of our Liberty and Security Committee. Congressman Edwards is also a co-chair of our War Powers Committee. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical, accessible material designed to make constitutional issues a part of ordinary political debate.

In recent years, the Constitution Project has done extensive work to restore and promote the rule of law. Our Rule of Law Program addresses threats to the rule of law and to our constitutional liberties stemming from the assertions of expansive presidential authority since September 11, 2001; Congress's simultaneous failure to exercise its duties as a separate and independent branch of government; and efforts by both Congress and the President to strip the courts of their jurisdiction to oversee the actions of the executive and legislative branches. These threats include warrantless domestic surveillance, the denial of *habeas corpus* rights to "enemy combatants," the increasing and unrestricted use of terrorist watch lists, Congress's abdication of its exclusive authority to declare war, the abuse of immigration law as a counter-terrorism tool, and increasing governmental secrecy that conceals wrongdoing and prevents Americans from knowing what the government is doing in our names.

The statements and reports of our bipartisan, blue ribbon panels listed below convey the recommendations of influential leaders concerning these most pressing concerns.

Checks and Balances: The Constitution Project's Coalition to Defend Checks and Balances issued a powerful statement in February 2006 calling for renewed emphasis on the constitutional separation of powers within the federal government.

http://www.constitutionproject.org/pdf/Checks_and_Balances_Initial_Statement.pdf

MCA Habeas: In March 2007, a distinguished bipartisan group of over forty-five experts organized by the Constitution Project, released a statement calling on Congress to restore *habeas corpus* rights to non-citizens designated as "enemy combatants" eliminated by the Military Commissions Act (MCA). The group asserts *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system. The statement also points out the importance of full and fair *habeas* hearings to "ensure there is a meaningful process to determine

[whether the United States] is holding the right people," and to "help repair the damage [to America's international reputation] and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy."

http://www.constitutionproject.org/pdf/MCA_Statement.pdf

National Security Courts: The Constitution Project condemns proposals to create a system of "national security courts" in a July 2008 white paper, *A Critique of 'National Security Courts*. In recent years, and particularly in the aftermath of the Supreme Court's decision in *Boumediene v. Bush* affirming the constitutional rights of "enemy combatants" to challenge their detentions through *habeas corpus*, several scholars and government officials have called for the creation of specialized hybrid tribunals that would review the preventive detention of suspected terrorists, conduct the detainees' criminal trials, or, in some cases, both. However, as our report makes clear, these provisions neglect basic and fundamental principles of American constitutional law, and incorrectly assume that the traditional processes have proved ineffective. The government can accomplish its legitimate goals using existing laws and legal procedures without resorting to such sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries.

http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts1.pdf

NSA Surveillance: In its *Statement on the National Security Agency's Domestic Surveillance Program*, the Liberty and Security Committee asserted that the spying program "upends separate, balanced powers by thwarting the will of Congress and preventing any opportunity for judicial review." The statement was issued on July 25, 2007, shortly before Congress passed the Protect America Act. As with the *Statement on the Protect America Act* described above, it outlines principles regarding the need for congressional and judicial oversight that remain relevant today.

http://www.constitutionproject.org/pdf/NSA_Statement_20071.pdf

Presidential Signing Statements: In the Coalition to Defend Checks and Balances' 2006 *Statement on Presidential Signing Statements*, Coalition members expressed their concern that unconstitutional uses of presidential signing statements are undermining our system of checks and balances. While noting that "there is nothing inherently troubling" about signing statement, they condemned the use of such statements "to challenge or deny effect to legislation" that the President has chosen to sign and not veto. They sharply urged the President "to immediately abandon these uses of the presidential signing statement," and Congress "to make unmistakably clear the link between a President's inappropriate use of signing statements and the costs of doing so."

http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf

Protect America Act: The Constitution Project's Liberty and Security Committee released a *Statement on the Protect America Act* in October 2007 to address the legislation that authorized the National Security Agency to conduct many types of surveillance in the without first seeking a warrant. The statement advised Congress that many of the amendments to the Foreign Intelligence Surveillance Act (FISA) contained in the Protect America Act (Pub. L. 110-55) were unnecessarily overbroad, undermined our constitutional system of checks and balances, and failed to sufficiently protect the privacy of the communications of Americans. The statement outlines several critical problems with the Protect America Act, and urged Congress "not to reauthorize these overbroad and harmful provisions." Although Congress

passed new amendments to FISA in July 2008, the statement outlines principles regarding the need for congressional and judicial oversight that remain relevant today.
<http://www.constitutionproject.org/pdf/Statement%20on%20PAA.pdf>

War Powers: The War Powers Committee's 2005 Report *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* is an emphatic call to Congress to reassert its constitutional role as the branch responsible for deciding when the United States should use force abroad. The committee explains and applies the constitutional demands of the separation of powers in its recommendations, which include calling upon the President to supply Congress with timely and complete information about its recommendations for the use of force and upon Congress to authorize initiating the use of force only by declaration of war or a specific statute of appropriations, except in clearly stated cases of clandestine counter-terrorism operations requiring secrecy and speed.
http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf

State Secrets: In a statement released in May 2007, *Reforming the State Secrets Privilege*, members of the Constitution Project's Liberty and Security Committee and its Coalition on Checks and Balances outline the need to limit the state secrets privilege "to balance the interests of private parties, constitutional liberties, and national security." Since September 11th, the executive branch has increasingly asserted that this privilege prevents citizens from bringing lawsuits to challenge federal policies, including those associated with wiretapping and federal detention policies. In the statement, the more than forty expert signatories emphasize the importance of independent judicial review as a check on executive discretion.
http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf

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