



2009 ACLU Legislative Priorities

Restoring Meaningful Checks on Executive Authority Preserving and Advancing Individual Rights

The branches of our government, co-equal in theory, are out of balance. The executive branch has overreached – engaging in unlawful and immoral torture, conducting warrantless wiretapping, illegally detaining innocent individuals without judicial authority, spying on citizens based on race, ethnicity, religious or political views. The legislative branch has acquiesced in many of these efforts and failed until recently to exercise its oversight authority to call the administration into account. The judicial branch, meanwhile, has curtailed programs designed to protect vulnerable populations from discrimination. It's time for a new paradigm. Congress must conduct a full investigation into the abuses of executive authority in the years since 9/11 and the new administration should promptly appoint a special counsel to investigate and, if appropriate, prosecute those who may have broken the law. Just as importantly, Congress must undertake, and the President must support, a comprehensive legislative program to restore the rule of law and the rights of individual Americans, including the following:

- Restoring appropriate limits on governmental power;
 - Re-establishing and advancing each individual's right to live free of discrimination; and
 - Setting meaningful standards to re-establish and preserve the right to speak freely.
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SAFE AND FREE

Restore Appropriate Limits on Governmental Power

- **Interrogation and detention reform -- stop torture and rendition and investigate unlawful government actions**
 - Congress must help restore American values of justice and due process. Officials at the highest levels approved the use of torture, extraordinary rendition and detention in secret prisons; they authorized unlawful surveillance of Americans. If we don't learn the full extent of illegal and inappropriate activities, and if reforms are not codified, recurrence remains a possibility and our standing in the international community will be forever diminished. Congress was complicit in acquiescing to many of the unlawful activities by passing laws like the Military

Commissions Act, and so it is critical to restore the federal legislature's place as a co-equal branch of government through its exercise of vigorous oversight.

Recommendation: Repeal the Military Commissions Act, including its provisions to strip habeas corpus rights, and adopt statutory bans on the use of extraordinary rendition and secret prisons. Adopt legislation to stop torture by applying the Army Field Manual on Intelligence Interrogations government-wide. Create a special committee to learn the truth about unlawful and inappropriate activities by government officials in the post-9/11 era and to craft legislation to restore America's commitment to fairness and justice.

Domestic surveillance reform - restore judicial oversight

- During the current administration, agencies have engaged in unjustified and unlawful surveillance of Americans without proper judicial oversight. First, the administration sought the assistance of telecommunications companies to gain access to private emails and telephone calls in violation of statutory authority and without court approval. Then the so-called Protect America Act temporarily authorized such surveillance. In July 2008, Congress amended the Foreign Intelligence Surveillance Act to authorize surveillance with rubber-stamp oversight for a full four years. The effort to amend FISA began several years ago with the narrow goal of adjusting the law to allow surveillance of foreign to foreign communications from within the US. Somehow, that simple goal mushroomed into the final proposal going far beyond that original plan.

Recommendation: Repeal the FISA Amendments Act of 2008.

• **PATRIOT Act reform – limit NSL records demands**

- The passage of the Patriot Act in 2001 was a harbinger of the Bush Administration's obsession with gathering private information on the lives of innocent Americans. The law relaxed the standards for FBI use of national security letters (NSLs) and allowed federal agents to obtain personal information on almost anyone without judicial oversight – all the while prohibiting the third party recipients of these requests from telling anyone - even their lawyers – about the NSLs or from going to court to challenge them. When the law was amended several years later, it reinstated the basic right to challenge the NSL in court, but other problems still remain. Internal reports on the use of NSLs show that the FBI has issued literally tens of thousands of these invasive requests – and has NOT limited their use to rooting out terrorism. With parts of the Patriot Act due to expire in 2009, Congress must subject NSLs and other surveillance authorities to a complete overhaul.

Recommendation: Amend the NSL provisions to expand court oversight, require a mandatory showing of a connection to terrorist activity and rescind unconstitutional gag restrictions.

- **REAL ID repeal – stop national identity cards**

- The surveillance society will come to full bloom if REAL ID is ever fully implemented. This 2005 law requires all states to change their drivers' licensing systems to a single national standardized format – to contain a wide array of personal identifying information and to be readily accessible to DMV workers across the nation in one central database. The heightened risk of identity theft is enormous and the system does little to improve national security. In fact, if DHS is allowed to create its planned database of 160 million drivers, such an accumulation of data, without privacy protections, would create new and dangerous national security vulnerabilities by providing a ripe source for identity theft. Already, dozens of states have voiced their objections to the system's tremendous costs and threat to personal privacy. Over 20 percent of the states have passed laws barring compliance with the REAL ID mandate.

Recommendation: Repeal REAL ID and replace it with the bipartisan plan for comprehensive negotiated rulemaking engaging not just the federal government, but states, privacy advocates, national security advocates and other stakeholders. Regulations implementing REAL ID should be suspended forthwith. All appropriations for REAL ID implementation should be stopped in the next budget cycle.

Government database standards – protect privacy and accuracy of personal information

- With the rise of the information age, electronic communications have mushroomed together with risks to the disclosure of personally identifying information stored or transmitted in electronic form. While all individuals must take steps to protect themselves from prying intruders, government should not be leading the charge to accumulate and disseminate our personal information. If such an aggregation of personal information is necessary for a legitimate government purpose, it must be accurate, correctable, absolutely secure and the government must afford relief to those damaged by its improper use. Congress should pursue comprehensive codification of uniform privacy standards. In the meanwhile, Congress must address the following items:
 - **Health IT** – Electronic aggregation and sharing of medical records is the wave of the future. Achieving such advances should not come at the cost of sacrificing the privacy of individual medical information.
 - **Watch lists** – Government watch lists are bloated, with as many as a million names on the government's lists as of summer 2008. The lists are inaccurate, duplicative and there is no effective way for an innocent person to get his or her name removed from the list once on.
 - **Employer verification** – The EV system is designed to allow employers to check a database of Social Security and DHS information to confirm that an employee is lawfully entitled to work. The database is fraught with errors and the Social Security Administration lacks the capacity to handle

the workload of correcting individual records. A simple database error should not be the basis for barring someone from working.

- Arrestees' DNA – DNA testing has provided prosecutors and defense attorneys a new tool to advance arguments for the guilt or innocence of criminal defendants. But the government does not have the right or need to collect DNA samples from the entire population. Government should have a legitimate reason to acquire personal information and courts have the authority to grant permission to do that. Laws that give blanket permission to collect DNA from those who have not been convicted of a crime violate individuals' right to privacy and the Fourth Amendment.

Recommendations: Incorporate privacy and security protections into health technology legislation. Mandate minimum accuracy standards for watch lists. Reject legislation mandating national EV implementation. Rescind laws mandating DNA collection from federal arrestees and reject bills encouraging states to do so.

- **State secrets reform – allow legitimate lawsuits**
 - With the variety of novel and self-serving legal positions taken by the Bush administration to justify its actions – on warrantless surveillance, torture, extraordinary rendition, unlawful detention – the number of legal challenges to the propriety of these executive actions is not surprising. With a frequency never before seen, the Bush administration has consistently asserted the state secrets privilege in order to derail court proceedings. In the past, courts had typically applied the privilege sparingly, to exclude specific pieces of evidence. Now, however, the administration has asserted, and some courts have accepted, that the privilege can be applied to an entire lawsuit. Not only is one party barred from using a piece of evidence in establishing or defending a claim, but that party is also effectively barred from bringing certain claims in their entirety, regardless of the merits of the underlying claim.

Recommendation: Adopt legislation to codify the conditions under which the government may assert the state secrets privilege and the degree to which it can affect an otherwise legitimate claim.

CIVIL RIGHTS/DISCRIMINATION

Re-Establish and Advance the Right to Live Free from Discrimination

- **Drug sentencing reform - eliminate the crack/powder sentencing disparity**

- Heightened penalties for crack cocaine were adopted decades ago, based on assumptions about crack that are now known to be false. The single feature that most distinguishes a crack cocaine arrestee from a powder cocaine arrestee is skin color – with crack arrestees far more likely to be black than white, notwithstanding that the majority of crack users are white. Despite the absence of evidence that the harms associated with the use of crack are any greater or lesser than for powder, sentences for crack are equivalent to the sentences for 100 times the amount of powder cocaine – and the impact falls disproportionately on African-Americans. The U. S. Sentencing Commission and the Supreme Court have both recognized the unfairness of this sentencing scheme, yet the statutory disparities remain.

Recommendation: Eliminate the sentencing disparity by passing legislation that lowers crack sentences to match those for powder cocaine.

- **Juvenile justice reform - keep youth out of the adult criminal justice system**
 - Youth coming into contact with our juvenile justice system can follow one of two paths – one leading to successful integration into our society and the other leading to the adult justice system. For more than 30 years, the Juvenile Justice Delinquency Prevention Act (JJDP) has been a force for the former path. In the coming year, the JJDP will require reauthorization to help keep youth from entering the system, to ensure young people receive age-appropriate treatment and to guard against racial and ethnic disparities within the system. In addition, Congress should adopt legislation like the Youth PROMISE Act to keep the focus on evidence-based and promising practices aimed at reducing gang activity and membership and rejecting other more punitive legislative approaches. We must move youth onto paths toward successful adulthood and avoid the simplistic counter-productive push to put more and more young people into prisons and jails across the country.

Recommendation: Reauthorize JJDP and enact the Youth PROMISE Act.

- **Police practices reform – stop racial profiling**
 - Every year, thousands of people of color experience the humiliation of being stopped while driving, flying or even walking simply because of their race, ethnicity or religion. They are stopped not because they have committed a crime, but because law enforcement authorities wrongly assume that they have committed a crime, simply because of their appearance. Racial profiling has become more pervasive in recent years, particularly within the Muslim, South Asian and Arab American communities. A September 2004 report indicates that one in nine Americans has been victimized by racial profiling - a total of 32 million people nationwide. The End Racial Profiling Act would ban the practice of racial profiling by federal law enforcement agencies and create an enforcement mechanism to ensure that anti-profiling policies are being followed.

Recommendation: Enact the End Racial Profiling Act.

• **Employment discrimination reform – reverse restrictive court decisions**

- Congress rectified years of injustice when it adopted laws barring employment discrimination on the basis of gender, race, national origin, age, religion and disability in Title VII of the Civil Rights Act of 1964, the Equal Pay Act and the Americans with Disabilities Act (ADA). Courts in recent years, however, have restricted the ability of victims to use those laws to stop discrimination – and some victims have only limited protection, if any. Passage of the ADA Amendments Act in 2008 was a step in the right direction as it restored the original intent of the ADA. However, much more is left to be done. With Congress' failure to enact the Employment Non-Discrimination Act, lesbian, gay, bisexual and transgender individuals still have no legislation in place to protect their workplace rights. The Lilly Ledbetter Fair Pay Restoration Act would allow victims of pay discrimination to seek a court remedy for as long as the discrimination continues – rather than a mere six months after it begins. The Paycheck Fairness Act would eliminate loopholes and weak remedies for violations that have made the Equal Pay Act less effective in combating wage discrimination since its passage over four decades ago.

Recommendation: Enact the Employment Non-Discrimination Act in a form that includes both sexual orientation and gender identity protections, the Lilly Ledbetter Fair Pay Restoration Act and the Paycheck Fairness Act.

• **Comprehensive sex education – stop government-funded abstinence-only programs**

- Since 1996, Congress has appropriated more than a billion dollars for programs that focus exclusively on sexual abstinence and censor other information that can help young people make responsible and healthy decisions about sexual activity. While federal funding for abstinence-only-until-marriage programs has increased steadily to more than \$176 million annually, there are no federal funds dedicated to supporting comprehensive sex education programs that teach both abstinence and contraceptive use. Abstinence-only programs are bad public health policy and raise serious civil liberties concerns. Congress should not support programs that censor important information, reinforce gender stereotypes, provide inaccurate and misleading information, promote particular religious views, serve a narrow ideological agenda and jeopardize the well-being of young people.

Recommendation: Stop all funding of abstinence-only programs and adopt legislation to support comprehensive sex education.

• **Voting rights reform – eliminate barriers to full participation**

- Crucial to guaranteeing that citizens are able to exercise their fundamental right to vote are accurate and complete voter rolls and the elimination of unnecessary and onerous barriers to the ballot box. To that end, we support, with

appropriate safeguards, efforts to make voter registration efforts simpler, less onerous to the voter, and less prone to errors and purges. In addition, we support efforts to expand access more generally by removing restrictions on absentee voting, expanding opportunities to vote early, refranchising citizens with past felony convictions, and stopping deceptive practices and caging techniques that prevent voters from casting a ballot. We continue to support full enforcement of current federal voting rights protections, including the VRA, HAVA, and the NVRA.

Recommendation: Enact laws that encourage full voter participation in federal elections.

FIRST AMENDMENT

Restore and preserve the rights to free speech and free press

- **Restore online freedom - assure equal access and online free speech**
 - As more Americans come to rely on the Internet and wireless forms of communication, the more those means of communications take the place of traditional ones, especially wired telephones. Private third party corporate interests that now control these facilities, largely as a result of government contract or decision-making, have imposed their own private forms of censorship on Americans. Internet service providers block certain types of websites and file sharing. Wireless companies block certain types of text messaging. And in 2008 industry groups have aligned themselves with a government-created non-profit organization to decide what websites must be blocked. The Internet and, indeed, all means of personal communications must not be subject to censorship either by the government or by corporate gatekeepers. Openness and neutrality standards for Internet and wireless services and other future forms of such services should track in all essential respects those currently applicable to telephone communications – meaning equal access to such newer forms of services, no censorship based on content and content-based filtering controlled only by the user. While the FCC’s 2008 enforcement order against Comcast for unlawful censorship of BitTorrent and other file-sharing services is a step in the right direction, more is needed.

Recommendation: Codify binding open Internet principles so that enforcement will not be limited to discretionary FCC policy.

- **Real freedom of the press - enact meaningful federal reporters’ shield law**
 - Federal prosecutors are hauling journalists into court more than ever to compel their testimony about confidential sources of information. With the government

sometimes motivated by the desire merely to hide embarrassing or unlawful activities, prosecutorial intimidation in this context is just another form of restricting the freedom of the press guaranteed under the First Amendment. Forty-nine states and the District of Columbia already have some form of reporters' shield, but the absence of a federal shield law has created a hodge-podge of protection that undermines even the strongest state law.

Recommendation: Protect freedom of the press and speech by enacting a well-defined privilege from testifying for journalists that balances the importance of a free and independent press with other important interests, such as a defendant's right to exculpatory evidence.