

To: *President Barack Obama*

From: **Virginia Sloan and Becky Monroe**

Subject: *Your National Security Agenda*

In order to strengthen our national security, you must restore our commitment to the constitutional principles that have always made us safe and strong. Your national security agenda should include these priorities: (1) reform policies regarding the detention, interrogation, and trial of suspected terrorists; (2) restructure surveillance techniques, protect privacy, limit secrecy, and promote government transparency; (3) restore constitutional checks and balances; and (4) end the improper and discriminatory use of immigration authority as a counterterrorism tool.

Below, we provide examples of the kinds of concrete actions that you can take to start to address the problems identified in each issue area. These steps are merely illustrative of the comprehensive set of recommendations The Constitution Project has compiled in partnership with a coalition of prominent liberty and security experts, advocates, and organizations. You can find all of these recommendations at www.2009transition.org.

Reform Policies Regarding Detention, Interrogation, and Trial of Suspected Terrorists

Reject Proposals to Create National Security Courts

Our failed detention policies have undermined not only fundamental principles of fairness and justice, but also our national security. By ignoring our own laws, we aided terrorists in recruiting additional members to their ranks, thus making our country less secure. If we are to combat terrorism, to regain the confidence of our allies, and to restore Americans' confidence in our policies, we must conduct detainee trials using the system that has served us effectively for over two centuries. Our Article III courts are up to the task of handling the cases of accused terrorists, and combatants captured on the battlefield who would be subject to traditional military jurisdiction may be tried by military courts for offenses properly triable by such courts. Therefore, as president, you should embrace our Article III courts and reject the call for national security courts, lest we find ourselves once again struggling to restore the rule of law in the face of even greater security threats.

Support for national security courts—hybrid tribunals that would review the preventive detention of suspected terrorists (both within and outside the territorial United States), conduct the detainees' criminal trials, or both—is usually premised on the argument that traditional Article III courts are ill-equipped to handle these cases. However, this claim is directly contradicted by the more than 120 international terrorism cases that Article III courts have already successfully handled.

In addition, proponents of hybrid courts argue that terrorists do not deserve full constitutional protections and that the relaxed procedural and evidentiary rules employed by a national security court would be sufficient. However, it turns the system on its head to say that—even before any sort of a trial is held—we can determine who is a terrorist and therefore not entitled to traditional constitutional protections. This violates the presumption of innocence that serves as the foundation of our justice system and would establish a dangerous precedent of a separate and unequal criminal justice system that may creep to envelop cases not related to terrorism.

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The only way both to obtain legitimate convictions of terrorist suspects and to avoid the excessive confusion and legal challenges that would be inevitable in the creation of a new system is to prosecute detainees in federal courts. As president, you should oppose all attempts to create national security courts and work to reverse the steps the Bush administration took to circumvent existing Article III courts.

Restructure Surveillance Techniques, Protect Privacy, Limit Secrecy, and Promote Government Transparency

Reform the State Secrets Doctrine

Transparency and access to information are critical to our democracy and the separation of powers framework upon which our government is based. Two steps that you can take to restore the public's trust in the government are: (1) refrain from invoking the state secret privilege except under narrow and exceptional circumstances; and (2) support congressional efforts to reform the state secrets doctrine to restore the appropriate role of our courts and balance the interests of private parties, constitutional liberties, and national security.

Under the state secrets privilege, the executive branch claims that the disclosure of certain evidence in court may damage national security and therefore cannot be released in litigation. In the wake of the 9/11 attacks, the Bush administration repeatedly invoked the state secrets privilege in cases challenging the government's national security policies. A

number of courts have treated these claims as absolute without independently evaluating whether disclosure of evidence would in fact endanger national security. Rather than permitting an evaluation of whether there is sufficient non-classified evidence for a case to proceed, courts have completely foreclosed litigation challenging the legality and constitutionality of executive branch national security policies.

While there is a proper role for the privilege to protect actual national security secrets from public disclosure, even a well-meaning executive branch should not be able to hide behind this privilege on the basis of its own unchecked authority. We learned this lesson the hard way: we now know that the government's assertion in the 1953 case establishing the privilege was factually inaccurate. The judiciary can and should provide an independent check on executive discretion to remove the incentive for abuse and ensure proper application of the privilege.

As president, you should take steps to limit and reform the application of the state secrets doctrine to properly balance the interests of private parties, constitutional liberties, and national security. Work with Congress to pass reform legislation that clarifies that judges, not the executive branch, have the final say about whether disputed evidence is subject to the state secrets privilege. Refrain from claiming the privilege in all but extraordinary circumstances, and, under these circumstances, agree to allow a judge to make the final determination about whether evidence should be withheld in litigation. These steps will help to ensure the independence of our judiciary, restore confidence in the office of the president and our national security policies, and make your government accountable to the people.

Restore Constitutional Checks and Balances

America's greatness is due in no small measure to our system of government, in which power and authority are deliberately divided. The vital importance of our system of checks and balances is clearly illustrated in the Constitution's system of shared authority in war powers. The Constitution vests the power to declare war exclusively with Congress; the president, as commander in chief, makes all decisions as to how to wage that war.

The framers made this deliberate and strategic delegation of constitutional authority in rejection of the royal tradition they fled. They decided that those who would do the fighting and dying should make—through their representatives—the decision to go to war. However, over the past sixty years, starting with President Harry S. Truman in Korea, presidents have sent troops to war without a formal declaration from Congress. Most recently, President George W. Bush sought Congress's approval to go to war in Iraq, but he made it clear that he did not think that he was obliged to do so, and Congress has done little to limit the president to the actions described in its authorization for military force.

As president, you must seek advance authorization from Congress for initiating the use of force abroad except when force is used for a limited range of defensive purposes. Con-

gress must do its part as well and perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes. In making the agonizing decision to go to war, we owe it to the men and women who fight and die for our country to make the decision in accordance with the democratic principles for which they are fighting.

End the Improper and Discriminatory Use of Immigration Authority as a Counterterrorism Tool

The misuse of immigration as a counterterrorism tool has compromised our constitutional commitments and come at significant costs to our long-term security. In the wake of the terrorist attacks of 9/11, the government undertook a wide range of immigration-related measures in the name of national security, many of which violated the guarantees of liberty and equality on which our nation was founded. This misuse of immigration law and procedure resulted in five principal abuses: (1) prolonged detention without charge (in some cases up to four months); (2) interference with the right to counsel; (3) overriding judicial decisions to release a non-citizen on bond after a hearing; (4) prolonged detention well after a person was ordered deported despite the absence of any criminal charge; and (5) excessively harsh conditions of confinement including cases of physical and verbal abuse.

As a security matter, these initiatives have been counterproductive. There is no evidence that these post-9/11 measures led to any measurable increase in safety, yet the policies came at the cost of alienating U.S. immigrant communities and tarnishing the U.S. image abroad, especially in the Arab and Muslim world. We would do far better to work on developing positive ties with these communities here and throughout the world, while using objective criteria to target our enforcement of terrorist activity.

As president, you have the opportunity to renew respect for the law and our Constitution, and for the rights of foreign nationals, by replacing the unjust and ineffective policies of the past. You should rescind the Creppy Memorandum, which authorizes blanket closure of immigration hearings, and the "automatic stay" regulation, which permits the Justice Department to stay automatically a judicial decision to release a detainee on bond after an immigration court hearing. Further, you should require the prompt filing of charges and bond hearings for detained persons, as well as compliance with legal limits on prolonged detention of non-citizens who have been ordered deported.

These are just some of the ways you can restore the rule of law in our country. Through your leadership, Americans will know that we can respect our Constitution while at the same time ensuring our country's security.

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