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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.

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1 Stephen Daggett, Costs of Major U.S. Wars, Cong. Research Serv., June 29, 2010, available at http://centerforinvestigativereporting.org/files/June2010CRScostofuswars.pdf.

2 Walter Isaacson, GQ Icon: Colin Powell, Gentleman's1 1 T-Y 2.656 0 T(R)-64(C)TJ43108 1867 186 T---92W BT 2FEMC 5.9E T-Y 2.656 0 T(R)-64(C)

> “...we overclassify very badly.”
>
> —

block lawsuits challenging government misconduct.[25]

- Fought a court order to release photos depicting the abuse of detainees held in U.S. cus-

crimes without redress.

[illegible]

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 previoupane

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 secrets[47] 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

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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-N28o-s-spy-NIlary-Cl1 Tf8.5 0 0 8.5 435.6867 424.2m9-4

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.

[illegible]

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

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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 a 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.-

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

[illegible] 13526: [illegible] B [illegible]

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.

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]

[illegible]

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.

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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:TEMC /Span <MC <MC n <s Smr281.7n 8.5 340.0603e.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.

equate that DOJ had to repudiate them.[90] The torture scandal has been an unmitigated disaster for

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]

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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.talkingpointsmemo.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 Pubb

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

3. [illegible]

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.

- **[illegible]**
  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't), 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.

- [illegible]

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 de11 1(de11 1(de11 x529 Tm[k23(y BT/T1_1 1 Tf2s)-1(de11 1(de1T1_1 1 TfiL11 0106(the)-106(pr)9aq)

> "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]

- **A**
  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 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.

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

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.

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]

> 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. [illegible]

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.

- [illegible]. 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]

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

- [illegible] Because of advances in technology, covert

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 defi-

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. [illegible]

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. [illegible]

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

[illegible]

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:

- [illegible] 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]

- [illegible]. 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.mming,

- **[illegible]** 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 constituess0(theiWhimcent'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 [illegible] legislative and constituent service functions to enable more thorough, balanced and open oversight of intelligence activities.[191]

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

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 S9woc23(01doc25,idoc25,idoc25,ds31(T

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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 authorite authorite aut(y8eed2(the s)16(s)2(o)24(4he s)16p)D5fmss br sefuse

A A B

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.

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

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.

- [illegible]. 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.

- [illegible]. 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.

- [illegible]. 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.

- [illegible] **B.** 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.

Specifically, Congress should:

A. [illegible]

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

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.

[illegible]

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 ma-

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.