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May 14, 2007

Privacy and Civil Liberties Oversight Board Members
1724 F St. NW, 4th Floor
Washington DC 20503

Dear Carol, Alan, Ted and Frank:

I have written the President and tendered my resignation from the Privacy and Civil Liberties Oversight Board, effective as of today. See the enclosed letter to President Bush.

It was an honor to be asked to serve on the Board. Because of all the time and effort we put into the last year together on the Board, I feel it is necessary to explain to you in some detail why I have made the difficult decision to resign.

My reasons for resignation are based on my respectful disagreement with administration officials and most members of the Board over (1) the scope of the Board's oversight responsibilities; and (2) the interpretation of an ambiguous statute and the degree of independence of the Board intended by congress under that statute. I realize there is room for honest disagreement here and I question no one's motives or sincerity.

As to the first reason, I agree with the criticisms of the Board's report to the congress contained in the May 8, 2007, letter to the Board by the co-chairs of the 9/11 Commission, former Governor Thomas H. Kean and former Rep. Lee H. Hamilton, stating that the Board has interpreted the scope of its oversight mandate too narrowly. In particular, as you know, I agree with their view that the Board could and should review alleged civil liberties violations by American officials of non-U.S. person detainees. But I see no hope that the Board as presently constituted will ever do so.

I also continue to be concerned that there may be current and developing anti-terrorist programs affecting civil liberties and privacy rights of which the Board has neither complete knowledge nor ready access.

In addition, the decision by a majority of the Board to refuse to include a more lengthy and critical section in the congressional report concerning FBI abuses of National Security Letters ("NSLs"), as found by the DOJ's Inspector General, increased my concerns about the overly narrow interpretation of its mandate, as expressed by former Governor Kean and former Rep. Hamilton in their letter.

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As you know, only after much debate over several weeks was a more extensive and critical statement on the NSL abuses allowed – and even then, it was relegated to the cover letter submitting the report to congress, and not as part of the report itself.

The only reason given for not including the NSL statement in the report – that the report had a self-imposed cut-off date of March 1 and the DOJ Inspector General's NSL report was published after that date – made no sense to me and still doesn't. After all, the Board seemed willing to accept most of the substantial "redline" edits submitted by the White House staff on March 29, just two days from the March 31 deadline for submission to congress; and the final report was not submitted until April 20. So why not move up the self-imposed March 1 "cut-off" date to include a section in the report itself on the NSL issue? I still have no answer that makes sense to me.

I accepted the final compromise to include the longer NSL section in the cover letter to the report -- but not in the report itself -- as form over substance. But, as you all recall, even that compromise would probably not have occurred but for the intervention and support of Fred Fielding in the last day or two before the report was finally submitted to congress on April 20.

Regarding the second reason for my resignation -- the extensive "redlining" of the Board's report to the congress by administration officials, and the majority of the Board's willingness to accept most of these proposed edits and deletions – I was ready to simply state that there was a reasonable difference of opinion over interpreting the level of Board independence intended by congress under the underlying statute, and leave it at that.

But just last week an unidentified member of the Board was quoted in the newspaper "Roll Call" describing the redlined-edits to the Board's report by administration officials as "relatively light."

I respectfully disagree and, in light of the relevance of such redlining to my reason for resigning, I simply cannot allow that comment to go unchallenged. Therefore, I will make available to anyone who asks the copy of the redline of the Board's report and let others judge for themselves whether they were, or were not, "relatively light."

I will offer only one example in this letter to a deletion that I believe was not "relatively light" – the one that troubled me most. In the "Year Ahead" section (pp. 40-41 of the redline version, where all significant proposed deletions were found), we had proposed to

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review the application of the Material Witness statute. That paragraph was deleted in the redline.

The Board was told that there was no objection to the Board's looking into the subject of the Material Witness statute; but rather, that the White House Counsel's Office requested that we drop the reference to this statute in the report to congress because they were concerned that, as this is a tool used exclusively by U.S. attorneys in their prosecution efforts, this issue could unintentionally get folded into other issues associated with the U.S. attorneys public controversy.

I found this reason to be inappropriate – and emblematic of the sincere view, with which I strongly disagreed, of at least some administration officials and a majority of the Board that the Board was wholly part of the White House staff and political structure, rather than an independent oversight entity.

I am and remain grateful to White House Counsel Fred Fielding for intervening at my request and agreeing to restore that deletion of the Material Witness Statute paragraph as it was written and, indeed, all the proposed deletions from the "Year Ahead" section -- with one exception. That was the deletion of the paragraph reporting to congress on the Board's unanimously – approved January 31, 2007, memorandum to the president asking him to issue a directive to all executive agencies assuring the Board early access to developing and current anti-terrorist programs affecting privacy rights and civil liberties. I agreed to this deletion because I believed and hoped that Fred Fielding would do his best to send the Board's, memorandum to the president for his serious consideration.

As you know, in February, I was asked to offer my opinion to Senators Joseph Lieberman and Susan Collins, Chair and Ranking Member of the Senate Government Oversight Committee, on pending legislation affecting the Board's structure. I told both Senators that I supported the Senate version of the legislation that would have kept the Board within the Office of the President. I explained my belief then that the Board could still conduct independent oversight while part of the Office.

However, because of my recent experiences with the Board's report, I no longer believe that. I now believe the approach of the House bill is better – creating an independent board within the executive branch with subpoena power -- similar to the independence granted executive branch departmental Inspectors General. I have communicated to Senators

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Lieberman's and Collins' staff my change of opinion. I intend to do the same with the sponsors of the House legislation.

In closing and to repeat what I said above at the outset:

I understand and respect that I have an honest and good-faith disagreement with White House and other administration officials -- and with many of you, my colleagues, on the Board -- about the appropriate scope of the Board's oversight mandate and with the interpretation of the statute that established the Board.

I have spent many hours over the last year doing important work with you and, especially, searching together for the right balance between effective anti-terrorism programs and the need to preserve our nation's civil liberties and privacy rights that are so fundamental to American freedom and values.

I will treasure my memories working with each of you and the impressive and dedicated public servants we met and observed working so hard and so conscientiously to win the war against terrorism while honoring these core American values.

My best wishes to each of you in the months and years ahead.

Sincerely,


Lanny Davis