

## **LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS**

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

- CHAPTER 1:** Eliminate Unnecessary Barriers To Legitimate Charitable Work
- CHAPTER 2:** Closing Guantánamo
- CHAPTER 3:** End Illegal Detention, Torture, and Rendition
- CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law
- CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
- CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
- CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts
- CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations
- CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications
- CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence
- CHAPTER 11:** Promoting Government Transparency
- CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act
- CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures
- CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
- CHAPTER 15:** Reforming the State Secrets Privilege
- CHAPTER 16:** Reforming Watch Lists
- CHAPTER 17:** Assertion of Executive Authority in National Security Matters
- CHAPTER 18:** Executive Privilege and Congressional Oversight
- CHAPTER 19:** Signing Statements
- CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at [www.constitutionproject.org](http://www.constitutionproject.org), and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

## CHAPTER FIVE

### **Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material Support for Terrorism**

#### **I. The Problem**

Changes made by the PATRIOT Act of 2001 and the REAL ID Act of 2005 to the Immigration and Nationality Act (INA) have blocked access to refugee protection in the United States for bona fide refugees and asylum seekers who pose no risk to national security or danger to American communities. These laws contain definitions of “terrorist activity” and “terrorist organization” that are so broad that they strain any common sense understanding of the concept. Rape victims who were forced into domestic servitude by armed rebels have been barred from protection for providing “material support” to terrorists, as have refugees who were forced to pay money or provide food or medical care to armed militants. Afghans who fought against the Soviet Union in the 1980’s and Iraqis who banded together to fight Saddam Hussein have been defined as members of “terrorist organizations” and similarly turned away. These sweeping definitions of terrorist activity and terrorist organization and the misguided interpretation adopted by the current administration extend far beyond any legitimate purpose and thwart the United States’ longstanding humanitarian commitment to refugee protection.

In an effort to avoid punishing refugees and asylum seekers in the name of counter-terrorism, Congress enacted legislation in late 2007<sup>[1]</sup> that expanded the discretionary authority of the executive branch to waive the terrorism bars in appropriate cases, ensuring that deserving cases would not be statutorily barred because of an overly broad definition of terrorist activity and terrorist organization. Unfortunately, the new legislation did not modify these sweeping definitions, and the potential for the expanded use of waivers to make a dent in the problem has not been realized. To date, DHS has issued only a handful of waivers in asylum cases and the process for issuing exemptions in removal proceedings, which was only announced in late October 2008, leaves asylum seekers in a precarious situation by requiring full adjudication of all elements of the case before an exemption is considered. Thousands of deserving asylum seekers and individuals previously granted asylum who are applying for permanent legal status have been told that their cases are on permanent hold.

#### **II. Proposed Solutions**

The new administration should work with Congress to pass legislation to fix the overly broad definitions of terrorism in the INA. In the interim, the administration

---

[1] Consolidated Appropriations Act of 2008, Division J, Section 691, which amended INA § 212(a)(3)(B). See Human Rights First, *Newly Enacted Amendments to the “Terrorism Bars” and Related Waivers Under the Immigration and Nationality Act* (Jan. 29, 2008), available at: <http://www.humanrightsfirst.info/pdf/08130-asy-new-amendmensts-ina.pdf>.

should make full use of the waiver process to address the protection needs of refugees. The new administration should:

- A. Streamline and improve the process for issuing waivers in appropriate cases so that far more deserving asylum applicants have access to protection
- B. Direct DHS to establish a more effective policy for consideration of waivers in immigration court cases that does not leave the consideration of the waivers until the very end of the process.
- C. Ensure that victims of terrorism who were forced against their will to provide goods or services to rebel groups are no longer labeled “terrorists” and thereby barred from refugee protection
- D. Work with Congress to pass legislation that would adopt reasonable definitions of terrorist activity and terrorist organization under the INA

### III. Allies\*

#### **American Library Association**

Lynne E. Bradley, Director

[lbradley\(at\)alawash.org](mailto:lbradley(at)alawash.org)

202-682-8410

The ALA Policy Manual: Support of Immigrants’ Rights (52.4.5)

*available at*

[http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31\\_3.pdf](http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf)

#### **Bill of Rights Defense Committee (BORDC)**

Flavia Ayala

[flavia\(at\)bigplanet.com](mailto:flavia(at)bigplanet.com)

856-221-3276

#### **The Constitution Project**

Becky Monroe

[bmonroe\(at\)constitutionproject.org](mailto:bmonroe(at)constitutionproject.org)

202-580-6920

#### **Defending Dissent Foundation**

Sue Udry, Director

[Sue.udry\(at\)defendingdissent.org](mailto:Sue.udry(at)defendingdissent.org)

202-549-4225

[www.defendingdissent.org](http://www.defendingdissent.org)

#### **Essential Information**

John Richard or Robert Weissman

202-387-8034

**Government Accountability Project**

Jesselyn Radack, Homeland Security Director

[JesselynR\(at\)whistleblower.org](mailto:JesselynR@whistleblower.org)

202-408-0034 (ext. 107)

**International Justice Network**

[www.IJNetwork.org](http://www.IJNetwork.org)

**Liberty Coalition**

Michael D. Ostrolenk, Co-Founder/National Director

[www.libertycoalition.net](http://www.libertycoalition.net)

[mostrolenk\(at\)libertycoalition.net](mailto:mostrolenk@libertycoalition.net)

301-717-0599

**OpenTheGovernment.org**

Patrice McDermott

[pmcdermott\(at\)openthegovernment.org](mailto:pmcdermott@openthegovernment.org)

202-332-6736

**Open Society Policy Center**

[www.opensocietypolicycenter.org](http://www.opensocietypolicycenter.org)

202-721-5600

**Physicians for Human Rights**

Sara B. Greenberg, JD, MALD

Advocacy Associate

[sgreenberg\(at\)phrusa.org](mailto:sgreenberg@phrusa.org)

202-728-5335 ext. 302

**South Asian Americans Leading Together**

Priya Murthy

[priya\(at\)saalt.org](mailto:priya@saalt.org)

301-270-1855

**Stanford Law School - Mills International Human Rights Clinic**

Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director

Kathleen Kelly, Clinical Teaching Fellow

[bj.olshansky\(at\)gmail.com](mailto:bj.olshansky@gmail.com)

650-736-2312

**U.S. Bill of Rights Foundation**

Dane vonBreichenruchardt, President

[usbor\(at\)aol.com](mailto:usbor@aol.com)

02-546-7079

\* These groups and individuals support the general principles expressed in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposal, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

#### **IV. Counterarguments and Rebuttal**

A. *If we adopt these changes, will the asylum program and the refugee resettlement program be vulnerable to fraud and abuse by “terrorists”?*

Such assertions are made without engaging in a serious debate about whether the terrorism definitions sweep too broadly and actually serve the purpose they claim to serve. Barring rape victims from asylum or refugee resettlement because they were forced to provide domestic services to the armed rebels who captured them not only serves no legitimate purpose, counter-terrorism or otherwise, but also flies in the face of sensible refugee protection policy. The asylum process has numerous background checks and gathers substantial amounts of information on applicants and their activities. The U.S. government can ensure appropriate screening of applicants while carrying out the refugee and asylum programs, which advance U.S. interests as a global leader on humanitarian issues.

#### **V. Recommended Documents for Further Information**

- A. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama <http://hrw.org/reports/2008/us1108/>
- B. Jesselyn Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525 (2005), available at [http://2009transition.org/liberty-security/administrator/index2.php?option=com\\_docman&section=documents&task=download&bid=4](http://2009transition.org/liberty-security/administrator/index2.php?option=com_docman&section=documents&task=download&bid=4)

## APPENDIX

# Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material Support for Terrorism

## I. Jurisdiction

### A. Legislative Branch

The Congress has jurisdiction to pass legislation amending terrorism definitions under immigration law and the waiver of the related bars. The Congress most recently exercised this jurisdiction through the Congressional Appropriations Act of 2008.

### B. Executive Branch

Pursuant to the INA, the Secretaries of State and Homeland Security, in consultation with each other and the Attorney General, may issue waivers to terrorism bars to immigration.

The Secretary of Homeland Security has authorized the U.S. Citizenship & Immigration Services agency within Homeland Security to exempt certain individuals from the terrorism-related bars to immigration. In 2007 USCIS issued guidance on the granting of waivers.

## II. Status of Actions in Legislative, Executive, and Judicial Branches:

### A. Legislative Branch:

The Consolidated Appropriations Act of 2008, Pub. L. 110-161 (H.R. 2764), was sponsored by Representative Nita Lowey (D-NY) on June 18, 2007, passed the House of Representatives on June 22, 2007, passed the Senate on September 6, 2007, and was finalized (with amendments) on December 19, 2007 before being signed by the President on December 26, 2007.

The Consolidated Appropriations Act (in relevant part) grants discretionary authority, to waive terrorism grounds as bars to asylum, to the Secretary of State in consultation with the Secretary of Homeland Security and Attorney General, and to the Secretary of Homeland Security in consultation with the Secretary of State and the Attorney General (at § 212(d)(3)(B)(i) of the INA). The Act also (1) provides that certain groups will no longer be considered terrorist organizations for purposes of immigrants seeking asylum based on any act or event occurring before the Consolidations Appropriations Act was enacted; and (2) designates the Taliban as a “Tier I” terrorist organization for purposes of

immigrants seeking asylum, meaning that it is posted as a terrorist organization by the State Department.

There have been several congressional hearings on the material support bar for immigrants. On September 19, 2007, the Senate Judiciary Committee, Subcommittee on Human Rights and the Law, held a hearing and the following individuals testified: Anwen Hughes, Senior Counsel in the Refugee Protection Program at Human Rights First; Paul Rosenzweig, Deputy Assistant Secretary for Policy for the Department of Homeland Security; Bishop Thomas G. Wenski, Chariman of the International Policy Committee of the United States Conference of Catholic Bishops; and a refugee from Colombia.

The same subcommittee of the Senate Judiciary Committee held another hearing on material support issues on April 24, 2007. Anwen Hughes testified, as did Ishmael Beah, a former child soldier; Kenneth Roth, executive director of Human Rights Watch; and Joseph Mettimano, Director of public policy and advocacy at World Vision.

## **B. Executive Branch**

Before the Consolidated Appropriations Act was enacted, USCIS issued guidance on the exercise of waiver authority at [www.uscis.gov/files/pressrelease/MaterialSupport\\_24May07.pdf](http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf).