

## **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 SEVENTEEN**

## **ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS**

### **I. The Problem**

In the area of national security, the executive branch's assertion of executive authority, and "Commander-in-Chief authority" in particular, has extended farther than any time in history and in a manner that inappropriately seeks to evade review. The executive has argued that any presidential action taken in the name of national security is necessarily legal, rejecting congressional and judicial checks and undermining the separation of powers. For example, the President has asserted claims of executive authority to disregard laws enacted by Congress and has used the broadly worded Authorization for Use of Military Force (AUMF) of September 2001 to justify overriding existing laws.

The President has not merely advanced a constitutional theory of unfettered executive power, but has also veiled its implementation of the theory in secrecy, thwarting the constitutional system of checks and balances. Congress, the courts and the public cannot curb abuse of executive power of which they are unaware. Under the theory of presidential unilateralism, the Justice Department's Office of Legal Counsel ("OLC") has issued poorly reasoned legal opinions licensing torture, extraordinary rendition, indefinite detention and warrantless domestic surveillance, among other activities, notwithstanding statutory and constitutional constraints. Indeed, OLC has essentially opined that there are no constraints when the President acts in the name of national security. These OLC opinions obliterating the administrative, statutory, and constitutional limits on executive power were problematic not only because they flouted the rule of law, but also because the executive hid this usurpation from the public and Congress. The executive branch in essence adopted its own "secret laws," discovered by the public only when leaked. Then and only then was OLC's shoddy reasoning exposed to legal scrutiny. Then and only then were the OLC opinions and related national security practices subjected to the Framers' intended checks and balances. Then and only then was there even a modicum of accountability.

OLC has also advised that because the President may revoke or modify an executive order at any time, he may do so simply by acting in a manner contrary to an executive order. Thus, in OLC's view, by contravening an existing executive order, the President modifies or revokes, rather violates, that executive order, and he need not issue a new order or even make public his modification or revocation. No notice, no procedural safeguards, and no articulation of legal principles are necessary.

Significantly, despite assertions of expansive presidential authority, Congress has failed to insist on its right to classified national security information and has failed to exercise its oversight authority and responsibilities, especially in matters of national security. Over-classification of intelligence and other information, as well as the expanding use of limited, "gang of eight" briefings has rendered legislative oversight of intelligence and national security activities ineffective, if possible at all. In "gang of eight" briefings, legislatively authorized only for covert actions in "extraordinary

circumstances affecting vital interests of the United States,” only leaders of the House, Senate and of their respective intelligence committees are briefed; no congressional staff, no notes, and no discussions with colleagues are permitted. Without staff or other assistance, legislators as a practical matter cannot examine intelligence activities, determine whether additional information is needed, or assess whether laws are being violated. Beyond the limited situations involving briefings on covert actions, there is no legislative or constitutional basis for permitting the executive to limit briefings to such a small subset of Congress. Nor is there any legal or constitutional basis for the executive choosing which members of Congress may have access to information on national security policies.

The current Administration’s unprecedented assertion of presidential unilateralism (what some have termed the “monarchical prerogative”) and Congress’ failure to exercise its oversight responsibilities not only undermine our constitutional system of checks and balances, but preclude effective national security policy-making by depriving the government of a forum to debate policy and to identify and correct errors.

## **II. Proposed Solutions**

### **A. Guiding Principles**

The President has an overriding obligation to exercise executive authority in conformity with the law. Accordingly, the new President should articulate a reasonable view of executive authority that is grounded in the text and structure of the Constitution, as well as settled judicial precedent. In addition to Congress’ authority to legislate, to appropriate funds, and to confirm presidential appointments, general principles of oversight and accountability underlying the separation of powers require that Congress be fully informed concerning intelligence and national security activities. The new Administration should promote transparency and accountability -- including with respect to OLC opinions upon which the executive relies -- and should limit secrecy and over-classification. Only when the executive shares information with Congress and exposes legal rulings and interpretations to scrutiny is democratic oversight of intelligence and national security activities possible, and only then can the system of checks and balances be restored.

By the same token, Congress must exercise its oversight authority in matters of intelligence and national security, rather than acquiescing to the Administration’s assertion of unfettered executive authority. In doing so, Congress must use its various powers and insist on obtaining information necessary to conduct effective oversight and to preserve the rule of law.

### **B. Proposed Measures**

1. **Proposal 1:** The new President should issue an unambiguous statement that his administration will enforce the laws passed by Congress or advise Congress promptly when he is not doing so and why. He should also clarify that the new administration will not construe the Authorization for Use of Military Force to override existing legislation.

2. **Proposal 2:** The new administration should publicly release the legal opinions issued by the Office of Legal Counsel that authorize torture, “enhanced” interrogation techniques, detention without meaningful hearings, extraordinary rendition and warrantless surveillance, among others. The President should also order the Attorney general to initiate a thorough review of all such opinions and, as appropriate, to revise or withdraw the opinions.
3. **Proposal 3:** Congress should enact legislation, such as the proposed OLC Reporting Act of 2008, requiring that the Attorney General report to Congress when the Department of Justice issues a legal opinion concluding that the executive branch is not bound by a federal statute.
4. **Proposal 4:** Congress should vigorously exercise its existing oversight responsibilities, including oversight of intelligence and national security activities. Likewise, the executive branch should respect Congress’ oversight role. For example, the new President and Congress should confine the use of “gang of eight” briefings, which create the impression of accountability but preclude effective oversight, to the limited category of situations for which they were legislatively authorized. By federal statute, “gang of eight” briefings are permitted for covert actions in “extraordinary circumstances affecting vital interests of the United States,” but not for other intelligence activities. At minimum, the use of such briefings should be limited to the narrow and extraordinary circumstances permitted by law.

### III. Allies\*

#### **American Association of Law Libraries**

Mary Alice Baish, Acting Washington Affairs Representative  
[baish\(at\)law.georgetown.edu](mailto:baish(at)law.georgetown.edu)  
202-662-9200

#### **American Library Association**

Lynne E. Bradley, Director  
[lbradley\(at\)alawash.org](mailto:lbradley(at)alawash.org)  
202-682-8410

#### **Association of Research Libraries**

Prudence Adler  
[prue\(at\)arl.org](mailto:prue(at)arl.org)  
202-296-2296 (ext. 104)

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

Chip Pitts, President  
[chip.pitts\(at\)att.net](mailto:chip.pitts(at)att.net)

#### **Center for Democracy & Technology**

Gregory T. Nojeim

[gnojeim\(at\)cdt.org](mailto:gnojeim(at)cdt.org)

202-637-9800 (ext 113)

The Internet in Transition, *available at* <http://www.cdt.org/election2008/>

**Citizens for Responsibility and Ethics in Washington**

Anne Weismann, Chief Counsel

[aweismann\(at\)citizensforethics.org](mailto:aweismann(at)citizensforethics.org)

202-408-5565

**Common Cause**

Sarah Dufendach, Vice President for Legislative Affairs

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

02-736-5709

**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)

**Electronic Frontier Foundation (EFF)**

Kevin S. Bankston

[bankston\(at\)eff.org](mailto:bankston(at)eff.org)

415-436-9333 (ext.126)

**Essential Information**

John Richard or Robert Weissman

202-387-8034

**Federation of American Scientists**

Steve Aftergood

[saftergood\(at\)fas.org](mailto:saftergood(at)fas.org)

202-546-3300

**Government Accountability Project**

Jesselyn Radack, Homeland Security Director

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

202-408-0034 (ext. 107)

**Liberty Coalition**

Michael D. Ostrolenk, Co-Founder/National Director

[www.libertycoalition.net](http://www.libertycoalition.net)  
[mostrolenk\(at\)libertycoalition.net](mailto:mostrolenk(at)libertycoalition.net)  
301-717-0599

**National Litigation Project of the Lowenstein International Human Rights Clinic, Yale Law School**

Hope Metcalf  
[hope.metcalf\(at\)yale.edu](mailto:hope.metcalf(at)yale.edu)  
Ramzi Kassem  
[ramzi.kassem\(at\)yale.edu](mailto:ramzi.kassem(at)yale.edu)  
203-432-4800

**OMB Watch**

Sean Moulton, Director, Federal Information Policy  
202-234-8494  
Fax: 202- 234-8584

**Physicians for Human Rights**

Sara B. Greenberg, JD, MALD  
Advocacy Associate  
[sgreenberg\(at\)phrusa.org](mailto:sgreenberg(at)phrusa.org)  
202-728-5335 ext. 302

**OpenTheGovernment.org**

Patrice McDermott  
[pmcdermott\(at\)openthegovernment.org](mailto:pmcdermott(at)openthegovernment.org)  
202-332-6736

**South Asian Americans Leading Together**

Priya Murthy  
[priya\(at\)saalt.org](mailto:priya(at)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(at)gmail.com)  
650-736-2312

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

Dane vonBreichenruchardt, President  
[usbor\(at\)aol.com](mailto:usbor(at)aol.com)  
202-546-7079

\*These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, 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**

Essentially, the Bush administration has argued that since we are at war in Iraq and Afghanistan and we are fighting a “war on terror,” the President has broad wartime powers under Article II of the Constitution as the Commander in Chief. They also contend that in this post-9/11 world, the need to safeguard our national security demands that the Executive branch maintain the secrecy of national security information. They assert that the Executive branch has a particular expertise in foreign policy and national security, and that the members of other branches – Congress and the courts – cannot be trusted either to safeguard national security information or to make informed decisions on national security issues.

However, the President’s powers under Article II are limited, and even the Commander-in-Chief power does not authorize the President to ignore the duly enacted laws of Congress. Further, while certain national security information must be protected from general public disclosure, information may still be shared with Members of Congress and/or federal judges in connection with their consideration of national security issues. Unchecked executive discretion promotes abuse, and oversight by Congress and the courts is necessary and constitutionally required.

Finally, as to the specific issue of OLC opinions, the Executive branch argues that the president must be free to receive confidential legal advice from his lawyers. Such confidentiality, however, should not preclude the Executive from complying with the requirements of the proposed OLC Reporting Act, by notifying Congress whenever OLC has concluded that the president is not bound by a particular federal statute. The proposed legislation would not require that the substance of the legal opinion be disclosed.

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

- a. Kathleen Clark, Ethical Issues Raised by the OLC Torture Memorandum, *Journal of National Security Law*, Vol. 1, p. 455, 2005, *available at* [http://www.mcgeorge.edu/documents/publications/jnslp/09\\_Clark\\_Master\\_e.pdf](http://www.mcgeorge.edu/documents/publications/jnslp/09_Clark_Master_e.pdf).
- b. Congressional Research Service, “Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions” (Jan. 18, 2006), *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/nsa/crs11806rpt.pdf>.
- c. Testimony of Walter Dellinger, United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on “Restoring the Rule of Law”, September 16, 2008, *available at*

- [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit\\_id=7411](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit_id=7411).
- d. Testimony of Harold Hongju Koh, United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on “Restoring the Rule of Law”, September 16, 2008, *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit\\_id=7408](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit_id=7408).
  - e. Testimony of the Honorable Mickey Edwards, United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on “Restoring the Rule of Law”, September 16, 2008, *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit\\_id=7407](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit_id=7407).
  - f. *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 110th Cong. (April 30, 2008), *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?renderforprint=1&id=3305>.
  - g. *Dept. of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part I): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 97 (2008), *available at* <http://judiciary.house.gov/hearings/printers/110th/42212.PDF>.
  - h. *Guidelines for the President’s Legal Advisors*, reprinted in 81 IND. L.J. 1345 (2006) (Introduction by Dawn E. Johnson) (identifying 10 key principles endorsed by 10 former OLC attorneys to guide OLC in performing its duties and upholding the rule of law), *available at* <http://www.indianalawjournal.org/downloadattachment.php?aId=7bc9fc4309f943c510905b5e75dbc254&articleId=478>.
  - i. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559 (2007), *available at* <http://www.uclalawreview.org/articles/content/54/ext/pdf/6.1-3.pdf>.
  - j. Jane Mayer, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).
  - k. Letter from Sens. Leahy and Specter to Fred Fielding, Counsel to the President (Aug. 19, 2008), *available at* <http://leahy.senate.gov/issues/Judiciary/081908FieldingReOLC.pdf>.
  - l. Subpoena Issued by Senate Judiciary Committee Chairman Leahy (D-VT) on October 21, 2008 to Attorney General Michael Mukasey, *available at* <http://judiciary.senate.gov/resources/documents/upload/10-21-08-OLC-Subpoena.pdf> (subpoena seeking specific OLC opinions related to interrogation and detention practices, as well as lists, logs or indices of memoranda, opinions or legal advice issued by the OLC since September 11, 2001 concerning the Administration’s national security practices and policies related to terrorism);

- available at <http://judiciary.senate.gov/resources/documents/upload/10-21-08-Subpoena-Coverletter.pdf> (cover letter accompanying subpoena).
- m. OLC Reporting Act of 2008 (S. 3501), available at <http://www.thomas.gov/cgi-bin/query/C?c110:./temp/~c110ilvVkK>.
  - n. Testimony of the John Podesta, United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on “Restoring the Rule of Law”, September 16, 2008 , available at [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit\\_id=7418](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3550&wit_id=7418)
  - o. *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 COLO. L. REV. 1 (2006) (lead article), available at [http://2009transition.org/liberty-security/administrator/index2.php?option=com\\_docman&section=documents&task=download&bid=6](http://2009transition.org/liberty-security/administrator/index2.php?option=com_docman&section=documents&task=download&bid=6)
  - p. The Constitution Project, *Statement of the Coalition to Defends Checks and Balances*, available at [http://www.constitutionproject.org/pdf/Checks\\_and\\_Balances\\_Initial\\_Statement.pdf](http://www.constitutionproject.org/pdf/Checks_and_Balances_Initial_Statement.pdf)
  - q. Dawn E. Johnsen, *All the President’s Lawyers: How to Avoid Another “Torture Opinion” Debacle* (July 2007), available at <http://acslaw.org/files/Dawn%20Johnsen%20July%202007.pdf>

# APPENDIX

## ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS

### I. Jurisdiction:

- A. Congress:** Proposal 3 would most likely be addressed by the House and Senate Judiciary Committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposal 4 would most likely be addressed by various congressional committees, including the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposals 1 and 2 do not require legislative action.
- B. Executive Branch:** The President could implement Proposal 1 through a presidential memorandum, without promulgating executive orders or regulations, and without agency involvement. Proposal 2 would be addressed by the White House and the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Executive action required by Proposal 3 would initially be signing the legislation into law and thereafter would be addressed by the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Proposal 4 would be addressed by the White House (primarily those responsible for briefing Congress on intelligence and national security activities).

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

#### A. Legislative Branch:

1. The OLC Reporting Act (S. 3501), co-sponsored by Sens. Russell Feingold (D-WI) and Diane Feinstein (D-CA), was introduced in the Senate on September 16, 2008. The bill would require the Office of Legal Counsel (OLC) to report to Congress when it *determines that the Executive Branch is not bound by a statute*. The bill was reported out of the Senate Judiciary Committee on September 25, 2008 and placed on the Senate Legislative Calendar under General Orders (Calendar No. 1083) No action has been taken on the Senate floor.
2. Rep. Brad Miller (D-NC) introduced a bill similar to the OLC Reporting Act in the House (H.R. 6929) on September 17, 2008. It has been referred to the House Judiciary Committee, but no action has been taken.
3. As authorized by the Senate Judiciary Committee, Senate Judiciary Committee Chairman Leahy (D-VT) issued on October 21, 2008 a subpoena to Attorney General Michael Mukasey seeking by November 18, 2008 specific OLC opinions related to interrogation and detention practices, as well as lists, logs or indices of memoranda, opinions or legal advice issued by the OLC since September 11, 2001 concerning the Administration's national security practices and policies related to

terrorism.<sup>1</sup> Senator Leahy and Judiciary Committee Ranking Member Arlen Specter (R-PA) previously had requested such documents from Fred Fielding, Counsel to the President, by letter dated August 19, 2008.<sup>2</sup>

4. The release of the previously undisclosed OLC opinions regarding torture, detention, and other issues has been the subject of extensive debate and testimony in Congress. Many members of Congress have called upon the Administration to fully release the OLC opinions related to interrogation and detention practices. Recent congressional hearings on this issue include the following: *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 110th Cong. (April 30, 2008); *Dept. of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part I): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 97 (2008). To date, Congress has not passed any laws on this issue.

---

<sup>1</sup> Subpoena available at <http://judiciary.senate.gov/resources/documents/upload/10-21-08-OLC-Subpoena.pdf>.

<sup>2</sup> Letter available at <http://leahy.senate.gov/issues/Judiciary/081908FieldingReOLC.pdf>.