

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, 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 EIGHTEEN

EXECUTIVE PRIVILEGE & CONGRESSIONAL OVERSIGHT

I. The Problem

When properly invoked, executive privilege is an important tool for protecting Presidential communications and executive branch deliberations. In recent years, however, the President has frequently abused this power by making overbroad privilege assertions and by showing insufficient respect for the interests of Congress. For many years, the Office of Legal Counsel in the Justice Department has recognized that in disputes regarding congressional requests for information, both branches have a constitutional obligation to seek to accommodate the interests of the other insofar as possible. The Administration has scantily honored this obligation in form and has eviscerated it in substance. Among other things, the Administration has claimed, under the cloak of executive privilege, that White House officials have no obligation even to appear in response to properly authorized congressional subpoenas. It has taken the position that Congress has no legitimate interest in investigating Presidential dismissals of his appointees, even if those dismissals are allegedly part of an effort to use criminal law enforcement against political enemies. Still further, when Congress voted these White House officials in criminal contempt for refusing to testify, the Administration has refused to investigate and prosecute the congressional contempt citations, potentially immunizing the executive from appropriate checks on this power. These actions, along with the Administration's general unwillingness to compromise with Congress and other delaying tactics, have made prompt and effective resolution of these inter-branch disputes illusory. The result has been a weakening of Congress's ability to fulfill its constitutional oversight responsibilities and a further erosion of our system of checks and balances.

II. Proposed Solutions

A. Guiding Principles

Executive privilege disputes have been and will continue to lie at the intersection of legal, political, and policy concerns. Although the political dynamics of each issue are unique, or at least distinct, it is critical that both the executive and the legislative branches recognize and respect each other's interests. Thus, both branches should agree on procedural issues – that is, upon a means by which these disputes can be resolved by accommodation in the first instance, and then, as a last resort, by a prompt and fair judicial proceeding if an accommodation is not reached.

B. Proposed Measures

- 1. Proposal 1:** Congress should enact legislation that allows the House or the Senate to ask a court to appoint a special prosecutor to investigate and prosecute criminal contempt charges when the executive branch has refused to

comply with a congressional subpoena and the Justice Department refuses to present the case to a grand jury.

2. **Proposal 2:** Congress should enact a civil contempt statute that applies to subpoenas issued to federal officials, whereby either House can civilly enforce its subpoenas in federal district court.¹
3. **Proposal 3:** At the outset of each Congress, Congress and the executive branch should, on a bi-partisan basis, agree to a protocol for resolving privilege disputes. The protocol would deal with issues such as the steps both sides should take as part of the accommodation process, the alternative means of obtaining certain types of information, the manner in which privilege should be invoked, the officials who should participate in the discussions before the parties resort to litigation, and similar issues.

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)

Citizens for Responsibility and Ethics in Washington

Anne Weismann, Chief Counsel
[aweismann\(at\)citizensforethics.org](mailto:aweismann(at)citizensforethics.org)
202-408-5565
Crossing the Line,
<http://citizensforethics.org/files/Crossing%20the%20Line.pdf>

Common Cause

¹¹ Currently only the Senate has statutory civil contempt power, and it does not apply to federal officials acting in their official capacity. *See* 28 U.S.C. § 1365.

Sarah Dufendach, Vice President for Legislative Affairs
www.commoncause.org
202-736-5709

Defending Dissent Foundation

Sue Udry, Director
[Sue.udry\(at\)defendingdissent.org](mailto:Sue.udry@defendingdissent.org)
202-549-4225
www.defendingdissent.org

Essential Information

John Richard or Robert Weissman
202-387-8034

Federation of American Scientists

Steve Aftergood
[saftergood\(at\)fas.org](mailto:saftergood@fas.org)
202-546-3300

Government Accountability Project

Jesselyn Radack, Homeland Security Director
[JesselynR\(at\)whistleblower.org](mailto:JesselynR@whistleblower.org)
202-408-0034 (ext. 107)

Liberty Coalition

Michael D. Ostrolenk, Co-Founder/National Director
www.libertycoalition.net
[mostrolenk\(at\)libertycoalition.net](mailto:mostrolenk@libertycoalition.net)
301-717-0599

National Coalition Against Censorship

Joan E. Bertin, Esq., Executive Director
[bertin\(at\)ncac.org](mailto:bertin@ncac.org)
212-807-6222
Fax: 212-807-6245

OMB Watch

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

OpenTheGovernment.org

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

Public Citizen

Angela Canterbury, Director of Advocacy, Public Citizen's Congress
Watch Division
[acanterbury\(at\)citizen.org](mailto:acanterbury@citizen.org)
202-454-5188
Fax: 202-546-5562

South Asian Americans Leading Together

Priya Murthy
[priya\(at\)saalt.org](mailto:priya@saalt.org)
301-270-1855

U.S. Bill of Rights Foundation

Dane vonBreichenruchardt, President
[usbor\(at\)aol.com](mailto:usbor@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

Proponents of the Administration's expansive use of executive privilege have argued that the Administration's stance is necessary to protect the President's ability to receive frank and candid advice. This privilege encompasses not only communications among the President and his closest advisors, but also other communications among other executive officials that are undertaken to inform presidential decisionmaking. If such communications are not protected from disclosure, it will have a "chilling effect" on the President's ability to receive candid advice. Proponents have also frequently argued that Congress has a limited legislative interest in obtaining such information, especially in areas outside of Congress' direct authority (such as the hiring and firing of U.S. Attorneys or certain national security matters). Finally, under the unitary executive theory, the Administration's defenders have argued that the Department of Justice cannot prosecute executive officials who fail to comply with congressional subpoenas at the command of the President. This also means that any attempt by Congress to intrude on such prosecutorial decisions would be unconstitutional.

In response, it can be argued that this Administration has gone well beyond traditional understandings of the scope of executive privilege. While some core executive branch communications and deliberations should indeed be protected, the Administration has unjustifiably expanded the privilege to shield itself from legitimate congressional oversight. Moreover, the courts have long recognized that executive

privilege can be overcome in certain circumstances, particularly where there are allegations of serious criminal wrongdoing – as has frequently been the case in recent years. In such cases, Congress may have a legitimate investigatory and legislative interest that outweighs the executive’s concerns about the so-called “chilling effect.” Finally, notwithstanding the substantive merits of the Administration’s privilege assertions, the Administration’s failure to participate in a good faith accommodation process has resulted in unnecessary litigation that does not serve the interests of either branch.

V. Recommended Documents for Further Information

- a. Brennan Center for Justice, *Twelve Steps to Restore Checks and Balances* (2008), available at http://brennan.3cdn.net/543341179e6a856b9b_9um6batcl.pdf.
- b. Citizens for Responsibility and Ethics in Washington, *Crossing the Line: The Bush Administration's Efforts to Expand Its Powerful Reach* (2007), available at <http://citizensforethics.org/files/Crossing%20the%20Line.pdf>.
- c. Draft Report of the House Committee on Oversight and Government Reform Regarding President Bush's Assertion of Executive Privilege In Response to the Committee Subpoena to Attorney General Michael B. Mukasey (Oct. 2008) available at <http://oversight.house.gov/documents/20081014104725.pdf>.
- d. Draft Report of the House Committee on Oversight and Government Reform Regarding the Bush Administration’s Abuse of Power in Asserting Executive Privilege in Response to the Committee Subpoenas to Stephen Johnson, Administrator, Environmental Protection Agency, and Susan Dudley, Administrator, White House Office of Management and Budget (Oct. 2008) available at <http://oversight.house.gov/documents/20081014104748.pdf>.
- e. Report of the Committee on the Judiciary, House of Representatives, *Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolten, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply with Subpoenas Duly Issued By the Committee on the Judiciary*, H.R. Rep. No. 110-423 (Nov. 5, 2007), available at <http://judiciary.house.gov/hearings/pdf/ContemptReport071105.pdf>.
- f. Morton Rosenberg, Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, CRS Report RL30319 (updated April 16, 2008), available at <http://www.fas.org/sgp/crs/secretcy/RL30319.pdf>.
- g. Morton Rosenberg, Congressional Research Service, *Congress’s Contempt Power: Law, History, Practice, and Procedure*, CRS Report RL34097 (updated April 15, 2008), available at <http://www.fas.org/sgp/crs/misc/RL34097.pdf>.

- h. Letter to the President from Michael B. Mukasey, Attorney General (July 15, 2008), available at <http://oversight.house.gov/documents/20081014104911.pdf>.
- i. Letter to the President from Michael B. Mukasey, Attorney General (June 19, 2008), available at <http://oversight.house.gov/documents/20081014105209.pdf>.
- j. *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. -- (2007), available at <http://www.usdoj.gov/olc/2007/wh-executive-privilege062707.pdf>.
- k. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* (July 10, 2007), available at <http://www.usdoj.gov/olc/2007/miers-immunity-Opinion071007.pdf>.
- l. Letter to the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents* (Dec. 10, 2001), available at <http://www.usdoj.gov/olc/executiveprivilege.htm>.
- m. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).
- n. David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079 (2007).
- o. Norman J. Ornstein & Thomas E. Mann, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).
- p. William P. Marshall, *Limits on Congress' Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (2004).
- q. Louis Fisher, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2003).
- r. Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002).
- s. Mark J. Rozell, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* (2002)

APPENDIX

Executive Privilege & Congressional Oversight

I. Jurisdiction:

- A. **Congress:** Proposals 1 and 2 would most likely be addressed by the House and Senate Judiciary Committees and possibly the House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee. Proposal 3 would most likely be addressed by the House and Senate leadership of both parties.
- B. **Executive Branch:** Proposals 1 and 2 do not require executive action other than signing the legislation into law. Proposal 3 would be addressed by the White House (primarily through the White House Counsel's Office) and the Department of Justice (primarily through the Attorney General, the Office of Legal Counsel, and the congressional affairs office).
- C. **Judicial Branch:** The preferred outcome in any inter-branch dispute is to avoid judicial intervention. If intervention is required, under any of these proposals the dispute would typically be litigated in the federal district court of the District of Columbia.

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

- A. **Congress:** In regard to Proposal 1, Congressman Brad Miller (D-NC) has introduced this legislation for the House. *See* Special Criminal Contempt of Congress Procedures Act of 2008, H.R. 6508, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken. In regard to Proposal 2, Congresswoman Sheila Jackson-Lee (D-TX) has introduced this legislation for the House. *See* Contempt of the House of Representatives Subpoena Authority Act of 2008, H. R. 5230, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken.
- B. **Executive Branch:** N/A
- C. **Judicial Branch:** The subjects of executive privilege and Congress' non-statutory civil contempt power were most recently addressed in *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, Civil Action No. 08-0409 (JDB) (D.D.C. 2008), *stay granted* by No. 08-5357 (D.C. Cir. 2008). Relevant prior decisions on the topics of executive privilege and congressional oversight include *United States v. Nixon*, 418 U.S. 683 (1974); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *Senate Select*

Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).