

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.

EXECUTIVE ACTION

Charities and Foundations

CHAPTER 1: NATIONAL SECURITY AND CHARITIES

- A. Direct the Secretary of State to use his/her authority under 18 USC 2339B(j) to waive the material support prohibition for technical advice and assistance, training, and personnel where no violent activity is involved.
- B. End the use of the International Emergency Economic Powers Act (IEEPA) to regulate charities, and allow the Department of State to develop a more effective and appropriate framework.
 - 1. Cease and desist orders to charity from Treasury
 - 2. Opportunity to cure: 60-90 days to sever a tie, restructure a program, fire employee, etc.
 - 3. Administrative hearing to challenge designation that includes cross-examination, ability to submit evidence, etc.
 - 4. Process for releasing funds to beneficiaries via another charity (including a time limit on frozen funds)
 - 5. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes
- C. Withdraw the Treasury Department's ineffective "Guidelines" and replace with real guidelines that help charities continue to meet critical needs while ensuring their scarce resources are used for legal and charitable purposes.

Detention, Interrogation, and Trials

CHAPTER 2: CLOSING GUANTANAMO

- A. Immediately direct the appropriate authorities to compile and review all information in the detainees' files. Instruct the authorities to determine which detainees should be prosecuted in the United States, repatriated, released, or resettled.
- B. Direct the Secretary of Defense to release any detainee who has already completed serving a sentence imposed by military commission. Discontinue pending military commission proceedings at Guantanamo.

- C. Transfer detainees charged with terrorism or other criminal offenses under U.S. law to an appropriate facility in the United States pending their prosecution in federal court.
- D. Immediately repatriate or resettle detainees in accordance with applicable domestic and international law. Provide sufficient advance notice of any transfer to allow detainees to assert their rights against transfer to torture and/or continued arbitrary detention.
- E. Allow the United Nations High Commissioner on Refugees (UNHCR) to conduct refugee status determinations of those detainees who express a fear of repatriation. Instruct all federal agencies to cooperate with humanitarian organizations and detainees' counsel to find suitable options for resettlement.
- F. In order to encourage other countries to agree to accept detainees for resettlement, immediately arrange for a small number of detainees who are known to pose no security risk, such as the Uighurs, to resettle within the United States.

CHAPTER 3: END ILLEGAL DETENTION, TORTURE, AND RENDITION

A. *Enforce Prohibitions against Torture and Other Cruel, Inhuman, and Degrading Treatment*

1. Denounce torture and reaffirm our commitment to the absolute prohibition of torture in peacetime and in war.
2. Denounce cruel, inhuman, and degrading treatment and reaffirm our commitment to the absolute prohibition of such treatment in peacetime and in war.
3. Issue an Executive Order establishing a set of national standards for interrogation to be used by all Defense Department, intelligence, and law enforcement agencies.
4. Revoke all Executive Orders, policy statements, memoranda, and any other documents or verbal orders authorizing the use of certain techniques on detainees that may be considered cruel, inhuman or degrading treatment, and reaffirm the country's commitment to compliance with the Geneva Conventions, the ICCPR, and the Convention Against Torture.
5. Review and reform intelligence gathering practices such that no person in U.S. government custody or control is held without charge solely for intelligence-gathering and/or preventive detention purposes.
6. Support congressional efforts to prevent torture and cruel, inhuman, and degrading treatment.

7. Amend Appendix M of the U.S. Army Field Manual to eliminate the use of isolation, sleep deprivation, and sensory deprivation as interrogation or coercive techniques. Make similar amendments to field manuals of all other branches of the armed forces

B. Enforce Prohibitions against Transfers to Torture, and End the Rendition Program

1. Denounce and repudiate all Executive branch policies, orders, memoranda, and statements authorizing or condoning the use of inter-state transfers to facilitate the interrogation of people seized by any U.S. agency, held at the request of any U.S. agency, and/or detained by any U.S. agency.
2. Revoke all prior Executive branch actions authorizing the CIA's "extraordinary rendition program," and any other agency's use of enforced disappearances or secret detentions.
3. Announce the country's commitment to working with the International Committee of the Red Cross(ICRC) to ensure that every detainee held around the world is listed properly as an internee, is permitted to meet with ICRC representatives, to send correspondence to family members through ICRC channels, and to receive humanitarian aid.
4. Issue an Executive Order prohibiting the acceptance of "diplomatic assurances" or similar bilateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial.
5. Call upon Congress to commence a prompt, thorough, and independent investigation into all allegations involving the torture or abuse of individuals in U.S. custody or effective control during the "war on terror" regardless of where in the world the misconduct has occurred.
6. Issue an Executive Order requiring the State Department to assist detainees eligible for release, who cannot be returned to their countries of origin or habitual residence because they would be at risk of grave human rights abuses, with their efforts to resettle in third countries. Ensure that any transfers to third countries are only made with the informed consent of the individuals concerned and that these persons are not subjected to any pressures or restrictions that may compel them to choose to resettle in a third country.
7. Commit the U.S. to providing prompt and adequate reparations, including restitution, rehabilitation, and fair and adequate financial compensation to released detainees for the period spent unlawfully detained and other violations that they may have suffered.

C. End Enforced Disappearances and Arbitrary Detention, and Abolish Secret Prisons and Hidden CIA Detentions

1. Repudiate and revoke any and all orders authorizing or providing legal justification for secret detentions.
2. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.
3. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency, and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each respective agency regardless of the length of the detention, and to publicly release all detainees' names, the duration and locations of their detention in U.S. custody or in constructive U.S. custody, the asserted bases for their detention, and the dates and circumstances of their releases, transfers, or deaths.
4. Issue an Executive Order requiring the Defense Department to provide the names of all persons in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the ICRC and ensure that the Committee has unfettered access to all such prisoners.
5. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.
6. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to publicly announce the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.
7. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody or constructive custody documenting the place, time, and the circumstances of the seizure or arrest, and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status.
8. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all detainees held in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies.
9. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel,

- meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, the right to seek an order of release.
10. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all Defense Department, intelligence, and law enforcement agency personnel involved in the seizure, arrest, or custody of persons are trained to enforce the above policies.
 11. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.
 12. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each agency regardless of the length of the detention, and to publicly release all detainees' names; the duration and locations of their detention in U.S. custody or in constructive U.S. custody; the asserted bases for their detention; and the dates and circumstances of their releases, their transfers, or their deaths.
 13. Issue an Executive Order requiring the Defense Department to provide the names of all prisoners in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the International Committee of the Red Cross and ensure that the International Committee of the Red Cross has unfettered access to all such prisoners.
 14. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision, are officially acknowledged and announced to the public.
 15. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody, documenting the place, time, and circumstances of the seizure or arrest and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status.
 16. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies.
 17. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel, meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, to seek an order of release.

18. Require that all Defense Department, intelligence, and law enforcement agency personnel involved in the seizure, arrest, and/or custody of detainees are trained to enforce the above policies.

CHAPTER 4: PROSECUTE TERRORIST SUSPECTS IN ACCORDANCE WITH THE LAW

- A. Oppose all proposals to create National Security Courts.
- B. Immediately suspend all military commission proceedings at Guantanamo and terminate the existing Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards.
- C. Rescind President Bush's Order of November 13, 2001 establishing military commissions.
- D. Direct the Secretary of Defense to withdraw the March 21, 2002, "Military Commission Order No.1," establishing procedures for trial by military commission.
- E. Direct the Attorney General to withdraw the August 12, 2005 "Proposed Amendments to Military Commission order No. 1," proposing certain amendments to the Secretary of Defense's Military Commission Order No. 1.
- F. Direct the Secretary of Defense to release and arrange for the immediate repatriation or resettlement of detainees upon either (a) acquittal or (b) completion of their sentences (including those already sentenced by military commission).
- G. The appropriate authorities should perform a case-by-case assessment for each detainee at Guantanamo Bay to determine which detainees can and should be charged for violations of U.S. law pursuant to federal criminal jurisdiction. Individuals for whom criminal charges are inappropriate should either be repatriated or, in the event repatriation is not possible, should be resettled in a third country or the United States.
- H. For cases subject to prosecution, direct the Attorney General to thoroughly review existing evidence for materiality, reliability and admissibility; canvass the federal criminal code to identify any offenses with which the detainee could be charged; and undertake any additional investigation as warranted.
 1. Prosecute complex international terrorism cases in federal courts, relying on CIPA to protect sensitive intelligence sources.
 2. Prosecutions should begin on a rolling basis once individual case reviews are completed.

3. The security clearance process for qualified federal and private defenders should be administered concurrently with the case review so as not to cause future delay in prosecution.

Immigration and National Security

CHAPTER 5: FAILING TO PROTECT REFUGEES AND ASYLUM SEEKERS: OVERLY BROAD DEFINITION OF MATERIAL SUPPORT FOR TERRORISM

- A. 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.
- B. 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.
- C. Streamline and improve the process for issuing waivers in appropriate cases so that far more deserving asylum applicants have access to protection.

CHAPTER 7: MISUSE OF IMMIGRATION DETENTION LAWS IN COUNTER- TERRORISM EFFORTS

- A. Require by regulation that a non-citizen detainee be charged with an immigration violation and served with a charging document within 48 hours of his/her arrest, and that court hearings be scheduled timely.
- B. Issue an internal directive not to exercise the Secretary’s discretion to seek an automatic stay and instead pursue any stay as part of filing an appeal of the judge’s decision as per 8 C.F.R. §1003.19(i)(1).
- C. Rescind the Creppy Memorandum and prohibit the blanket closure of immigration hearings, with limited, case-by-case exceptions only.
- D. Repeal the “automatic stay” regulation, 8 C.F.R. §1003.19(i)(2) (Oct. 17, 2001).
- E. Follow legal limits on prolonged detention of non-citizens who have been ordered deported.

Secrecy, Surveillance, and Privacy

CHAPTER 8: REVISING ATTORNEY-GENERAL GUIDELINES ON FBI INVESTIGATIONS TO PREVENT INVESTIGATIONS BASED ON FIRST AMENDMENT ACTIVITIES, OR ON RACE, RELIGION, ETHNICITY, OR NATIONAL ORIGIN

- A. Direct the Attorney General to evaluate all FBI investigative activities and end any practices that are illegal, ineffective or prone to abuse.
- B. Direct the Attorney General to immediately and thoroughly review the new Guidelines as well as all previous guidelines issued during the past eight years and to amend them to make them consistent with the guiding principles above.
- C. Direct the Attorney General to revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity.
- D. Work with Congress to pass the Ending Racial Profiling Act (HR 4611; S 2481)
- E. Work with Congress to establish a statutory investigative charter for the FBI that limits the FBI's authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

CHAPTER 10: FUSION CENTERS AND THE EXPANSION OF DOMESTIC INTELLIGENCE

- A. President should review the National Information Sharing Strategy to ensure that all federal information-sharing programs are carefully bounded to protect the privacy and civil liberties of U.S. persons.
- B. Revise federal regulations to ensure that no personally identifiable information can be collected in a criminal intelligence system without reasonable suspicion that the person is or may be involved in criminal activity. Reinstate previous regulatory restrictions on the dissemination of information from criminal intelligence systems contained in 28 CFR Part 23.
- C. Issue a new National Information Sharing Strategy that incorporates the following principles:
 - 1. All information collected, analyzed, or shared must comply at a minimum with the Federal Privacy Act, and where stronger state statutes exist the additional privacy protection afforded must apply.

2. Information Fusion Centers must have a single operational definition for their mission and clearly defined scope for their operation.
 3. The Department of Homeland Security should fully disclose the location, jurisdiction served, and amount of federal funding provided to each intelligence fusion center operating within the United States.
 4. Prohibit no-bid contracting, and require publication of contracts and listing of all private sector data sources used in fusion center data collection and analysis.
 5. Require an annual report from the Secretary of Homeland Security to the Congress, on each fusion center, which includes the number of arrests, prosecutions, and convictions by category of offense directly related to fusion center operations.
 6. Intelligence Fusion Centers should be subject to federal Privacy Impact Assessment rules.
 7. Federal reporting requirements should direct that each information fusion center make public the partnering organizations, businesses and government entities engaged in the effort.
 8. Prohibit the U.S. military from participating in domestic intelligence activities.
- D. The Department of Justice or Department of Homeland Security Inspector General should launch an investigation of information fusion centers to review their compliance with existing federal laws intended to protect due process, privacy, civil liberty, and civil rights.

CHAPTER 11: PROMOTING TRANSPARENCY IN GOVERNMENT

A Information Removed from Government Websites and “Need to Know” Culture Reduce Public Trust and Security

1. President should direct the executive branch to operate under the presumption that government information should be made available to the public except under limited and clearly-articulated statutory or regulatory exceptions.
2. President should direct the review of standards and guidelines created and implemented post-September 11th regarding information made publicly-available online.

B. Sensitive But Unclassified/Controlled Unclassified Information Markings Reduce Security by Impeding Disclosure to State, Local and Tribal Authorities, First Responders and to the Public

1. Amend or replace the CUI Memorandum with a memorandum that directs agencies to reduce use of information control markings, prohibits reliance on a control marking as a basis for withholding information requested by the public, and includes a positive statement recognizing that information-sharing and transparency improve security and making clear that the CUI Framework's uniform system is intended to increase disclosure wherever possible.
2. Ensure that the implementation of any framework includes measures to reduce unnecessary control labels, such as a system of audits, training, discipline, and internal and public challenges.

C. FOIA – National Security Used to Justify Overuse of Exemptions and Limit Public Access

1. Order the Attorney General to issue a memorandum to heads of departments and agencies rescinding the Ashcroft memorandum and reaffirming FOIA's presumption of disclosure and the Department of Justice's commitment to government transparency. The new memorandum should set forth the agency's policy that records should be released unless there is both a legal basis to withhold them and the withholding agency reasonably foresees that disclosure would harm an interest protected by the applicable exemption

D. Presidential Records – Executive Order Limits Disclosure; Records Policy Puts National Security History at Risk

1. Commit to working with the National Archives and Records Administration and Congress to ensure the necessary oversight and resources for the transfer of the Bush presidential records.
2. Revoke Executive Order 13233.
3. Support legislation to mandate preservation of presidential records.

E. Preemption of State and Local Open Government Laws Promotes Secrecy

1. Issue guidance that instructs all federal agencies to respect state open government and privacy laws and prohibits agencies from using contracts or memoranda of understanding to effectively limit disclosure under state and local public access laws or otherwise infringe on state government management of state record systems.

2. Direct DHS and the DOJ to make public any existing contracts or memoranda that have such effect.

CHAPTER 12: NATIONAL SECURITY LETTERS AND SECTION 215 OF THE USA PATRIOT ACT

- A. Direct agency heads to curtail use of National Security Letters (NSLs) to seek sensitive information about Americans.
- B. Direct the incoming Attorney General to require the FBI to come up with a plan to minimize the collection and retention of personal information about Americans that is obtained with NSLs and Section 215 orders. That plan should require adoption of minimization procedures that comply with Section 101(h) of the Foreign Intelligence Surveillance Act.
- C. Support legislation like the National Security Letters Reform Act (S. 2088 in the 110th Congress) and work with Congress to pass it. The legislation should:
 1. Promote uniform practices by allowing only the FBI to issue NSLs;
 2. Permit the FBI to obtain only less sensitive information with an NSL, such as information that identifies a person or reveals a person's home or email address;
 3. Permit the FBI to use an NSL to obtain that less sensitive information when it has "specific and articulable facts" that the information sought: (i) pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities; or (ii) pertains to an agent of a foreign power or a person in contact with an agent of a foreign power;
 4. Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and transactional records from financial institutions;
 5. Tighten the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;
 6. Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government can prove to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended;

7. Require adoption of minimization procedures based on FISA Section 101(h);
8. Provide for civil damages, including liquidated damages, to any person aggrieved by a clearly illegal misuse of NSL authorities, and such a provision can be found in H.R. 3189, the House counterpart to S. 2088 in the 110th Congress.

CHAPTER 13: REFORM OF THE NATIONAL SECURITY SURVEILLANCE LAWS AND PROCEDURES

- A. President-elect Obama should announce early in the first 100 days of his administration that it is the policy of his administration to:
 1. Adhere to FISA's judicial warrant requirements when engaging in surveillance in the United States;
 2. Comply fully with all intelligence surveillance statutes, and specifically with FISA, and to assert no power under Article II of the Constitution to engage in domestic intelligence gathering that does not fully comply with the law;
 3. Publicly disclose the government documents, including the opinions of the DOJ Office of Legal Counsel, that provided the legal basis for the NSA's warrantless surveillance program;
 4. Direct the Attorney General to withdraw the government's motion to dismiss pending privacy litigation brought against telecommunications carriers for assisting with unlawful warrantless surveillance, or seek a stay of those proceedings until such time as the Attorney General, based on review of the Inspectors' General reports required by the FISA Amendments Act, determines that a grant of immunity is appropriate;
 5. Refrain from using the FISA Amendments Act to engage in bulk collection of the Americans' communications, whether domestic or international; and
 6. Cooperate fully with any investigation of post 9-11 warrantless surveillance.
- B. As President, Mr. Obama should work with Congress to amend FISA in his first year in office to:
 1. Ensure that surveillance authorized under FISA does not undermine the Fourth Amendment's requirement of probable cause of crime and that it complies with all Fourth Amendment standards;
 2. Repeal Title II of the FISA Amendments Act;
 3. Strengthen FISA's exclusivity provisions to ensure that telecommunications firms that provide assistance with surveillance in the future are given immunity only

when the surveillance is authorized by the FISA court or is conducted under a specific, articulated statutory exception to the court order requirement;

4. Require that applications for roving intelligence wiretaps specify either the target of surveillance or the telephone or other communications facility to be surveilled;
5. Amend the FISA Amendments Act to require judicial authorization of surveillance and more searching judicial review of such surveillance, and to bar bulk collection of Americans' international communications;
6. Implement additional civil liberties safeguards, including possibly, civil liberties recommendations that may be contained in the Inspectors General report on the FISA Amendments Act, due in July 2009; and
7. Improve public reporting and transparency so that the effectiveness of FISA surveillance can be evaluated.

CHAPTER 14: PREVENTING OVER-CLASSIFICATION AND RETROACTIVE CLASSIFICATION, AND PROMOTING DECLASSIFICATION, OF GOVERNMENT DOCUMENTS

- A. Issue a new executive order on classification, revising Executive Order 12958
 1. Immediately issue a presidential directive rejecting prior abuses of the classification system and pledging accountability in the classification process.
 2. Commit to consulting with the public and an executive branch task force to develop the new executive order on classification.
 3. New order should:
 - a. Set forth clear standards and procedures for proper classification;
 - b. Reestablish a presumption against classification and ensure consideration of the public interest before information is classified;
 - c. Limit the duration of classification and prohibit abuse of classification markings;
 - d. Systematize and improve the process for declassification of historical records and institute stricter standards for reclassification;
 - e. Create clear and effective processes for sharing classified information among agencies and state and local entities; and
 - f. Establish new mechanisms for oversight of the classification system.
- B. Task each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security

secrecy to the essential minimum and declassifying all information that has been classified without a valid national security justification, whose disclosure would no longer cause any harm to the national security, or of which the continued classification would be outweighed by the public interest.

- C. Direct agency heads to task inspectors general at the agencies to perform oversight of secrecy and classification.

CHAPTER 15: REFORMING THE STATE SECRETS PRIVILEGE

- A. President should declare that it is the policy of his administration never to invoke the privilege to cover up illegal or unconstitutional governmental conduct.
- B. Order the Attorney General to convene an interagency working group to implement the policy and direct the Department of Justice to report invocations of the state secrets privilege to Senate and House Committees on the Judiciary
- C. Declare that the state secrets privilege will be invoked only by the head of an agency and only when he/she has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to national defense or diplomatic relations.
- D. The president should direct the Attorney General that in all litigation in which the state secrets privilege is asserted, attorneys representing the United States government shall:
 1. Assert the privilege only when the head of the agency possessing the evidence concludes that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
 2. Consent to have the judge review *in camera* and *ex parte* all evidence claimed to be protected by the state secrets privilege;
 3. Consent to discovery of non-privileged information in cases in which the state secrets privilege has been invoked;
 4. Consent to the appointment of special masters and/or technical experts to assist with evaluating state secrets privilege claims;
 5. Prepare and submit non-privileged substitutes for evidence asserted to be protected by the state secrets privilege wherever possible; and
 6. Decline to seek dismissal of a case on the basis of the state secrets privilege except where the attorney concludes that it is not possible to create a non-

- privileged substitute for the evidence and disclosure of the evidence asserted to be privileged would cause substantial harm to national defense or diplomatic relations.
- E. Direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege and assess whether assertion of the privilege can be withdrawn with respect to disclosure of particular pieces of evidence, as well as whether the case can move forward with non-privileged information that is substituted for the privileged information.
 - F. Direct the Attorney General that attorneys representing the United States government shall consent to reinstatement and reconsideration of cases dismissed on the basis of the state secrets privilege if the underlying judgment, order, or proceeding from which party seeks relief was entered within the past six years, and the claim on which the judgment, order or proceeding is based is against the government or arises out of conduct by persons acting in the capacity of a government officer, employee, or agent.

CHAPTER 16: REFORMING WATCH LISTS

- A. Direct the Department of Homeland Security and all other federal agencies that watch lists shall not be used in employment screening or hiring decisions. Instead, the government should protect its interests by conducting a careful investigation through established security clearance systems. The President should also direct the Department of Homeland Security to abandon its developing plans to screen applicants for employment (in both the public and private sector) through watch lists.
- B. Direct the TSC and all other agencies with jurisdiction to nominate persons to the watch lists to establish a series of measures to promote the accuracy of the lists at the “front end,” to improve the efficiency and effectiveness of the lists and provide greater fairness to individuals. These measures should include:
 1. Establishing clear written standards that specify the criteria for including a person on the watch lists, the kinds of information to be considered as relevant evidence that the criteria have been met, and the standards of proof required for including individuals on the watch lists.
 2. Establishing a rigorous and reliable nominating process (including an oversight process) to make certain that decisions to include persons on watch lists are made objectively and as consistently as possible across agents and across agencies.
 3. Establishing programs of internal monitoring so that agencies nominating persons to the TSC consolidated watch list and other watch lists can ensure the completeness, timeliness, accuracy, and effectiveness of error correction. This

- should include regular random sampling and analysis of records, annual reporting requirements to Congressional Oversight Committees and to the public.
4. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish systems to ensure that the lists are maintained under fully secure conditions, to protect against the risks of both inadvertent tampering and computer hacking.
 5. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish policies and procedures to safeguard the personal information of individuals submitted to the government as part of the screening process (including as part of Secure Flight and in connection with the redress proceedings and cleared flight programs).
 6. Delaying implementation of Secure Flight until the above –described corrections to the watch lists and the privacy safeguards are fully implemented. Once these corrections and privacy safeguards have been made, new final Secure Flight rules should be promulgated and a 180-day test of the system should be undertaken.
 7. Directing agencies nominating persons to the watch lists or otherwise utilizing such watch lists to better coordinate actions to ensure that consistent changes are made across all watch lists on a timely basis (including requiring agencies to make clear the originating source or an appropriate designation for the source of the information to make more transparent the propagation of information among watch list creators).
 8. Making transparent and publicizing to travelers the information about them that will be shared with the government by aircraft operators as part of the Secure Flight program.
- C. Direct the TSC and all other agencies with jurisdiction to nominate names to or maintain watch lists to establish a redress system that will provide a meaningful and fundamentally fair opportunity for individuals to challenge their inclusion on a watch list.
1. The review process should provide for more extensive review and due process rights than that provided by current agency procedures, including the current DHS Travelers Redress Inquiry Program (“TRIP”). In appropriate cases, this should include the opportunity for an oral administrative hearing and judicial review.
 2. Individuals should be able to challenge their inclusion either on the basis of mistaken identify or on the grounds that the government lacks an adequate justification for including them.
 3. For cases alleging inadequate justification, the government should employ government attorneys with security clearances at a level adequate to ensure that they can review classified material to serve as public advocates.

Separation of Powers

CHAPTER 17: ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS

- A. 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.
- B. 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.
- C. Order the Attorney general to initiate a thorough review of all such legal opinions and, as appropriate, to revise or withdraw the opinions.
- D. Confine the use of “gang of eight” briefings to the narrow and extraordinary circumstances permitted by law.

CHAPTER 18: EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT

- A. 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.

CHAPTER 19: SIGNING STATEMENTS

- A. The President should commit that, when bills are under consideration by Congress, the President will promptly identify any concerns that certain provisions may be unconstitutional and communicate these concerns to Congress so that it can correct the provisions.
- B. If the President believes a previously enacted law is unconstitutional, he should commit to provide Congress a report setting forth in full the legal basis for any decision to disregard or decline to enforce all or part of a law, or to interpret a law in a manner inconsistent with the clear intent of Congress.

CHAPTER 20: WAR POWERS AUTHORITY

- A. The President should publicly pledge that he will not commit troops abroad without prior congressional authorization, except when force is used for a limited range of defensive purposes.
- B. The President should further pledge that he will present complete and accurate information to Congress about any such proposed use of force.