

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:

Charities, Foundations, and National Security

CHAPTER 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists

CHAPTER 2: Closing Guantánamo

CHAPTER 3: End Illegal Detention, Torture, and Rendition

CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security

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

Secrecy, Surveillance, and Privacy

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

Separation of Powers and Executive Authority

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.

APPENDIX

Misuse of Immigration Detention Laws in Counter-Terrorism Efforts

I. Jurisdiction:

A. Legislative Branch

Congress has jurisdiction to pass legislation addressing each of the issues discussed. Such legislation was proposed but not passed in the Civil Liberties Restoration Act of 2004 (H.R. 4591), introduced by Hon. Howard Berman and Hon. William Delahunt and the Civil Liberties Restoration Act of 2004 (S. 2528), introduced by Hon. Edward Kennedy, Hon. Patrick Leahy, Hon. Richard Durbin, Hon. Russ Feingold, and Hon. John Corzine on June 16, 2004. In 2005, Hon. Howard Berman and Hon. William Delahunt introduced the Civil Liberties Restoration Act (H.R. 1502), on April 6, 2005.

B. Executive Branch

The DOJ and DHS have the authority to rewrite the procedures that the DOJ and INS implemented in the wake of the September 11 attacks. Similarly, the memorandum issued by then-Chief Immigration Judge Creppy providing for blanket closure of immigration hearings can also be rescinded administratively.

The rule enabling the Government to nullify a judge's order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community, a rule established by the DOJ in October 2001, can be rewritten by the DOJ.

Likewise, the regulation providing the INS the authority to subject aliens to prolonged detention without charge was instituted by the INS, and can be amended by DHS, which took over responsibilities of the INS under the Homeland Security Act of 2002.

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

A. Legislative Branch:

In 2005, legislation was proposed but not passed that sought to address the issues discussed above. The Civil Liberties Restoration Act sought to "make certain that our Government is given both adequate resources and the authority to protect the well-being of the American people, and clear legal standards and oversight [to] protect their civil liberties." *Immigration Removal Procedures Implemented in the Aftermath of the September 11, 2001 Attacks: Hearing on H.R. 1502 before the House Subcommittee on Immigration, Border Security, and Claims of the*

Committee of the Judiciary, 109th Cong. 109-54 (2005) (statement of Hon. Howard Berman).

B. Executive Branch

The April 2003 Inspector General Report recommended that “DHS document when the charging determination is made, in order to determine compliance with the “48-hour rule” and also that “DHS convert the 72-hour NTA serve objective to a formal requirement.” It further recommended that “DHS specify the ‘extraordinary circumstances’ and the ‘reasonable period of time’ when circumstances prevent the charging determination within 48 hours,” and that “DHS provide, on a case-by-case basis, written justification for imposing the ‘extraordinary circumstances’ exception and place a copy of this justification in the detainee’s A-File.” Report of the Office of the Inspector General: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) at 189.

The same report recommended that the Office of General Counsel establish processes for identifying “legal issues of concern,” such as the “‘hold until cleared’ policy and immigration laws and regulations.” *Id.* at 192.

In response to the Inspector General report, DHS issued internal guidance with regard to the “48-hour rule.” While this guidance moves in the direction of clearer rules for timely charging determinations and timely service of immigration charges on persons in detention, the guidance contains a broad emergency exception that could swallow the rule.¹ The November 21, 2003 Memorandum also addressed the recommendation for formal processes to address issues of legal concern. Specifically, it advised that DHS was working with DOJ to create policies to identify key senior positions within each Department to resolve these types of issues. *Id.* at 7-8.

With regard to the recommendation that DHS examine the limits on its legal authority to detain individuals after they have received final orders of removal or voluntary departure orders, the November 21, 2003 Memorandum pledged to “ensure that post-order custody reviews are conducted consistently and effectively, and ... will issue new guidance to ICE field offices to guarantee that

¹ *Response to the U.S. Department of Justice Office of Inspector General Report, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation off the September 11 Attacks*, Memorandum of Asa Hutchinson, Under Secretary for Border and Transportation Security, Department of Homeland Security (November 21, 2003) at 6-7.

these reviews are completed." However, DHS also advised that the opinion of the DOJ Office of Legal Counsel would govern DHS policies and practices in this area. *Id.* at 8-9

C. Judicial Branch

Two Courts of Appeals have addressed the constitutionality of the procedures set forth in the Creppy memorandum. In *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), the Third Circuit rejected the notion that the public has a First Amendment right of access to immigration court proceedings. The Sixth Circuit disagreed in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), holding that such a First Amendment right does exist and that the INS directive requiring closure of "special interest" deportation cases infringed on the newspapers' First Amendment rights.

The Supreme Court declined to resolve the issue. Although it denied the plaintiff's petition for *certiorari* in the Third Circuit case, it did so only after the government represented to the Court that immigration proceedings for virtually all of the special interest detainees had already been completed and as a result any decision would have very little practical impact on the government. (Brief for Respondents in Opp. to Petition for a Writ of Certiorari, filed Apr. 2003, available at <http://www.usdoj.gov/osg/briefs/2002/0responses/2002-1289.resp.pdf>.) The government confirmed that it was reviewing and would likely revise the procedures and regulations at issue in the Third and Sixth Circuit cases. (*Id.*, at p. 14.). The Creppy Memorandum, however, has not been rescinded.