

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

Chapter 8: Revising Attorney General Guidelines on FBI Investigations

I. Jurisdiction

- A. Executive Branch:** The Attorney General has the discretion to re-write the FBI investigative guidelines pursuant to Executive Order 12333, and 28 U.S.C. §§ 509, 510, 533 and 534.

The President has authority to amend Executive Order 12333 and/or to issue a new Executive Order and restate the goals, direction and/or responsibilities of the FBI with respect to its investigative efforts. (President Bush last amended Executive Order 12333 on July 30, 2008.)

The Attorney General has the discretion to revise the June 2003 Guidance Regarding the use of Race by Law Enforcement Agencies, to close the existing exemption for national security and border integrity.

- B. Legislative Branch:** The Senate and House Judiciary and Intelligence Committees have jurisdiction to create a legislative charter for FBI investigations, and/or can limit the use of specific investigative techniques through statute.

Congress has the authority to deny requested funds and/or to defund FBI activities. Appropriations are handled principally through the Commerce, Justice, Science and Related Agencies, with appropriations bills considered for markup by subcommittees of the same name in both chambers' full Appropriations Committees. Similarly, Congress can provide resources and authority to the General Accounting Office and the DOJ Inspector General to collect and analyze information on implementation of the Guidelines and to report on same.

The Senate and House Judiciary Committees have jurisdiction to review the Ending Racial Profiling Act (currently HR 4611, S 2481) and to send the proposed legislation to the House and Senate floors for a vote.

II. Status of Actions

- A. Executive Branch:** Attorney General Edward Levi created the first FBI Domestic Security Guidelines in 1976. As noted, these Guidelines were created to forestall the creation of a statutory charter after revelations of widespread FBI surveillance of civil rights and activists through its counterintelligence programs. The Levy Guidelines were successful in forestalling the creation of a statutory charter in part because Congress understood that the Guidelines and any changes thereto would be subject to Congressional review and oversight. When later

Attorney Generals amended the Levy Guidelines (prior to 2002), they did so each time with such consultation and oversight.

On May 30, 2002, Attorney General John Ashcroft issued revised Guidelines, but this time without Congressional consultation or oversight. The 2002 Ashcroft Guidelines greatly expanded the FBI's data collection authority and loosened parameters for investigations. Attorney General Ashcroft revised the Guidelines again in 2003, and the Guidelines were further revised in 2006.

Attorney General Mukasey proposed the current Guidelines in August 2008, and issued them on September 29, 2008. The Guidelines will become effective on December 1, 2008.

B. Legislative Branch

Guidelines: The House Judiciary Committee held a hearing on the Guidelines on September 16, 2008 and the Senate Judiciary Committee heard testimony on the proposed Guidelines on September 17, 2008. On September 23, 2008, Senators Dick Durbin (D-IL), Edward Kennedy (D-MA) and Russ Feingold (D-WI) wrote to Attorney General Mukasey expressing concern regarding the Guidelines. The Senators asked the Attorney General to revise the Guidelines (1) to prohibit profiling on the basis of race, religion, ethnicity, national origin and religion; and (2) to require a factual predicate for the basis for initiating assessments. The Senators also asked the Attorney General to include protections in the Guidelines for United States persons about whom information is collected, retained and shared. (That same day the Senate Intelligence Committee held a hearing on the Guidelines, with John D. Rockefeller IV (D-W VA) presiding.)

The Guidelines, as issued on September 29, 2008, do not contain the modifications requested by Senators Durbin, Kennedy and Feingold.

On October 3, 2008, John Conyers (D-MI) (Chairman of the House Judiciary Committee), Robert C. "Bobby" Scott (D-VA) (Chairman of the House Crime, Terrorism and Homeland Security Subcommittee) and Jerold Nadler (D-NY) (Chairman of the House Constitution, Civil Rights and Civil Liberties Subcommittee) called on the Department of Justice to postpone the effective date of the Guidelines until the new Administration had the opportunity to review and approve them.

Statutory Charter: There has not been recent activity regarding a statutory charter for the FBI. In 2002, Senator Patrick Leahy (D-VT) introduced the FBI Reform Act, which would have at least strengthened Congressional (and also Department of Justice) oversight of the FBI, but this bill did not reach the full Senate for a vote despite passing the Senate Judiciary Committee by a unanimous vote.

Ending Racial Profiling Act: Senator Russ Feingold (D-WI) and House Judiciary Chairman John Conyers (D-MI) introduced the Ending Racial Profiling Act in the Senate (S 2481) and House (HR 4611), respectively. S2481 has been referred to the Senate Judiciary Committee, but the Committee has not taken action on the bill. Likewise, JR 4611 has been referred to the House Judiciary Committee, but the Committee has not taken action on that bill.

C. Judicial Branch: As of October 29, 2008, there is no pending litigation and there are no court decisions regarding the new Guidelines.

In promoting the Guidelines, Attorney General Mukasey indicated that the FBI would abide by the Department of Justice’s June 2003 “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” (“DOJ Guidance”), which addresses past judicial decisions by recognizing the United States Supreme Court’s well-settled position that “all racial classifications by a government actor are subject to the ‘strictest judicial scrutiny’” (quoting *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 224-25 (1995)). The DOJ Guidance goes on to state that “the legality of particular, race-sensitive actions taken by federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination.” DOJ Guidance. The DOJ Guidance emphasizes that “[i]n investigating or preventing threats to national security . . . Federal law enforcement officers *may not consider race or ethnicity except to the extent permitted by the Constitution and the laws of the United States.*” DOJ Guidance (emphasis added). In this regard, while the Supreme Court has recognized that race may be a potential factor considered (but not the sole factor) in government action in the national security context, *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003), the Court likewise strongly cautioned that that the “use of race to advance that objective must be narrowly tailored.” 539 U.S. at 352. The use of race as a factor, even a small factor, is never permissible when not narrowly tailored. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), the Court struck down the use of race when used as a “tie-breaker” to determine which students would fill open slots at oversubscribed Seattle schools. In light of the potential threat to individual civil liberties brought about by the changes in the new Guidelines, the DOJ must take care to ensure it does not overstep the bounds of the Constitution.