

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 15: Reforming the State Secrets Privilege

I. Jurisdiction

A. Judicial

The state secrets privilege was first recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), a case brought by three widows of civilian contractors against the government for negligence in a military plane crash that killed their husbands. The widows sought, and were denied, production of the Air Force accident report. More recently, rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, courts have dismissed cases at the pleadings stage, and foreclosed any litigation of cases in which the state secrets privilege is asserted. Since September 11, 2001, various federal courts of appeals have consistently credited the executive branch's invocation of the state secrets privilege in cases relating to national security issues, without independently evaluating whether disclosure of evidence, in fact, would endanger national security. *See, e.g., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (dismissing case alleging that El-Masri is innocent victim of U.S. extraordinary rendition program); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007) (state secrets privilege prevented plaintiffs from establishing standing to challenge NSA surveillance program). Although some courts have rejected claims that the very subject matter of a lawsuit challenging national security policy is a state secret, *see, e.g., Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (NSA surveillance program has been publicly disclosed and program itself is not a state secret), even in such cases courts have shown extreme deference to executive assertions.

Since this is a judicially created doctrine, the Supreme Court would have had jurisdiction to reexamine and clarify the scope of the privilege, and this issue was squarely presented in the *El Masri* case. However, with the Supreme Court's denial of the petition for writ of certiorari from the Fourth Circuit's decision in *El-Masri* in the fall of 2007, legislative reform and changes in executive practice are now the most viable options.

B. Executive

The Executive branch has jurisdiction to determine whether and when it will assert the state secrets privilege in litigation. It can also fully control which evidence is claimed to be privileged and can consent to independent judicial review to assess privilege claims.

C. Legislative

Congress has jurisdiction to enact reforms to the state secrets privilege. The Constitution specifically grants Congress the power to enact “Regulations” regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress should establish new rules that will simultaneously protect individual rights and national security, and preserve access to the courts and our constitutional system of checks and balances. The House and Senate Judiciary Committees have jurisdiction to consider such legislation.

II. Status of Actions in Legislative and Executive Branches

A. Executive Branch

The Bush administration has broadly and frequently asserted the state secrets privilege as outlined above.

B. Legislative Branch

Legislation was introduced in both the House and the Senate in the 109th Congress to reform the state secrets privilege and modify the executive branch’s blanket invocations of the state secrets privilege in national security cases. The State Secrets Protection Act (H.R. 5607, S. 2533) is designed to allow the executive branch properly to assert the privilege where necessary, while allowing litigation that would not jeopardize national security interests to proceed. The proposed legislation would enact many of the reform measures identified above, including (1) allowing non-privileged discovery to proceed in the litigation, (2) requiring the government to make available for the court’s in camera and ex parte review the supposedly privileged evidence; and (3) authorizing the court to employ special masters to assist in its review of the evidence as to which the government has asserted the state secrets privilege.

Congressional Hearings:

January 29, 2008: Oversight hearing by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee

February 13, 2008: Legislative hearing by the Senate Judiciary Committee on the State Secrets Protection Act S. 2533

April 24, 2008: Senate Judiciary Committee passed State Secrets Protection Act S. 2533 out of committee by an 11-to-8 vote.

September 18, 2008: The Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee voted 6-3 to order the State Secrets Protection Act H.R. 5607 reported favorably.