

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 17: Assertion of Executive Authority in National Security Matters

- I. Jurisdiction:
 - A. Congress: Proposal 3 would most likely be addressed by the House and Senate Judiciary Committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposal 4 would most likely be addressed by various congressional committees, including the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposals 1 and 2 do not require legislative action.
 - B. Executive Branch: The President could implement Proposal 1 through a presidential memorandum, without promulgating executive orders or regulations, and without agency involvement. Proposal 2 would be addressed by the White House and the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Executive action required by Proposal 3 would initially be signing the legislation into law and thereafter would be addressed by the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Proposal 4 would be addressed by the White House (primarily those responsible for briefing Congress on intelligence and national security activities).
- II. Status of Actions in Legislative, Executive, and Judicial Branches:
 - A. Legislative Branch:
 1. The OLC Reporting Act (S. 3501), co-sponsored by Sens. Russell Feingold (D-WI) and Diane Feinstein (D-CA), was introduced in the Senate on September 16, 2008. The bill would require the Office of Legal Counsel (OLC) to report to Congress when it determines that the Executive Branch is not bound by a statute. The bill was reported out of the Senate Judiciary Committee on September 25, 2008 and placed on the Senate Legislative Calendar under General Orders (Calendar No. 1083) No action has been taken on the Senate floor.
 2. Rep. Brad Miller (D-NC) introduced a bill similar to the OLC Reporting Act in the House (H.R. 6929) on September 17, 2008. It has been referred to the House Judiciary Committee, but no action has been taken.
 3. As authorized by the Senate Judiciary Committee, Senate Judiciary Committee Chairman Leahy (D-VT) issued on October 21, 2008 a subpoena to Attorney General Michael Mukasey seeking by November 18, 2008 specific OLC opinions related to interrogation and detention practices, as well as lists, logs or indices of memoranda, opinions or legal advice issued by the OLC since September 11, 2001 concerning the Administration's national security practices and policies related to terrorism.^[1] Senator Leahy and Judiciary Committee Ranking Member Arlen Specter (R-PA) previously had requested such documents from Fred Fielding, Counsel to the President, by letter dated August 19, 2008.^[2]

4. The release of the previously undisclosed OLC opinions regarding torture, detention, and other issues has been the subject of extensive debate and testimony in Congress. Many members of Congress have called upon the Administration to fully release the OLC opinions related to interrogation and detention practices. Recent congressional hearings on this issue include the following: Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 110th Cong. (April 30, 2008); Dept. of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part I): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 97 (2008). To date, Congress has not passed any laws on this issue.

^[1] Subpoena available at <http://judiciary.senate.gov/resources/documents/upload/10-21-08-OLC-Subpoena.pdf>.

^[2] Letter available at <http://leahy.senate.gov/issues/Judiciary/081908FieldingReOLC.pdf>.