

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 18: Executive Privilege and Congressional Oversight

I. Jurisdiction:

- A. **Congress:** Proposals 1 and 2 would most likely be addressed by the House and Senate Judiciary Committees and possibly the House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee. Proposal 3 would most likely be addressed by the House and Senate leadership of both parties.
- B. **Executive Branch:** Proposals 1 and 2 do not require executive action other than signing the legislation into law. Proposal 3 would be addressed by the White House (primarily through the White House Counsel's Office) and the Department of Justice (primarily through the Attorney General, the Office of Legal Counsel, and the congressional affairs office).
- C. **Judicial Branch:** The preferred outcome in any inter-branch dispute is to avoid judicial intervention. If intervention is required, under any of these proposals the dispute would typically be litigated in the federal district court of the District of Columbia.

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

- A. **Congress:** In regard to Proposal 1, Congressman Brad Miller (D-NC) has introduced this legislation for the House. *See* Special Criminal Contempt of Congress Procedures Act of 2008, H.R. 6508, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken. In regard to Proposal 2, Congresswoman Sheila Jackson-Lee (D-TX) has introduced this legislation for the House. *See* Contempt of the House of Representatives Subpoena Authority Act of 2008, H. R. 5230, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken.
- B. **Executive Branch:** N/A
- C. **Judicial Branch:** The subjects of executive privilege and Congress' non-statutory civil contempt power were most recently addressed in *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, Civil Action No. 08-0409 (JDB) (D.D.C. 2008), *stay granted* by No. 08-5357 (D.C. Cir. 2008). Relevant prior decisions on the topics of executive privilege and congressional oversight include *United States v. Nixon*, 418 U.S. 683 (1974); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *Senate Select Comm. on Presidential*

Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).