

From the desk of Virginia Sloan

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Dear Friend,

In the Halls of Congress

House Rebuffs Bush on Surveillance

On March 15, the House narrowly passed legislation that would update the Foreign Intelligence Surveillance Act of 1978 to expand the powers of intelligence agencies to eavesdrop on terrorism suspects, but would require advance court approval of most surveillance, authorize federal inspectors general to investigate warrantless wiretapping programs, and establish a bipartisan commission to examine these activities. Notably, the House bill would not provide retroactive immunity for the telecommunications companies that provided private customer information and communications to federal agencies in violation of federal law. Instead, the bill would establish a procedure for telecoms to defend themselves before the secret FISA court. The House bill thus provides for far greater protections for civil liberties than the bill passed earlier by the Senate and supported by the administration.

Twice last year the Constitution Project's bipartisan Liberty and Security Committee and Coalition to Defend Checks and Balance [issued statements](#) condemning the NSA's warrantless surveillance program and calling for legislation that would protect both national security and individual privacy.

Nadler Introduces State Secrets Reform Bill

On March 13, Rep. Jerrold Nadler (D-NY), chair of the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties, [introduced](#) legislation that would dramatically reform the so-called "state secrets privilege." Since September 11th, the executive branch has repeatedly asserted this privilege to prevent people from challenging federal policies - like the extraordinary rendition and torture of German citizen Khaled El-Masri and the warrantless NSA spying program - in court. Chairman Nadler was joined by Reps. Thomas Petri (R-WI) and Bill Delahunt (D-MA), as well as Rep. John Conyers (D-MI), chair of the House Judiciary Committee. Senators Ted Kennedy (D-MA) and Arlen Specter (R-PA) previously introduced similar legislation in the Senate.

The Constitution Project's bipartisan Liberty and Security Committee and Coalition to Defend Checks and Balances previously issued a [statement](#) calling for reform of the privilege. The statement recognized that the government must have some ability to restrict the disclosure of sensitive information, but urged that either the courts or Congress should clarify the narrow scope of the privilege, and require that all evidence claimed to contain state secrets be subject to independent review by a neutral judge. The Constitution Project's Liberty and Security Committee previously [called](#) for the formation of a bipartisan commission to investigate allegations of torture and abuse of detainees held as terrorist suspects.

In the Courts

SCOTUS Reaffirms Right to a Fair Trial

On March 19, the Supreme Court issued a 7-2 [decision](#) in *Snyder v. Louisiana* that reaffirmed the constitutional right to a fair trial. Allen Snyder, an African-American man, was sentenced to death by an all-white jury for the stabbing of his wife's male companion. After striking all African-Americans from the jury, the prosecutor in the case urged the all-white jury to return a death sentence and not to let Snyder "g[e]t away with it" like O.J. Simpson did. While not mentioning the Simpson comment, the Court ruled that the trial judge erred in summarily rejecting Mr. Snyder's protest of the prosecutor's challenge to a black potential juror.

Last September, the Constitution Project filed a [friend-of-the-court brief](#) on behalf of Mr. Snyder, which concluded that this "provocative and impermissible conduct was powerful evidence of the prosecutor's discriminatory intent to use his peremptory challenges to purge Mr. Snyder's capital jury of all African Americans," in violation of the Supreme Court's 1986 ruling in *Batson v. Kentucky*.

In 2006, the Constitution Project's bipartisan Death Penalty Committee, in "[Mandatory Justice: The Death Penalty Revisited](#)," urged courts to "vigorously enforce[e] *Batson* ... [and] to ensure that members of all races are part of ... petit juries that decide guilt and punishment." The Committee went on to recommend that all "jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner."

SCOTUS Rejects Vienna Convention Claim

In a 6-3 ruling last Tuesday, the Court [ruled](#) in *Medellin v. Texas* that the President has no authority to order states to bypass their procedural rules and comply with a ruling from the International Court of Justice (ICJ). Jose Medellin, a Mexican citizen on Texas' death row, along with 50 other Mexican death row inmates, filed suit in the ICJ alleging that arresting authorities violated their rights under the Vienna Convention on Consular Relations by failing to advise them of their right to the assistance of their consulate. After the ICJ ruled in their favor in *Avena and Other Mexican Nationals - Mexico v. U.S.* (2004) and ordered courts in the U.S. to review their cases, Texas refused, arguing that the state's procedural rules superseded the Vienna Convention. Following the ICJ ruling, the Bush administration withdrew from that part of the Vienna Convention.

In *Mandatory Justice*, the Death Penalty Committee recommended that "[e]very capital defendant who is a foreign national should be ineligible for the death penalty if not provided with consular rights under the Vienna Convention on Consular Relations."

In The Courts (Cont'd.)

GA Court Denies Troy Davis New Hearing

On March 17, the Georgia Supreme Court announced its 4-3 [decision](#) to deny Troy Anthony Davis' appeal for a new trial; Mr. Davis has been on Georgia's death row for more than 16 years after being convicted of the murder of an off-duty police officer. The Georgia Supreme Court agreed to review the case last August after a series of questions about his guilt were raised.

Of the nine witnesses who originally testified against Mr. Davis, seven have now recanted or changed their testimony. One of the remaining two is now accused by several new witnesses of being the actual shooter. There was no physical evidence linking him to the crime, and the murder weapon was never found. A lawyer for Mr. Davis has acknowledged that, because of severe budget cuts, he did not have the resources needed to properly defend his client. Because of state and federal procedural restrictions, no court had heard any of the evidence that suggested that Georgia may have been about to execute an innocent man. Last July, the Georgia Board of Pardons and Parole stayed the sentence one day before he was scheduled to be executed; the Georgia Supreme Court then agreed to review the case.

In "[Mandatory Justice: The Death Penalty Revisited](#)," the Death Penalty Committee argued that "[s]tate and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence." In an op-ed in *The Atlanta Journal-Constitution*, William S. Sessions, former federal judge and Director of the FBI and member of the Death Penalty Committee, [urged](#) the Board of Pardons and Parole to stay the execution, arguing that "[s]tate and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence." According to Judge Sessions, it would be "intolerable to execute a man without his claims of innocence ever being considered by the courts or by the executive."

Mr. Davis's remaining options appear to be another appeal to the courts or a request to the governor for clemency.

Above the Fold

Jurist: Protecting US Citizens Held by US Forces

On March 24, *Jurist* featured Constitution Project senior counsel Sharon Bradford Franklin's [commentary](#) on the consolidated cases of *Munaf v. Geren* and *Geren v. Omar*. The cases, heard by the Supreme Court on March 25, were brought by two American citizens detained in Iraq by US-led forces. Both men have been denied judicial review through the writ of *habeas corpus*. As Sharon noted in the piece, "denying *habeas* rights to our own citizens will only erode any remaining goodwill (both abroad and at home) and provide our enemies with yet another recruiting tool." The Constitution Project filed a [friend-of-the-court brief](#) in support of the detainees' right to *habeas*.

With a Little Help from Our Friends

Presidential Candidates' Criminal Justice Platforms

On March 24, the Sentencing Project, a non-partisan public policy organization that does not support or oppose any candidacy for the presidency, issued an [analysis](#) of the leading presidential candidates' positions on key criminal justice issues. The report is a must-read for those interested in Senators Clinton, McCain, and Obama's positions on a variety of issues ranging from mandatory minimum sentences to the death penalty to felon disenfranchisement.

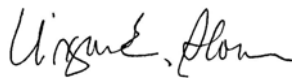
Brennan Center on Restoring Constitutional Order

Today at 1:00 pm, the Brennan Center for Justice will present a "comprehensive plan to rein in the imperial presidency." Brennan Center attorney Aziz Huq will present [12 Steps to Restore Checks and Balances](#), followed by a panel discussion with Pulitzer Prize-winning reporters Eric Lichtblau and Charlie Savage (winner of the 2007 Constitution Project Award for Constitutional Commentary), Coalition to Defend Checks and Balances member Bruce Fein, and ACLU staff attorney Hina Shamsi. This free discussion will take place in the Zenger Room at the National Press Club, 529 14th Street, NW, Washington, DC.

Verbatim

"The separation of powers has always been vital to our national security because it augments accountability and promotes wise choices. Checks and balances are not a historical curiosity. They are imperative today." - Aziz Huq, in [12 Steps to Restore Checks and Balances](#).

Sincerely,



Virginia E. Sloan