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From the President's Desk

Last Thursday, standing at the National Archives before the Declaration of Independence, the Constitution, and the Bill of Rights, President Barack Obama laid out his vision for America's national security policy. It was reassuring to hear the president say that upholding our nation's values is not only right, but also strengthens our resolve and keeps us safe. He went on to call on Congress to recognize that our national security is an American issue and not one of partisan politics. To this extent, the Constitution Project applauds the president's remarks.

But in outlining his policies for transparency and handling suspected terrorists being held at Guantanamo Bay, the president's remarks caused us some concern. While the president spoke of applying a stricter test for use of the state secrets privilege, he did not go nearly far enough to cure the current problems with the government's use of the privilege. Most importantly, it is unclear whether the president supports a requirement that the executive branch submit evidence it claims to be secret to an independent judge who will review the government's claim of privilege and determine what information can and cannot be made public – a determination that may establish whether a lawsuit may proceed.

He also announced that his administration will revive some form of the failed military commissions, and that he will work to pass new legislation establishing a new system of indefinite detention without charge for some individuals.

We find these developments very troubling, especially given the raised expectations of a restoration of the rule of law that surrounded the president's executive orders his first days in office. These newly announced policies threaten to betray the values of which he spoke so highly. When he signed the executive order closing Guantanamo, President Obama said that he did so to "restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with terrorism." As the president continues to work to restore the rule of law in our country, his actions must be consistent with his soaring rhetoric. He must remember his own claim that our Constitution and the values it enshrines are our nation's best line of defense.

Upcoming Events

Members of the Constitution Project's National Right to Counsel Committee to Testify Before the House Judiciary Subcommittee on Crime

On June 4th, Committee co-chairs **Rhoda Billings** and **Robert M.A. Johnson**, and member **Alan Crotzer**, will represent the National Right to Counsel Committee when they testify before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Following the release of the Committee's report, "[Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#)," the subcommittee is holding a hearing to examine the state of indigent defense in the United States and the need for reform.

Asa Hutchinson, Constitution Project Liberty and Security Committee Member, to Testify Before House Judiciary Subcommittee on State Secrets

Liberty and Security Committee member **Asa Hutchinson**, former undersecretary for the Department of Homeland Security under President Bush, is scheduled to testify on the need to reform the state secrets privilege before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties on June 4th. The hearing will examine H.R. 984, the State Secret Protections Act of 2009, legislation aimed at curtailing excessive use of the state secrets privilege through judicial oversight, while ensuring that national security information will be kept secret. The Constitution Project [welcomed](#) the legislation's introduction in February.

News

Supreme Court Cuts Back on *Miranda* Protections

On Tuesday, the U.S. Supreme Court, in a [5-4 decision in *Montejo v. Louisiana*](#), overruled *Michigan v. Jackson*, which held that “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceedings, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.” Writing for the majority, Justice Scalia said, “[b]ecause of the protections created by this court in *Miranda* and related cases, there is little if any chance that a defendant will be badgered into waiving his right to have counsel present during interrogation.” Justice Stevens criticized the majority’s lack of respect for *stare decisis*, stating that overruling *Jackson* “can only diminish the public’s confidence in the reliability and fairness of our system of justice.”

On April 14, a group of former federal and state prosecutors and judges, responding to the Court’s post-argument order for briefing on whether *Jackson* should be overruled, filed an [amicus brief](#) in support of the *Jackson* rule. The Constitution Project helped organize the brief, in which two bedrock criminal procedural rights intersected—the right to counsel under *Gideon v. Wainwright*, and the interrogation rights of a person in custody, described in *Miranda v. Arizona*. The Court rejected a request for oral argument on the *Jackson* issue.

The Constitution Project Supports President Obama’s Call to Depoliticize National Security But Opposes Plan to Create System of Preventive Detention

As noted above, in his speech last Thursday on national security issues, President Obama reaffirmed that adhering to America’s constitutional principles strengthens our resolve, while keeping our nation safe, and that national security should not be treated as a political issue in America. The Constitution Project [welcomed this theme](#), but also expressed grave concern about the president’s plans to seek legislation to establish a system of indefinite detention for some accused terrorists. Finally, while we join the president in his call for greater transparency and reform of the state secrets privilege, we urge him to go further and support legislation that will ensure that state secrets privilege claims are independently reviewed by judges. The Constitution Project’s Liberty and Security Committee has issued statements supporting [reforms to the state secrets privilege](#) and [opposing preventive detention](#).

The Constitution Project Coordinates U.S. Supreme Court *Amicus* Brief by 27 Former Judges and Prosecutors in Support of Troy Davis' Appeal

Last Wednesday, in an effort coordinated by the Constitution Project, 27 former judges and prosecutors signed onto an [amicus brief submitted to the U.S. Supreme Court](#), in support of Troy Davis' appeal, urging the Court to exercise its original *habeas* jurisdiction to order an evidentiary hearing in District Court. The brief argued that "Mr. Davis' petition for an original writ meets this Court's exceptional circumstances test because Mr. Davis can make an extraordinary showing through new, never reviewed evidence that strongly points to his innocence, and thus his execution would violate the Constitution." A stay to Mr. Davis' execution was lifted on May 15. Signers of the brief include: Larry Thompson, Deputy Attorney General in the George W. Bush administration; former Congressman Bob Barr (R-GA); former federal judge and FBI Director William S. Sessions; and Norman Fletcher, the former Chief Justice of the Georgia Supreme Court.

President Obama to Revive Flawed Military Commissions

News accounts the week before his national security speech last Thursday indicated that President Obama planned to announce a revival, in modified form, of the flawed military commission proceedings for trying suspected terrorists at Guantanamo Bay. Military commissions are designed to provide less due process protection for terrorism suspects than do our federal courts. Throughout our nation's history, federal courts have proven their ability to handle the most difficult and sensitive cases. Reviving these flawed military tribunals - outside of our federal courts and the military courts established under traditional military jurisdiction - would create a separate and unequal criminal justice system that might not be easily isolated to terrorism cases. The Constitution Project [denounced this development](#), saying, "President Obama should have demonstrated a return to the rule of law by ending the tainted military commission proceedings."

News in Brief

- In yesterday's *New York Times*, **William S. Sessions**, the former FBI Director and federal judge, as well as a member of our Death Penalty Committee, published a [letter to the editor on post-conviction DNA testing](#). The *Times* had a favorable editorial on testing last week, and Judge Sessions welcomed its critique of prosecutors who resist such testing, saying, "Prosecutors should recognize that we have nothing to fear, and much to gain, by allowing post-conviction testing."
- In connection with President Obama's nomination of Judge Sonia Sotomayor, of the U.S. Court of Appeals for the Second Circuit, to serve on the United States Supreme Court, the Constitution Project [reissued recommendations](#) for when it is appropriate for the executive and legislative branches to consider ideology in reviewing federal judicial selections. The Project's bipartisan Citizens for Independent Courts Task Force on Federal Judicial Selection made these recommendations in its 2000 report "[Uncertain Justice: Politics and America's Courts.](#)"
- Last Friday, Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California [ordered](#) the Justice Department to explain why he should not enter a judgment finding liability against the federal government for illegally spying on the Al-Haramain Islamic Foundation. Judge Walker and the U.S. Court of Appeals for the Ninth Circuit had previously issued a series of decisions rejecting the executive branch's state secrets privilege claims in this case, and establishing a process under which the court could review evidence filed under seal through an appropriate protective order. In last week's ruling, Judge Walker described the government's failure to comply with previous orders to provide plaintiffs' counsel with security clearances and negotiate a protective order. The federal government could face court sanctions for failing to comply with Judge Walker's most recent order to show cause, including having the case decided against the government. The Constitution Project has [urged reforms](#) to the state secrets privilege to facilitate precisely this type of private review by trial judges.

- Last Tuesday, Judge John Bates of the U.S. District Court for the D.C. Circuit issued an [opinion in *Hamlily v. Obama*](#), rejecting the administration’s broad claim of authority to indefinitely detain individuals who merely supported organizations involved in terrorist activities, and limiting indefinite detention to situations in which the government can demonstrate that the individuals actually participated in “belligerent acts” or were actual members of Al Qaeda, the Taliban, or associated forces.
- **Sharon Bradford Franklin**, Constitution Project Senior Counsel, participated in a televised panel discussion for [Whistle Where You Work](#), a program by the Government Accountability Program that addresses issues of accountability. The panel focused on the issue of presidential signing statements and particularly President Obama’s signing statement on whistleblowers, part of the \$410 billion omnibus spending bill signed in March.
- The Law Library of Congress recently launched a [website devoted to the United States Constitution](#). The site has sections on topics including Constitutional Interpretation, Executive Privilege, Military Tribunals, Presidential Inherent Powers, Presidential Signing Statements, Second Amendment, State Secrets Privilege, War Powers, War Powers Resolution, and Additional Constitutional Resources.

The Constitution Project’s unique mission is to promote and defend constitutional safeguards. We create coalitions of respected leaders from across the political spectrum, advancing their consensus recommendations for policy reforms. Since the Constitution Project’s founding in 1997, our advocacy and public education efforts, influential *amicus curiae* briefs, and respected scholarship have helped to create public support for those reforms.