

The Constitution Project



June 25, 2009

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From the President's Desk

This week, the United States Supreme Court handed down its ruling in *District Attorney's Office v. Osborne*. The decision is a troubling one, with broad repercussions for our criminal justice system. Even though the Court agreed in its majority opinion that post-conviction DNA testing is vital to prove guilt or innocence, it found that the Constitution does not require the prosecution to turn over DNA evidence to the defense for testing. *Osborne* thus leaves such decisions entirely to the discretion of local prosecutors.

State laws concerning post-conviction DNA testing vary widely, making it hard to determine *Osborne's* national effect, but one thing is both clear and troubling: prisoners will have limited post-conviction rights across the U.S., and in some states, they will have none at all. In Alaska, Massachusetts, and Oklahoma, there are no state DNA access laws. In a handful of other states, access is narrow and confined to specific circumstances. In Pennsylvania, for example, DNA testing is only permitted for people convicted before 1995, and in Idaho, a prisoner must file for DNA testing within one year of conviction.

State governments should adopt expansive and fair post-conviction DNA testing laws. According to **William S. Sessions**, who created the nation's

first DNA lab when he was FBI Director and member of the Constitution Project's Death Penalty Committee: "DNA testing has the capacity to make law enforcement more effective – by freeing the innocent and apprehending and incarcerating the guilty. Prosecutors should recognize that we have nothing to fear, and much to gain, by allowing post-conviction testing."

Events

The Constitution Project and the Project On Government Oversight Team Up for Events on Congressional Oversight

The Constitution Project and the Project On Government Oversight (POGO) both have developed handbooks on congressional/executive relations and oversight. We are delighted to collaborate with POGO on two events to promote the release of the two books, which complement each other well. Copies of the Constitution Project's handbook, "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry," will be available at both events. The author of our handbook is Morton Rosenberg, a veteran of the Congressional Research Service and a leading expert on congressional/executive relations.

The first event will take place on July 10 and is exclusive to congressional staff. We will hold an event for the public at the National Press Club on July 16. Both events will start late morning and last through the lunch hour, with refreshments provided. More details on the panelists and specific locations will be in our next newsletter. If you would like to RSVP for either event, please send an email to rsvp@constitutionproject.org.

News

Effectiveness of Criminal Justice System Diminished by Supreme Court's DNA Ruling

As noted above, the United States Supreme Court issued a [troubling ruling](#) last Thursday in *District Attorney's Office v. Osborne*, denying an individual convicted of a crime access to DNA testing, even though both the prosecution and defense agree the evidence could prove Mr. Osborne's guilt or innocence. In its 5 to 4 opinion, the Court found that DNA evidence has "an unparalleled ability" to prove a defendant's innocence or guilt, but that "cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt."

Prior to the ruling, William S. Sessions, former director of the FBI and current Constitution Project Death Penalty Committee member, wrote a *New York Times* [letter to the editor](#) on the effectiveness of post-conviction DNA testing. The Constitution Project's Death Penalty Committee, which includes both supporters and opponents of capital punishment, unanimously agreed that DNA evidence should be preserved, that government officials should consent to DNA testing and make it available to those convicted of capital crimes, and that, if they do

courts should order the government to submit the evidence for testing. These recommendations were made in the Committee's report, "[Mandatory Justice: The Death Penalty Revisited](#)," released in July 2005.

Constitution Project Applauds Bermuda for Welcoming Uighurs

The Department of Justice announced that four of the 17 Chinese Muslims—known as Uighurs—were released from detention at Guantanamo Bay and settled in the nation of Bermuda two weeks ago. The Constitution Project [welcomed their release](#) and applauded the government of Bermuda for its willingness to accept the four men, ending their unlawful detention. Unfortunately, despite court findings and unanimous agreement that the Uighurs are not enemy combatants, the other 13 Uighurs remain detained at Guantanamo.

The Uighurs were ordered released by District Court Judge Ricardo Urbina last year in October. That decision was struck down by the U.S. Court of Appeals for the D.C. Circuit. The Uighurs then [appealed to the U. S. Supreme Court](#), which is scheduled to conference today to determine whether it will hear their case. The Constitution Project, along with the Brennan Center for Justice, the Rutherford Institute, the National Association of Criminal Defense Lawyers, and the City of New York Bar Association, filed an [amicus brief](#) in *Kiyemba v. Obama*, urging the Court to hear the Uighurs' case.

Constitution Project Dismayed By Department of Justice Request for Full Court Review of State Secrets Case; Continues to Push for Reform Legislation

The Obama administration filed a [brief](#) on June 12 seeking a full bench, or *en banc*, review of the U.S. Court of Appeals for the Ninth Circuit's [decision](#) earlier this year in *Mohamed v. Jeppesen Dataplan*. The case concerns allegations by five people that defense contractor Jeppesen Dataplan, a subsidiary of Boeing, flew them to a foreign country where they were tortured as part of the CIA's extraordinary rendition program. The Bush administration intervened on behalf of Jeppesen and asserted the state secrets privilege. The Obama administration adopted the same broad claim for dismissal of the entire lawsuit, but, in April, the court rejected the notion that the "very subject matter" of a case alleging torture is a state secret. The Constitution Project [praised the court's decision](#) and is [troubled](#) by the Obama administration's continued adoption of an overly-broad assertion of the state secrets privilege, as exhibited by this recent filing.

At the request of Congressman Jerrod Nadler (D-NY), Constitution Project Senior Counsel **Sharon Bradford Franklin** participated in a briefing on June 22 for staff of the House Judiciary Committee on the state secrets privilege. Sharon provided background and answered questions regarding the development of the privilege, issues that have arisen in the absence of judicial standards, and the need for reform. She also discussed the specific provisions of H.R. 984, the “State Secrets Protection Act of 2009,” which recently was reported from the Subcommittee on the Constitution, Civil Rights, and Civil Liberties to the full House Judiciary Committee.

News in Brief

- Today, in its last scheduled conference of the 2008-2009 Term, the U.S. Supreme Court will consider the petition of [Troy Davis](#), a death row inmate who has been barred from presenting new evidence of his innocence. The Constitution Project organized a [friend of the court brief](#) in support of Mr. Davis. The Supreme Court is expected to release orders from the conference on Monday.
- Last night, speaking at the American Council of Chief Defenders Conference, Attorney General [Eric Holder acknowledged](#) the nation’s indigent defense crisis by highlighting the large resource disparity between public defender programs and other justice system programs. He then urged a continued national dialogue on the issue and cited the Constitution Project’s “[Justice Denied](#)” report as an important first step, saying the “Constitution Project has done excellent work in describing the state of indigent defense in its report.”
- Incoming Senior Counsel **Laura Olson** represented the Constitution Project at Tuesday’s Workshop on U.S. Detention Policy in Afghanistan, sponsored by the International Justice Network, Human Rights First, and the National Litigation Project of the Lowenstein International Human Rights Clinic at Yale Law School. We look forward to Laura’s official start next week.
- Last Friday, the CIA [delayed the release](#) of a highly-anticipated 2004 Inspector General report on the Agency’s role in the interrogation and detention of suspected terrorists. The CIA is expected to release a redacted version of the report tomorrow.
- A [recent study](#) published in the Northwestern University School of Law’s *Journal of Criminal Law and Criminology* reports that eighty-eight percent of the nation’s leading criminologists believe that capital punishment does not serve as a deterrent to homicide.

- On June 15, Constitution Project Senior Counsel Sharon Bradford Franklin spoke on a panel titled “The Internet, Cell Phones, and Voice Over Internet Protocol: Legal and Privacy Issues for Criminal Justice Practitioners,” as part of the National Institute of Justice’s annual conference. Her remarks addressed the constitutional concerns raised by pervasive networks of public video surveillance cameras. In related news, on June 3, the Brookline, Massachusetts Board of Selectman [voted against](#) a proposal for police surveillance cameras, even though funds were available through a grant from the state Department of Homeland Security. In April, as the Brookline Board was evaluating whether to implement a video surveillance system, Sharon participated in a meeting of the Board’s Camera Review Committee to discuss Brookline’s proposed guidelines and the constitutional and privacy issues raised by video surveillance systems.
- **Eugene Fidell**, president of the National Institute of Military Justice and member of the Constitution Project’s Liberty & Security Committee, wrote an [OpEd](#) in the *New York Times* on June 14 challenging President Obama’s assertion that military commissions have long played a respectable role in our nation’s history. He argued that the burden rests on President Obama to justify his plan to try some detainees in military commissions rather than federal courts.
- On June 12, in the case of *Padilla v. Yoo*, District Court Judge Jeffrey White [rejected](#) former Office of Legal Counsel lawyer John Yoo’s assertion of absolute immunity from a lawsuit involving OLC legal memos that he authored. Unless an appellate court overturns the ruling, Jose Padilla, a U.S. citizen who was held for years without charge as an enemy combatant before finally being tried in a civilian court, can now proceed with his claim that John Yoo should be held personally responsible for his unlawful detention and treatment.

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.