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From the President's Desk

The relationship between an open government and a government held accountable to its citizens is clear. As President Obama's memo on the Freedom of Information Act put it, "a democracy requires accountability, and accountability requires transparency." On his first full day in office, President Obama pledged an "unprecedented level of openness in government." Yet, the administration's early actions demonstrate that realizing this goal will not be easy. Especially when national security is threatened and fears run high, the forces of secrecy often prevail. Ironically, this resistance to transparency hinders the effectiveness and efficiency of government, making us less safe as a result.

Recognizing the importance of openness and transparency to our democracy, President Obama ordered a 90-day review on May 27 of the federal government's system for classifying information and for designating sensitive information known as controlled unclassified information (CUI). His administration has called for public input on this matter—a call that the Constitution Project has answered. We are pleased to announce the release of "Reining in Excessive Secrecy: Recommendations for Reform of the Classification and Controlled Unclassified Information Systems." We believe that this report can serve as a valuable resource to the public and decision-makers alike, and hope that it will help the administration strike the ideal balance between accountability and national security.

News

Detention and Interrogation Task Forces Miss Deadline, Leave Door Open for Preventive Detention

The Obama administration's detention and interrogation policy task forces both [missed their July 21 deadlines](#) for presenting recommendations to the president, seeking extensions of six and two months respectively. In announcing the delays, the administration reaffirmed its commitment to closing the Guantanamo Bay detention facility by January 22, 2010. The detention policy task force did issue a [preliminary report](#) on a limited number of issues under consideration, as well as a [prosecution protocol](#). The protocol states a policy preference for trying suspected terrorists in federal courts as opposed to using military commissions, but describes three broad factors that could tip the balance in favor of commissions. The same document also left open the possibility of legalizing a system of indefinite detention without charge by stating there could be cases that are "not feasible in any forum."

The Constitution Project has [rejected the revival](#) of the failed military commission system and [opposes the legalization](#) of a preventive detention system. In last Sunday's edition of the *Miami Herald*, Liberty and Security Committee members **Stephen Abraham**, a former Lieutenant Colonel in the U.S. Army, and **Neal Sonnett**, a former U.S. Attorney, published an [OpEd](#) opposing the creation of a preventive detention regime.

Constitution Project Releases Recommendations on Improved Information Sharing and Increased Government Transparency

As mentioned above, on July 16, the Liberty and Security Committee released a report that highlights the problems with current government policies for identifying and handling classified and sensitive information. "[Reining in Excessive Secrecy: Recommendations for Reform of the Classification and Controlled Unclassified Information Systems](#)," offers specific policy reforms that would improve government transparency and accountability, as well as ensure protection of both our national security and core constitutional principles. The report has been provided to the presidential task forces established under President Obama's [May 27 memorandum](#), in connection with their 90-day review of the federal government's systems of classification and controlled unclassified information (CUI). The report is endorsed by over 25 members of the Liberty and Security Committee, which includes former government officials, academics, and other experts from across the political spectrum.

Constitution Project and POGO Release Handbooks and Host Events on Congressional Oversight Authority

The Constitution Project and the Project On Government Oversight (POGO) recently released compatible handbooks explaining congressional oversight authority and the respective roles and powers of Congress and the executive branch. The Constitution Project's "[When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry](#)," and POGO's "[The Art of Congressional Oversight: A User's Guide to Doing it Right](#),"

provide guidance on issues involving congressional oversight by explaining the appropriate use of oversight tools. The organizations co-sponsored two events to announce the handbooks' release.

On July 10, a group of congressional staffers packed a Capitol Visitor Center's room to gain practical tips on how to conduct effective oversight. Panelists for the briefing included Morton Rosenberg, author of the Constitution Project's handbook and a leading expert in the field of congressional oversight; Zulima Espinel, Senior Counsel for National Security issues to Senate Judiciary Committee Chairman Patrick Leahy; Beth Nolan, former White House Counsel to President Clinton; and Mark Paoletta, former Chief Counsel for Oversight and Investigations for the U.S. House Committee on Energy & Commerce from 1997 to 2007. Conrad Martin, the Executive Director of the Stewart R. Mott Charitable Trust, moderated the event.

More recently on July 16, over 100 people gathered for a [discussion](#) at the National Press Club with panelists Mickey Edwards and Chris Shays, two Republican former members of Congress, from Oklahoma and Connecticut, respectively; Ronald Weich, the new Justice Department Assistant Attorney General for Legislative Affairs; and Mr. Rosenberg. Jeanne Cummings of *POLITICO* moderated the discussion.

Restarting Flawed Military Commissions Will Endanger National Security

Last Thursday afternoon, the House Armed Services Committee held a hearing to examine the legal implications of reforming the military commission system for suspected terrorists. Tomorrow, the same committee will again receive testimony on reforming the Military Commissions Act of 2006. Although the Constitution Project welcomes Congress' efforts to evaluate this crucial policy matter carefully, [the Project urges Congress](#) to ultimately reject restarting the military commissions. Stephen Abraham, a retired Lieutenant Colonel and member of the Constitution Project's Liberty and Security Committee, issued a [statement](#) opposing the revival of military commissions. Lieutenant Colonel Abraham's personal statement noted, "Military commissions are an unacceptable substitute for our federal courts that have demonstrated time and again they can handle such cases without diminishing our national security or shared values."

Mandatory Minimums Fail to Achieve Justice

The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a [hearing](#) last Tuesday to examine mandatory minimum sentencing. The Subcommittee is currently considering three different proposed pieces of legislation that seek to provide judges with

more discretion to avoid unjust outcomes when handing down sentences. [The Constitution Project applauded](#) the Subcommittee for holding the hearing and for moving forward with these much-needed fixes to our nation's sentencing policies.

The Constitution Project's [Sentencing Committee](#), a bipartisan group of current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts, issued two reports on criminal sentencing, "[Principles for the Design and Reform of Sentencing Systems](#)," and "[Recommendations for Federal Criminal Sentencing In A Post-Booker World](#)." The Committee concluded that mandatory minimums are inconsistent with a system of sentencing guidelines and called for guideline simplification, an end to the crack and powder cocaine sentencing disparity, and meaningful due process protections and reliable fact-finding mechanisms.

News in Brief

- Royce Lamberth, Chief Judge of the U.S. District Court for the District of Columbia, issued an [order](#) on Monday ruling that government officials committed fraud by improperly invoking the state secrets privilege in defense of a CIA operative from illegal spying charges. After learning that his court was misled, [Judge Lamberth recommended](#) disciplinary action for the CIA attorney responsible. In 2000, then-CIA Director George Tenet filed an affidavit asking that the lawsuit be dismissed on state secrets grounds due to the undercover status of the defendant, a CIA operative. The official's cover was lifted in 2002, but CIA lawyers failed to inform the court and instead continued to claim that the state secrets privilege applied, resulting in Judge Lamberth's dismissal of the case on that basis in 2004. In Monday's ruling, Judge Lamberth also rejected current CIA Director Leon Panetta's efforts to keep the complex 13-year case under wraps, writing, "[t]he court does not give the government a high degree of deference because of its prior misrepresentations regarding the state secrets privilege in this case." The Constitution Project's Liberty and Security Committee, in its report "[Reforming the State Secrets Privilege](#)," urges significant reforms to the privilege, including judicial oversight of government claims, precisely to avoid this kind of situation.
- On Monday, the Senate adopted an amendment to the Hate Crimes Prevention Act that would expand the federal death penalty, applying it to newly-created hate crimes. The amendment was offered by Senator Jeff Sessions (R-AL). Given a host of concerns about the federal death penalty, including those regarding racial disparities, as well as a pending review of the Justice Department's procedures for bringing capital charges, the Constitution Project hopes that the amendment will be removed in the conference between the House and the Senate.
- Last Thursday, **Patricia Wald**, former Chief Judge of the United States Court of Appeals for the D.C. Circuit and Constitution Project Liberty and Security Member, wrote an [OpEd](#) in the *Washington Post* that both praised Judge Sonia Sotomayor's fitness for the Supreme Court and argued that her hearings highlighted "enduring problems in the judicial system."

- The House Intelligence Subcommittee on Intelligence and Investigations announced a probe to explore [reports](#) that a CIA plan to covertly capture or kill al Qaeda operatives was hidden from Congress. The probe will explore the scope of the program and to what extent information was withheld.
- It is being [widely reported](#) that Attorney General Eric Holder is seriously considering appointing a special prosecutor to conduct a criminal investigation of the CIA's handling and abuse of suspected terrorists after September 11. The extent of such an investigation, if it occurs, is unknown.
- On July 10, a public version of the [Joint Inspectors General report](#) on the President's Surveillance Program was made available. The report concluded that the "extraordinary and inappropriate" secrecy surrounding the creation and implementation of the wiretapping program damaged both individual liberties and national security.
- After spending 21 years on death row for a crime he did not commit, Ronald Kitchen was [exonerated and released](#) from an Illinois prison on July 7 when charges against him were dismissed. A few days later, the Florida Supreme Court [ordered the release](#) of Herman Lindsey, who was wrongfully convicted of murder and sentenced to death in 2006. According to the Death Penalty Information Center's [Innocence List](#), the number of exonerees from death row has now reached 135.
- The Constitution Project's efforts to address the crisis in indigent defense were highlighted in the [most recent issue of Human Rights](#), published by the Section of Individual Rights and Responsibilities (IRR) of the American Bar Association. Neal Sonnett, chair of the IRR and member of the Constitution Project's Liberty and Security Committee, mentioned "[Smart on Crime: Recommendations for the Next Administration and Congress](#)" in the issue's introductory remarks, and later, **Norman Lefstein**, reporter for our report, "[Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel](#)," contributed an article, "A Broken Indigent Defense System," that was adapted from the report.

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.