



October 1, 2009

Inside

- From the President's Desk
- Constitution Project Releases its *Statement on Reforming the Patriot Act* as Congress Debates Reform
- Constitution Project Applauds First Steps in New DOJ State Secrets Policy But Says Legislative Reform Still Needed
- News in Brief

From the President's Desk

It was encouraging to hear last week that the Obama administration has adopted a new framework for the executive branch's reliance upon the state secrets privilege. The announcement began a much-needed shift in policy away from the broad assertions of government secrecy made by both the Bush and Obama administrations to block litigation efforts challenging the government's policies on issues ranging from warrantless wiretapping to extraordinary rendition.

In his memorandum to all executive branch agencies, Attorney General Eric Holder tightened the standards for when government agencies can assert the privilege, requiring multiple levels of agency and Justice Department review before such a determination is made. The new policy also institutes a process of increased reporting to Congress and agency Inspectors General.

But these developments represent only the first step needed to bring the state secrets privilege into line with our democracy's requirements of transparency and justice. Enactment of legislation is still needed to codify the new standards contained in the attorney general's memorandum, as well as to clarify the courts' role and the tools available to judges in reviewing state secrets claims. By doing so, Congress would protect the courts' traditional and critical role as an independent check on executive discretion.

More details are below on the Constitution Project's immediate reactions to the Obama administration's announcement on state secrets.

Upcoming Events

The Constitution Project's Liberty and Security Committee Co-Chair **David Cole** will be featured at an event next week marking the release of his new book:

The Torture Memos: Rationalizing the Unthinkable

By Professor David Cole

Wednesday, October 7, 2009

3:00 pm – 5:00 pm

Gewirz Student Center 12th Floor
120 F Street NW
Washington, DC

Featuring:

Stuart Taylor, Contributing Editor, *Newsweek*

Alan Morrison, Professor, George Washington University Law School

David Luban, Professor, Georgetown University Law Center

Laura Donohue, Professor, Georgetown University Law Center

Milton Regan, Professor, Georgetown University Law Center

(moderator)

Reception & Book Signing to Follow

Co-sponsored by:

The Center for the Study of the Legal Profession and the Center for National Security and the Law

Please RSVP at rsvp2@law.georgetown.edu

News

Constitution Project Releases its *Statement on Reforming the Patriot Act* as Congress Debates Reform

Last Tuesday, as the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a [hearing](#) on the USA Patriot Act, the Constitution Project's Liberty and Security Committee [released](#) its [*Statement on Reforming the Patriot Act*](#). **Thomas B. Evans Jr.**, former member of Congress from Delaware and Co-Chairman of the Republican National Committee, and **Michael German**, policy counsel for the American Civil Liberties Union and former FBI agent, both members of the Liberty and Security Committee, testified at the hearing.

The [Statement](#), signed by a diverse group of 26 policy experts representing the full political spectrum, calls for significant reform to three provisions of the USA Patriot Act that will sunset at the end of the year: the business/library records, lone wolf, and roving wiretaps

provisions. The *Statement* also calls on Congress to take this opportunity to revisit and reform the National Security Letter (NSL) authority expanded by the Patriot Act, as well as the Act's provision allowing deportation and denial of visas based on individuals' political views.

The following day, the Senate Judiciary Committee held a [hearing](#) on the same topic. The Constitution Project issued a [press release](#) and submitted [testimony](#) welcoming Chairman Patrick Leahy's newly-introduced reform legislation, titled the [USA Patriot Act Sunset Extension Act](#), cosponsored by Senators Ben Cardin and Ted Kaufman.

Earlier today, the Senate Judiciary Committee held a markup of Patriot Act legislation. The Committee voted to adopt a substitute bill negotiated by Senators Leahy and Dianne Feinstein that would reauthorize the sunset provisions, while including many of the reforms contained in the original version of the USA Patriot Act Sunset Extension Act and called for in the Constitution Project's *Statement*. The committee then proceeded to vote on various amendments to the bill, but adjourned before considering all the offered amendments or voting on final passage of the substitute bill as amended.

The USA Patriot Act Sunset Extension Act substitute bill now pending before the committee would extend the sunsets for the three expiring provisions to December 31, 2013, to ensure continuing close oversight on the use of these authorities, and would establish a sunset of December 31, 2013 for the expanded authority to use national security letters (NSLs) conferred by the Patriot Act in 2001. The legislation includes other reforms, such as tightening the standards for obtaining library records orders under Section 215 and allowing recipients of NSLs to challenge the nondisclosure or "gag orders" that accompany NSLs. However, the bill includes fewer reforms than the original version introduced by Senator Leahy and than called for in the Constitution Project's *Statement on Reforming the Patriot Act*. The Senate Judiciary Committee is scheduled to resume consideration of the bill and amendments next week.

Constitution Project Applauds First Steps in New DOJ State Secrets Policy But Says Legislative Reform Still Needed

On September 23, Attorney General Eric Holder [announced](#) a new policy tightening the standards for when agencies may assert the state secrets privilege to prevent disclosure of national security secrets in litigation. The announcement marked a shift in policy away from the broad assertions of secrecy previously made by both the Bush and Obama administrations in such cases. The Constitution Project [welcomed](#) the announcement as an important first step in the right direction, by defining and limiting the

ability of the executive branch to assert the privilege. However, the Constitution Project also called on the administration and Congress to support legislation to protect and clarify the role of the courts in determining whether the state secrets privilege properly applies in given cases.

The following day, the Constitution Project, [along with six other organizations](#), sent a [letter](#) to the leadership of the House and Senate Judiciary Committees, explaining that legislation is still needed to reform the state secrets privilege despite the administration's welcome new policy. The letter urges the members of Congress to enact legislation such as the State Secrets Protection Act bills pending in both houses, to protect the role of the courts in determining whether the privilege applies in given cases.

Constitution Project Senior Counsel **Sharon Bradford Franklin** had an [OpEd posted on *Jurist*](#), summarizing the Project's analysis of the new administration policy and why legislation is still needed.

News in Brief

- Yesterday, the Constitution Project joined George Washington University Law School in hosting a [panel discussion](#) of Ronald Goldfarb's latest book [In Confidence](#). The author was joined by Professor Jeffrey Rosen, Meredith Fuchs of the National Security Archive, and Professor Orin Kerr in discussing issues of government secrecy and the ability of journalists to protect the confidentiality of their sources. If you were unable to join us yesterday, you can see photos of the event [here](#).
- An item in a recent newsletter discussed the case of Cameron Willingham, who was executed in Texas in 2004 after being convicted of setting a 1991 fire in which his three children died. Arson experts who have studied the case have reported to the state's Forensic Science Commission that they believe the fire was started by accident, and that the state's arson experts used a flawed analysis to reach their conclusion. The Commission was scheduled to hear this evidence on Friday, [but on Wednesday](#), Governor Rick Perry suddenly replaced the chairman and two of its members. The new chairman canceled the hearing, leading to a storm of criticism. Senator Kay Bailey Hutchison, who is running against Governor Perry in a primary this fall, said: "Why you wouldn't at least have the hearing that the former member suggested, to find out what the facts are, when a man has been executed and now the facts are in dispute – just like DNA has given more tools to determine the facts...I am strongly for the death penalty, but always with the absolute assurance that you have the ability to be sure – with the technology that we have – that a person is guilty."
- As part of its preview of the upcoming Supreme Court term, the *Los Angeles Times* published an [extensive article](#) earlier this week on whether life without parole for minors constitutes cruel and unusual punishment. The Supreme Court is scheduled to hear two cases on this matter in November.

- On Monday, a federal judge in Ohio [delayed](#) the state's latest attempt to execute Rommel Brown by lethal injection. A little over [two weeks ago](#), Ohio Governor Ted Strickland stopped the attempted execution of Mr. Brown following a two hour fiasco in which the state was unable to locate a usable vein for the injection. Judge Gregory Frost of the U.S. District Court for the Southern District of Ohio will now hold a hearing on November 30 to determine whether the state can try again to execute Mr. Brown.
- This [past weekend](#), on the Sunday news shows, Secretary of Defense Robert Gates declined to counter suggestions that the Obama administration is unlikely to meet its January 22 deadline for closing the detention facility at Guantanamo Bay. Early [this week](#), Press Secretary Robert Gibbs said, "[w]e're not focused on whether the deadline will or will not be met on a particular day."
- [Multiple news accounts](#) last Thursday reported that the Obama administration will not seek or support new legislation from Congress that would authorize the indefinite detention of suspected terrorists. In his national security speech given at the National Archives back in May, President Obama indicated he would seek such legislation, but the news reports indicate that his administration now feels it already has the necessary authority under the authorization for use of military force passed by Congress in 2001. The Constitution Project's Liberty and Security Committee has opposed indefinite detention without charge for suspected terrorists in its 2008 report [A Critique of National Security Courts](#).
- **Dr. Tony Fabelo**, a member of the Constitution Project's National Right to Counsel Committee, presented the Committee's findings, set forth in [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#), at a Texas event sponsored by the American Constitution Society this week. **Robert Spangenberg**, a co-reporter for *Justice Denied*, also spoke on indigent defense, giving remarks at two Nevada indigent defense training sessions, sponsored by the Administrative Office of the Courts and the State Bar of Nevada.
- **Harold Koh**, previously the Dean of Yale Law School and a former member of the Constitution Project's Liberty and Security Committee, was [sworn in](#) as the State Department's chief lawyer two weeks ago today on Constitution Day. In his remarks, Mr. Koh noted that September 17th was the 222nd birthday of the United States Constitution.

- Tomorrow and Saturday, multiple organizations are joining together to host “[Who Decides About War?](#),” a national conference on war powers, law and democracy being held at the Georgetown University Law Center in Washington, DC. The Constitution Project will provide copies of our War Powers Committee’s report, [Deciding to Use Force Abroad: War Powers in a System of Checks and Balances](#), at the conference.