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## From the President's Desk

Two weeks ago, the Constitution Project, in coordination with Human Rights First, released *Beyond Guantanamo: A Bipartisan Declaration*, “urg[ing] Congress and the president to support a policy for detention, treatment and trial of suspected terrorists that is consistent with U.S. treaty obligations and constitutional principles.” Its 135 signatories (to date) include former members of Congress, diplomats, federal judges and prosecutors, high-level military and government officials, as well as national security and foreign policy experts, bar leaders, and family members of 9/11 victims.

The *Declaration* came at a crucial time. Attorney General Eric Holder announced last Friday that five detainees will face prosecution in a New York federal court for the 9/11 terrorist attacks, that five others will be tried before military commissions, and as Congress continues to consider proposals to restrict the administration's ability to bring the detainees into the United States.

Already, the *Declaration* is having considerable impact in the halls of Congress, the executive branch, editorial boardrooms and news outlets. In remarks on the Senate floor regarding an amendment offered by Senator Lindsey Graham (R-SC) that would have limited the Obama administration's ability to try some terrorism suspects in federal courts, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) said:

“There has been an outpouring of opposition against this amendment including by numerous human rights groups such as Human Rights First, the National Institute of Military Justice, Constitution Project and Amnesty International. We have also seen a strong public declaration in support of trying terrorism offenses in Federal courts, signed by a bipartisan group of former Members of Congress, high-ranking military officials and judges...Experts and judges across the political spectrum have agreed that our criminal justice system can handle this challenge and indeed has handled it many times already.”

House Majority Leader Steny Hoyer (D-MD) told reporters that he supported the DOJ decision to try detainees in federal court, citing three prominent conservatives who signed the Declaration - former Republican congressman and U.S. Attorney Bob Barr (R-GA), American Conservative Union Chairman David Keene, and Grover Norquist, President of Americans for Tax Reform - as examples of the bipartisan support for the decision.

For more on the Constitution Project’s work on these matters, see the items below and check our website for more information and media coverage of [\*Beyond Guantanamo\*](#).

## **Upcoming Events**

### Justice Denied

On November 30 and December 1, former North Carolina Supreme Court Chief Justice Rhoda Billings and Anoka County, MN District Attorney Robert M.A. Johnson, who co-chair the Constitution Project’s Right to Counsel Committee, will travel to Michigan to advocate for the reforms set out in the Committee’s report, [\*Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel\*](#). On the 30<sup>th</sup>, they will participate in a lunch event at the Thomas M. Cooley Law School in Grand Rapids, co-hosted by the Constitution Project, the Campaign for Justice, the Grand Rapids Lawyers Chapter of the Federalist Society, and the Prison Fellowship. The following day, they will travel to Lansing to meet with state legislators to push for needed reforms in Michigan.

### Immigration and Access to Counsel

On December 2, the Constitution Project will join with Human Rights Watch (HRW) to host a panel discussion on immigration detention and access to counsel. The event will take place in the National Press Club’s First Amendment Lounge, from noon to 2 pm. Both organizations will be releasing reports that day. The Constitution Project will be unveiling *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, while HRW will release *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*. Panel discussion participants include:

- **Bruce Einhorn**, a former federal immigration judge and now Director of the Asylum Clinic and Professor of Law at Pepperdine University;
- **Asa Hutchinson**, former Member of Congress (R-AR); former Director of the Drug Enforcement Administration and Under Secretary for Border & Transportation Security at the Department of Homeland Security in the George W. Bush administration; former US attorney; and member of the Constitution Project's Liberty and Security Committee;
- **Alison Parker**, Deputy Director of Human Rights Watch's U.S. Program; and
- **Megan Mack**, Director of the American Bar Association's Commission on Immigration (moderator)

A light lunch will be served. RSVP at [RSVP@constitutionproject.org](mailto:RSVP@constitutionproject.org), with "Immigration Event" in the subject line. Look for a save-the-date later today regarding this event.

#### Book Event: *The Guantanamo Lawyers*

On December 3, the Constitution Project will co-host a discussion of the recently-released book, [\*The Guantanamo Lawyers: Inside a Prison Outside the Law\*](#). The book compiles the stories of many of the Guantanamo detainees as told to their lawyers. The event will be co-sponsored by Mayer Brown LLP and Shearman & Sterling LLP, whose lawyers have represented Guantanamo detainees and contributed to the book. The event will be a lunchtime gathering held at Mayer Brown's offices here in Washington, at 1909 K Street, NW. Lawyers from several law firms and non-profits who have contributed to the book will participate, including:

- **Jonathan Hafetz**, with the ACLU National Security Project and co-editor of *The Guantanamo Lawyers*;
- **Agnieszka Fryszman**, with Cohen Milstein Sellers & Toll PLLC;
- **Gary Isaac**, with Mayer Brown LLP;
- **Allison Lefrak**, with Reed Smith LLP; and
- **Thomas Wilner**, with Shearman & Sterling LLP

RSVP at [RSVP@constitutionproject.org](mailto:RSVP@constitutionproject.org), with "Guantanamo book event" in the subject line.

## News

### **Constitution Project Releases Report on Reforming Material Support Statutes**

Earlier this week, a bipartisan coalition of former government officials, scholars, practitioners, and other experts serving on the Constitution Project's Liberty and Security Committee [proposed reforms](#) to federal laws prohibiting material support for terrorism. These reforms, needed to safeguard constitutional liberties, are contained in [\*Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations."\*](#) The report proposes eight reforms to remedy serious First, Fourth and Fifth Amendment concerns

created by existing federal law, including the need to ensure that pure speech furthering lawful ends is no longer prohibited as material support of terrorism. The report came at an especially critical time, a day after the Humanitarian Law Project filed its opening brief in the U.S. Supreme Court in *Holder v. Humanitarian Law Project*, challenging the application of federal material support laws to punish pure speech that seeks to further lawful, non-violent ends. Constitution Project Senior Counsel **Sharon Bradford Franklin** was interviewed on the report's release for Pacifica Radio in New York for [WBAI's Evening News](#) program on the day of its release. Liberty and Security Committee co-chair and Georgetown law professor David Cole represents the Humanitarian Law Project in the Supreme Court case.

### **Prominent Conservatives Release Statement Supporting Ability of U.S. Prisons to Hold Guantanamo Detainees**

In response to recent news accounts that the federal government is considering incarcerating Guantanamo detainees at a retrofitted state prison in Thomson, Illinois, a group of prominent conservatives released a [Statement on Using U.S. Prisons to Hold Guantanamo Detainees](#). Organized by the Constitution Project, the *Statement* was joined by Doug Bandow, former Special Assistant to President Ronald Reagan, Bob Barr, former Republican member of Congress from Georgia, Philip Giraldi, the Francis Walsingham Fellow with the American Conservative Defense Alliance, David Keene, chairman of the American Conservative Union, Grover Norquist, president of Americans for Tax Reform, Michael Ostrolenk, national director of the Liberty Coalition and president and co-founder of the American Conservative Defense Alliance, Dane vonBreichenruchardt, president of the U.S. Bill of Rights Foundation, and John Whitehead, president of the Rutherford Institute. The *Statement* notes the ability of our prison system to securely hold dangerous individuals, including those convicted of terrorism offenses, and urges a halt to the "scaremongering" over this issue. It has been extensively covered by the media, including the [Washington Post](#), [MSNBC](#), [FOX News](#), [Atlanta Journal-Constitution](#), [Capitol Hill news outlets](#) and a variety of blogs.

### **Constitution Project Welcomes Federal Prosecution of Some Detainees While Criticizing Use of Military Commissions for Others**

As mentioned above, Attorney General Eric Holder announced last Friday that Khalid Sheikh Mohammed and four other Guantanamo detainees will face prosecution in a federal court in New York for the 9/11 terrorist attacks. He also announced plans to try Abd al-Rahim al-Nashiri, a suspect in the U.S.S. Cole bombing, along with four other detainees, before military commissions. The Constitution Project [welcomed the decision](#) to prosecute some detainees in federal court, while expressing concern about the decision to abandon that system for other detainees, in favor of military commissions.

The same day, the Constitution Project organized a [statement and conference call](#) with reporters for members of the [September Eleventh Families for Peaceful Tomorrows](#) organization. These family members of 9/11 victims supported the Attorney General's decision to use federal

courts to try some detainees. The call was reported by a variety of media outlets, including [CNN](#), the *Washington Times*, and the [New Haven Register](#).

Just a week earlier, as noted in the “From the President’s Desk” section above, the Constitution Project and Human Right First released [Beyond Guantanamo: A Bipartisan Declaration](#), advocating the use of federal courts to try terrorism suspects and an end to indefinite detention without charge. To date, the Declaration has been joined by 135 prominent Americans, including former members of Congress, diplomats, federal judges and prosecutors, high-level military and government officials, as well as national security and foreign policy experts, bar leaders, and family members of 9/11 victims.

## News in Brief

- Yesterday, Sharon Bradford Franklin participated in a full day conference examining “The State of the State Secrets Privilege,” hosted by American University Washington College of Law’s Collaboration on Government Secrecy. Sharon spoke on a panel examining the Obama administration’s approach to the privilege, and described how “[w]e’ve pulled back from the brink, but there’s still a long way to go.” She discussed how legislation is needed to restore the role of the courts as a check on executive branch claims of secrecy, and to ensure that litigation involving national security programs can proceed whenever possible. In 2007, the Constitution Project’s Liberty and Security Committee issued [Reforming the State Secrets Privilege](#), and the Project has been actively supporting efforts to enact legislation to reform this doctrine.
- As a result of the botched execution attempt of Romell Broom in September, the state of Ohio has been examining the constitutionality of its lethal injection protocol. The state tried for over two hours to find a suitable vein to administer a three-drug cocktail to execute Mr. Broom. Finally, Governor Ted Strickland put a halt to the proceedings. [Ohio now plans](#) to switch to a single-drug dosage. If this were to fail, or if executioners were unable to find a suitable vein, prison officials would then inject two chemicals into the inmate’s muscles. The Constitution Project will continue to monitor these developments and advocate for the reforms set forth in [Mandatory Justice: The Death Penalty Revisited](#).
- On Friday, November 6<sup>th</sup>, Constitution Project Senior Counsel **Laura Olson** participated in a panel discussion titled “International Law: Agreements Between Sovereigns or World Government?” as part of the Federalist Society’s 2009 Lawyers Convention.
- Also on November 6<sup>th</sup>, the Constitution Project, People For the American Way, the Rutherford Institute, and Reprieve filed an

[amicus brief](#) in the U.S. Court of Appeals for the D.C. Circuit in *Al Maqaleh, et al. v. Gates, et al.* While these organizations took no position on whether detainees held at the prison in Bagram Air Field in Afghanistan have a constitutional right to *habeas corpus*, the brief urges the Court to consider the similarities between *habeas* litigation on behalf of Guantanamo Bay detainees and potential *habeas* litigation on behalf of detainees held at Bagram. The brief explains that the government's "practicality" arguments opposing *habeas* rights for the Bagram detainees have already been addressed by the district courts throughout the Guantanamo Bay detainee litigation. This post-*Boumediene* litigation has demonstrated that these practical obstacles can be overcome. *Boumediene v. Bush*, of course, held that Guantanamo detainees have a constitutional right to *habeas corpus*. The Constitution Project coordinated two *amicus* briefs in that case before the Supreme Court, one [filed by former federal judges](#), the other [filed by the Project and other non-governmental organizations](#).

- Two weeks ago today, the House Judiciary Committee favorably reported the USA PATRIOT Amendments Act of 2009 by a vote of 16-10. H.R. 3845 would amend the USA Patriot Act to strengthen privacy protections for all Americans, while providing the federal government with the surveillance authority needed to keep our nation safe. The legislation addresses the three provisions of the Patriot Act scheduled to sunset this year, as well as the national security letter (NSL) provision. When the Act was introduced on October 20, the Constitution Project [praised its cosponsors](#), House Judiciary Committee Chair John Conyers (D-MI), Constitution Subcommittee Chair Jerrold Nadler (D-NY), and Crime Subcommittee Chair Bobby Scott (D-VA), and called on the Committee to adopt the legislation as introduced to ensure that individual rights are protected. In September, the Constitution Project's Liberty and Security Committee released its [Statement on Reforming the Patriot Act](#), which made recommendations similar to the reforms set out in the above mentioned legislation.
- The same day, the House Judiciary Committee also favorably reported the State Secrets Protection Act by a vote of 18-12. H.R. 984 would reform the use of the state secrets privilege by ensuring that judges will review executive branch secrecy claims and independently determine whether there is sufficient non-privileged evidence for cases to be litigated. The Constitution Project has been actively working in support of such legislative reform since 2007, when the Project's Liberty and Security Committee released [Reforming the State Secrets Privilege](#), which calls for reforms similar to those sought by the State Secrets Protections Act. Most recently, after the Attorney General announced a new executive branch policy for invoking the privilege in September, the Constitution Project [joined](#) with six other human rights and open government advocacy organizations in a [letter](#) to the House and Senate Judiciary, urging Congress to enact legislation that is still vitally needed to protect the role of the courts in determining whether the state secrets privilege

applies in given cases. The House Judiciary Committee's actions are consistent with that goal.

- Our last newsletter summarized the [swine flu discussion](#) we co-hosted with the University of Maryland's Center for Health and Homeland Security at the National Press Club. A [full-length video](#), as well as a [shortened, higher-quality version](#) are now available.