



January 14, 2010

## Inside

- From the President's Desk
- Employment Opportunity at the Constitution Project
- Upcoming Events
- Constitution Project Marks Eight-Year Anniversary of Guantanamo Bay Detention Facility
- Signatories to *Beyond Guantanamo: A Bipartisan Declaration* Counter Those Opposed to the Prosecution of Abdulmutallab in Federal Court
- News in Brief

## From the President's Desk

Happy New Year! I hope you all enjoyed the holiday season.

As you will see below, our team has been quite busy since we last wrote. Yet there is one event that could have the biggest impact on our work this coming year, and that is the allegedly Al-Qaida-linked attempt to blow up Northwest Airlines flight 253 on Christmas Day. Although the attempt failed, President Obama declared the incident a "systemic failure" of U.S. intelligence. The alleged would-be bomber, Umar Farouk Abdulmutallab, was on a government watch list but not designated for special review or "no-fly" status.

This near-catastrophe has created a political firestorm that is already affecting how the Obama administration, Congress, and the American public view a wide array of matters, which raise the following questions: Will there be sweeping new security measures that infringe on personal freedoms? Will government watch lists be expanded to include even more "suspects"? If so, what standards will be used to add individuals? While President Obama decided to try Abdulmutallab in federal court, will the incident affect the willingness - or ability - of the administration to try Guantanamo Bay detainees in federal court, rather than by military commission? And, will there be efforts to revive the abusive interrogation techniques that President Obama banned immediately upon assuming office?

The Constitution Project's job in the coming months is to make sure that, as the nation seeks to answer these and many other questions, we remember what our Liberty and Security Committee said about the reasons for its creation:

In a climate of increased fear about national security, we were alarmed both by government proposals that jeopardized civil liberties and by public opinion polls showing a lack of opposition to such proposals...Committee members "believe that Americans of widely differing political perspectives and experiences can, and must, respect a set of general principles that preserve our individual rights even as we protect our safety."

Fortunately, our recent work puts us ahead of the curve. As policymakers look for ways to address failures related to government watch lists, a good place to begin would be our recent report, Promoting Accuracy and Fairness in the Use of Government Watch Lists. Should the commitment to try detainees and other alleged terrorists in federal court weaken, or support grow for indefinite detention, our continuing work to gather endorsements for Beyond Guantanamo: A Bipartisan Declaration should help stiffen some spines. We have now helped to secure nearly 140 signatories to the Declaration, 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.

As we begin a new year and a new decade, we must renew our commitment to the rule of law and to the mission of our Liberty and Security Committee: to lead "a meaningful, informed, and bipartisan discussion ... in conjunction with public education addressed at policymakers, the media, and the public." Working shoulder-to-shoulder with friends and supporters like you, we will continue to defend the Constitution and to insist that our elected leaders uphold the rule of law.

Again, please accept my sincere wishes for a healthy and happy new year.

### **Employment Opportunity at the Constitution Project**

The Constitution Project is currently seeking a Coordinator for Federal Efforts to Reform the Death Penalty.

If interested in applying, please visit:

<http://www.constitutionproject.org/NewsDetail.asp?id=445>

### **Upcoming Events**

Next Friday, January 22, the Constitution Project, along with the Rockefeller Brothers Fund and the Open Society Institute, will cosponsor a panel discussion in New York City to mark the one year anniversary of President Obama's executive order to close the Guantanamo detention

facility within one year. The roster includes:

Moderator: **Jeffrey Toobin**, The New Yorker  
**Stephen Abraham**, Lieutenant Colonel (Ret.), US Army Intelligence Corps (Reserves)

Honorable **John Coughenour**, Federal District Court, Seattle, WA, who presided over the 2005 trial of Millennium Bomber Ahmed Ressam

**Talat Hamdani**, member, September Eleventh Families for Peaceful Tomorrows

**Shane Kadidal**, Senior Managing Attorney, Guantánamo Global Justice Initiative, Center for Constitutional Rights

**Celeste Koeleveld**, Chief of the Criminal Division, Chief Appellate Attorney, and Assistant United States Attorney, U.S. Attorney's Office, Southern District of New York (1991-2008)

**Brad Wiegmann**, Principal Deputy Assistant Attorney General, National Security Division, U.S. Department of Justice

We expect a very informative discussion that examines why the administration was unable to meet its deadline, what progress has been made and the hurdles that remain. We hope you can join us; specific details are below:

**January 22, 2010**

**12:00 pm - 2:00 pm**

A light lunch will be served at 11:30 am; the discussion will begin promptly at noon.

Rockefeller Brothers Fund (RBF)

475 Riverside Drive

New York, NY 10115

The RBF is located in the Interchurch Center. Please enter at 61 Claremont Avenue and 120th Street. The event will take place in the Interchurch Center's first-floor conference room, the Sockman Lounge.

RSVP to: [rsvp@constitutionproject.org](mailto:rsvp@constitutionproject.org)

-----

On Tuesday, January 26, 2010, the Constitution Project is cosponsoring a book event at Busboys and Poets in Washington, D.C. for Amy Bach, author of *Ordinary Injustice: How America Holds Court*.

In this revealing indictment of our criminal courts, Amy Bach moves from southern Georgia to upstate New York, from Mississippi to Chicago, exposing courts that administer assembly-line justice in the name of efficiency and strip poor people of their most basic constitutional protections in the process.

**Tuesday, January 26, 2010**

**6:30pm - 8:00pm**

Busboys and Poets - Langston Room  
2021 14th Street, NW (14th and V)  
Washington, DC 20009

RSVP to: [rsvp@constitutionproject.org](mailto:rsvp@constitutionproject.org)

-----

On February 24, 2010, the Constitution Project will cosponsor the Texas Indigent Defense Summit, to be held at the Texas Capitol Auditorium. Other sponsoring organizations include the Office of Senator Rodney Ellis, the National Association of Criminal Defense Lawyers, and the Texas Criminal Defense Lawyers Association.

Robert Spangenberg, coauthor of the report of the Constitution Project's National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, will participate on one of the panels, while Tony Fabelo, a Committee member, will give closing remarks. We will provide more details as the event nears.

## News

### **Constitution Project Marks Eight-Year Anniversary of Guantanamo Bay Detention Facility**

On January 11, the Constitution Project [marked the eight-year anniversary of the establishment of the detention facility at Guantanamo Bay Naval Base](#). During his presidential campaign, President Obama often pledged to close the facility and end the military commissions being used to try the detainees. On his second full day in office, the president signed an executive order promising to close the detention facility within one year. It is now acknowledged within the administration that this deadline will not be met, but the president and his advisors continue to pledge their commitment to closing the facility.

The Constitution Project supports prosecution of any detainees suspected of terrorism offenses in the federal courts, not in military commissions. In addition, we continue to urge the administration and Congress to reject indefinite detention without charge. Our federal courts have a proven track record of successfully handling the most sensitive terrorism cases, as have our federal prisons in holding suspects pre-trial and post-conviction. Military commissions and indefinite detention without charge are inconsistent with the constitutional values the president, his advisors, and members of Congress swore to uphold.

### **Signatories to *Beyond Guantanamo: A Bipartisan Declaration Counter Those Opposed to the Prosecution of Abdulmutallab in Federal Court***

Over the past week, signatories to the *Declaration* have rejected criticism of the Obama administration's decision to prosecute Umar Farouk

Abdulmutallab, charged with the failed Christmas day airline bombing, in a federal court in Michigan. Former Republican members of Congress Bob Barr and Mickey Edwards posted blog pieces rejecting these critics' scare tactics. Mr. Barr had [two posts in the Atlanta Journal Constitution](#), and Mr. Edwards had [his in The Atlantic magazine](#). Former Michigan U.S. Attorneys James Brady and Richard Rossman voiced their support for Abdulmutallab's prosecution in federal court in a recent [opinion piece in the Detroit Free Press](#). Former Brigadier General James Cullen was [interviewed by Sam Stein](#) of *The Huffington Post*.

## News in Brief

- This past Monday, [an opinion piece](#) written by the co-chairs of the Constitution Project's bipartisan National Right to Counsel Committee appeared in the *Lexington Herald-Leader*. The co-chairs - Rhoda Billings, a former chief justice of the North Carolina Supreme Court; Robert M.A. Johnson, district attorney for Anoka County, Minnesota; and Timothy K. Lewis, a former judge on the United States Court of Appeals for the Third Circuit - expressed opposition to cuts in Kentucky's state budget for indigent defense. They cited the committee's report, [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#), and its conclusions that this country's indigent defense system is in dire need of increased funding and independence in the method of appointing counsel.
- On January 5, 2010, the U.S. Court of Appeals for the D.C. Circuit issued a sweeping opinion in *Al Bihani v. Obama*. The court ruled that the president has broad authority to detain those at Guantanamo and other suspected terrorists. This is the appeals court's first opinion reviewing a habeas petition on the merits. In affirming the D.C. District Court's decision denying relief, the appeals court found that the government's power to detain suspected terrorists is not limited by the law of war.
- On December 29, 2009, President Obama issued a new Executive Order on Classified National Security Information. The order includes several key reforms that are consistent with recommendations found in the Constitution Project's report, [Reining in Excessive Secrecy: Recommendations for Reform of the Classification and Controlled Unclassified Information Systems](#). Specifically, the president's order embraced our recommendations for establishing the principle that no records should remain classified indefinitely and promoting more timely declassification of documents that no longer need to be protected.
- On December 23, 2009, the Constitution Project joined with the Brennan Center for Justice, the Center for Democracy and Technology, the Electronic Frontier Foundation, and the Rutherford Institute in [filing an amicus brief](#) in the U.S. Court of Appeals for

the Second Circuit in *Amnesty International USA v. McConnell*. The district court dismissed this challenge to the Foreign Intelligence Surveillance Amendments Act of 2008 (FAA) on the ground that the plaintiffs could not demonstrate that they had been subject to surveillance under the Act and therefore lacked standing to sue. In this appeal to the Second Circuit, the groups' *amicus* brief argues that the courts should not apply such a stringent standard in assessing standing because it is critical to preserve judicial review of the statute and the surveillance program it authorizes. The brief explains the importance of preserving judicial oversight over executive surveillance authority and the threats posed to First and Fourth Amendment rights.

- That same day, the Constitution Project also filed a [friend of the court brief in \*Maples v. Allen\*](#), urging the U.S. Court of Appeals for the Eleventh Circuit to grant a rehearing. In *Maples*, the court ruled that a capital defendant's failure to file a timely ineffective assistance of counsel claim cannot be excused simply because the omission occurred through no fault of the defendant. In this case, because Mr. Maples' *pro bono* lawyers had left their firm, the firm's mailroom clerk returned unopened the notice that triggered the time for filing a *habeas* petition. The court clerk made no further effort to notify anyone, and the time for filing passed. The *amicus* brief argues that the 11<sup>th</sup> Circuit's original decision was in error and that Alabama's procedural rules should not bar the court from considering Mr. Maples' constitutional claims. Moreover, the brief argues that no individual should be put to death when his lawyers and court clerks fail to make him aware of deadline-triggering orders.
- Also on December 23, 2009, the Constitution Project joined over a dozen civil liberties and civil rights groups in a letter to Attorney General Holder and Secretary of State Clinton, urging support for the International Court of Justice decision in *Avena and Other Mexican Nationals*. [The letter](#) pointed out that it has been five years since the United States was ordered by the ICJ to determine whether the denial of consular assistance prejudiced a group of Mexican nationals who were convicted and sentenced. The letter urged the administration to work with Congress to enact legislation giving full effect to the *Avena* decision.
- Constitution Project Senior Counsel **Sharon Bradford Franklin's** letter to the editor to the *Los Angeles Times* appeared on December 18. Sharon's letter criticized the Obama administration's state secrets claim in *Mohamed vs. Jeppesen DataPlan, Inc*, which was argued before the U.S. Court of Appeals for the Ninth Circuit sitting *en banc* earlier in December. Sharon pointed out that the problem extends beyond this particular case. She noted that even if the court rules favorably and narrows the scope of the state secrets privilege, congressional action is needed "to clearly establish that judges, and not the executive, have the final say on whether disputed evidence is subject to the privilege." In 2007, the Constitution Project's Liberty

and Security Committee issued a statement entitled [\*Reforming the State Secrets Privilege\*](#).

- The *Washington Post* printed a [letter-to-the-editor on January 13 from William S. Sessions](#), former FBI Director, federal judge, and honorary co-chair of our Right to Counsel Committee, commending the judge and defense lawyer whose persistence and dedication to justice resulted in the exoneration of Donald Eugene Gates. Mr. Gates served 28 years for rape and murder before the judge, based on DNA evidence, found him to be innocent and released him.

More information is available on the [Constitution Project's web site](#), including how to [subscribe to our newsletter](#) and a way for you to [show your financial support](#).