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## Inside

- From the President's Desk
- Upcoming Events
- DOJ OPR Report Furthers the Call for Commission of Inquiry
- Constitution Project Joins Coalition Letter Opposing Proposed Legislation Barring Prosecution of Some Suspected Terrorists in Federal Court
- Constitution Project Organizes *Amicus* Brief in Support of Charles Dean Hood Petition for *Certiorari*
- Event Summary: *Holder v. Humanitarian Law Project* Briefing
- News in Brief

## From the President's Desk

It's often been said that truth is the first casualty of war, and the many myths and obfuscations employed during the nine-years-and-counting "war on terror" have proved this "war" to be no exception. It is distressing, though, that while the passage of time has made more careful contemplation of the facts possible, the same myths and obfuscations continue to be asserted.

There should be no doubt, for example, that our federal courts are up to the challenge of administering justice in the cases of the alleged plotters of the 9/11 attacks. The evidence is unchallenged that nearly 200 terrorists have been convicted in our traditional criminal justice system since 9/11. The Bush administration frequently used these same federal courts for trials of suspected terrorists - and trumpeted these successful prosecutions. Federal investigators have elicited significant cooperation from suspected and convicted terrorists; and, as we saw just this past week, federal law enforcement officials are able to secure guilty pleas from those planning future attacks and to obtain lengthy sentences.

The facts are clear. As [General Colin Powell](#) and [former Attorney General John Ashcroft](#) have stated, the federal courts are up to the task. They recognize that these are complicated issues, and that the government is faced with extremely difficult decisions. So it is all the more unfortunate that some people are continuing to use our national security to gain

political advantage. The Constitution Project will continue to help get the facts out and to support the administration's plan to try those charged with the 9/11 attacks, Khalid Sheikh Mohammed and his alleged co-conspirators, in federal civilian court.

## Upcoming Events

On Thursday, April 15, we will host our Third Annual Constitutional Champion Awards Dinner. Our honorees this year are **George Kendall**, director of the Public Service Initiative at Squire, Sanders, & Dempsey, LLP, and the Honorable **Thomas Pickering**, former Undersecretary of State for Political Affairs and former U.S. Ambassador to the United Nations. Attorney General **Eric Holder** will be the keynote speaker.

Constitution Project's Third Annual Constitutional Champion Awards  
Dinner

Thursday, April 15, 2010

6:00pm Reception

7:00pm Dinner

Renaissance Mayflower Hotel

We hope you will be able to attend. Please contact Kristen Carson-Owens at (202) 580-6924 or [kcarson@constitutionproject.org](mailto:kcarson@constitutionproject.org) to purchase tickets or for more information.

## News

### DOJ OPR Report Furthers the Call for Commission of Inquiry

Late last Friday, the Justice Department's Office of Professional Responsibility (OPR) released its long-anticipated report on the conduct of Bush administration lawyers in providing the legal rationale for harsh interrogation tactics used by government personnel against suspected terrorists detained by the United States. The report found that John Yoo, who worked in the Department of Justice's Office of Legal Counsel, committed intentional professional misconduct by failing to "render thorough, objective, and candid legal advice," and that Jay Bybee, Mr. Yoo's superior at OLC, "acted in reckless disregard" of that same standard. Associate Deputy Attorney General David Margolis, in his Memorandum of Decision reviewing the OPR report, resolved the issue differently. He concluded that Yoo and Bybee showed "poor judgment" but did not go so far as to conclude that they had committed professional misconduct in authoring the Office of Legal Counsel memos.

In a [statement](#) released the same day the report was made public, Constitution Project Senior Counsel **Laura Olson** said, "The OPR report furthers the call for a comprehensive and nonpartisan commission of

inquiry into past deviations from the rule of law. President Obama pledged adherence to our constitutional principles, but for our nation to properly move forward, and for our citizens to be able to hold our leaders accountable, we must know all of the policies that were implemented in our name. Only with a full understanding can we ensure that policies allowing abusive and illegal treatment will stay in our nation's past."

In April 2009, the Constitution Project joined a coalition of 18 other advocacy organizations in a campaign to urge President Obama to appoint an independent commission to investigate the treatment of people detained since September 11, 2001 by the United States or at the direction of the United States as part of antiterrorism or counterterrorism activities. Look [here](#) for more details on the campaign.

### **Constitution Project Joins Coalition Letter Opposing Proposed Legislation Barring Prosecution of Some Suspected Terrorists in Federal Courts**

On February 19, the Constitution Project joined with 14 other advocacy organizations in sending a letter to U.S. Senators, urging them to oppose S. 2977, legislation recently introduced by Senator Lindsey Graham (R-SC) that would prohibit the Department of Justice from using funds to prosecute the alleged planners or conspirators of the September 11 attacks in traditional federal courts. Senator Graham sought similar legislative language in November, when he proposed an amendment to the Commerce, Justice, and Science appropriations bill, which was then rejected by a vote of 54 to 45.

The [letter](#) states, in part, "...S. 2977 would block the Department of Justice from access to the most effective courts for criminal prosecution.... [It] would hinder efforts to put to rest a legacy of a failed detention policy. The detentions at Guantanamo Bay are a blot on the reputation of the United States that harms U.S. national security and foreign policy interests. There is widespread agreement among national security and foreign policy experts-including General David Petraeus, Secretary of Defense Robert Gates, and five former Secretaries of State from both parties that closing the Guantanamo Bay detention facility is essential to U.S. counterterrorism efforts and to repairing the standing of the United States as a country committed to human rights and the rule of law."

### **Constitution Project Organizes *Amicus* Brief in Support of Charles Dean Hood Petition for *Certiorari***

Last Thursday, 21 former judges, prosecutors, and other government officials filed an [amicus brief](#) in support of Charles Dean Hood's petition to the U.S. Supreme Court asking the Court to hear the case. Mr. Hood was sentenced to death in 1990 for a double murder, but has long protested that his constitutional right to a fair trial was violated due to the romantic relationship between the prosecutor in his case and the judge presiding over his trial.

In 2008, a Texas court ordered both the judge and prosecutor to testify under oath in depositions after years of their refusing to do so, and both finally admitted the relationship. Nevertheless, in September 2009, the Texas Court of Criminal Appeals rejected Mr. Hood's challenge to his conviction as untimely. The *amicus* brief, organized by the Constitution Project, requests that the Supreme Court review the decision of the Texas Court of Criminal Appeals. The brief states, in part:

"The conduct of the trial judge and prosecutor in a proceeding that resulted in imposition of the death penalty, combined with the short shrift given to petitioner's claim by the Court of Criminal Appeals, cast grave doubt on the impartiality and fairness of the trial in this case and tarnish significantly the reputation of the judiciary as a whole. This Court likely is the last court with an opportunity to prevent the infliction of this serious harm-both to petitioner and to the judiciary."

Just yesterday, the Texas Court of Criminal Appeals overturned Mr. Hood's sentence on the grounds that the jurors were not able to consider mitigating evidence. His attorney said in a statement, "[w]hile today's decision recognized a clear flaw in the punishment phase of Mr. Hood's case, it should not distract the courts or the public from the more troubling issue at the center of this case: that the judge and prosecutor admitted under oath that they had a long-term, intimate sexual relationship prior to Mr. Hood's trial, and that they intentionally kept this affair hidden for 20 years.... This case requires Supreme Court intervention because the Texas Court of Criminal Appeals to date has ignored this obvious and outrageous constitutional violation."

In September 2008, we organized a [letter](#) to Texas Governor Rick Perry from former federal and state judges and prosecutors from across the country, urging the governor to grant a reprieve for Mr. Hood, who was then slated for execution within days. Shortly afterwards, the state stayed the execution, putting in motion the legal proceedings that finally led to the admissions of the judge and prosecutor about their affair.

### **Event summary: *Holder v. Humanitarian Law Project* Briefing**

On Tuesday, the Supreme Court heard argument in *Holder v. Humanitarian Law Project*, a constitutional challenge to provisions of the federal law prohibiting "material support" to groups designated as "terrorist." In preparation for the argument, the Constitution Project joined with the Charity and Security Network to host a briefing to examine the constitutional and policy issues at stake in the case. Titled "[Free Speech, Human Rights & Counter-Terrorism Laws](#)," the February 17 briefing featured constitutional experts and human rights advocates and was well attended by congressional staffers, students, fellow advocates and a slew of Supreme Court reporters. Panelists explained how the law sweeps very broadly to prohibit even pure speech designed to encourage lawful, nonviolent conduct. A video of the briefing can be found [here](#).

The Constitution Project and The Rutherford Institute filed an [amicus brief](#)

in the Supreme Court in support of the plaintiffs, arguing that the challenged provisions of the material support law - those that prohibit providing any "service," "training," "expert advice or assistance," or "personnel" to a designated group - unnecessarily chill free speech and association in violation of the First Amendment. At the oral argument before the Supreme Court, David Cole, co-chair of the Constitution Project's Liberty and Security Committee, argued the case for the Humanitarian Law Project and other plaintiffs. Most of the justices expressed concerns with the breadth and vagueness of the material support law, including Justice Alito, who asked how one could argue that "training" is not speech, and Chief Justice Roberts, who pointed out the difficulty of determining whether human rights training qualifies as "specialized" training that would violate the "expert advice or assistance" provision.

Last fall, the Constitution Project's Liberty and Security Committee released a [report on the need to reform the material support statute](#). As part of our continuing public education efforts to explain the First Amendment issues involved in the Supreme Court case and how a decision in favor of the plaintiffs will not undermine the utility of the material support statute for counter-terrorism prosecutions, Constitution Project senior counsel **Sharon Bradford Franklin** has made a variety of media appearances this week, including on FOX News' Special Report with Bret Baier and multiple radio interviews in various media markets across the country. In addition, Sharon and Constitution Project Legal Fellow **Karen Bloom** co-authored an [opinion piece](#) on the case that was published in *Jurist*.

## News in Brief

- Yesterday, the Constitution Project joined the Office of Texas State Senator Rodney Ellis, the National Association of Criminal Defense Lawyers, and the Texas Criminal Defense Lawyers Association in sponsoring the Texas Indigent Defense Summit at the Texas Capitol Auditorium in Austin. 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](#), participated on one of the panels, while Tony Fabelo, a Committee member, gave closing remarks.
- The Constitution Project joined in a [coalition letter](#) sent on Tuesday to Representative Jane Harman (D-CA), in support of her amendment requiring the Inspector General of the Intelligence Community to report on over-classification of information by the federal government. Representative Harman, the chair of the House Homeland Security Committee's Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment, plans to offer the amendment to the intelligence authorization bill. According to the coalition letter, "[o]ver-classification hinders information sharing, causes information to be inappropriately removed from public access, and causes the government to needlessly spend billions of taxpayer dollars protecting information that should never have been classified." The Constitution Project has been active

in the fight against over-classification. Just last July, our Liberty and Security Committee published [\*Reining in Excessive Secrecy: Recommendations for Reform of the Classification and Controlled Unclassified Information Systems\*](#).

- On February 18 and 19, Constitution Project President **Virginia Sloan** and members of the National Right to Counsel Committee participated in the Department of Justice's National Symposium on Indigent Defense. The event, chaired by Committee member and Harvard law professor Charles Ogletree, looked at the current state of indigent defense systems across the country and examined both successful and failed attempts at indigent defense reform. Attendees committed to working together to craft new ideas for successful reforms, while forging alliances and building partnerships to achieve them. Ginny reflected on the symposium and shared her ideas for necessary next steps in a blog post she co-authored with Cait Clarke of Equal Justice Works; it can be found on the [ACSBlog](#).
- On February 16, the Constitution Project joined a [coalition letter](#) to Secretary of State Clinton urging action against policies that exclude would-be immigrants and foreign visitors based on their ideology. Specifically, the letter requested Secretary Clinton to issue agency-wide guidance making clear that: (1) all applicants for admission to the United States will be evaluated on the basis of their actions, not their political beliefs and associations; and (2) with respect to foreign scholars, writers, artists, and activists who are deemed inadmissible under the Immigration and Nationality Act, the State Department will exercise its discretion to waive inadmissibility except where national security interests unrelated to the applicant's political beliefs or associations make waiver inappropriate.
- Death Penalty Committee member John Whitehead recently posted an [opinion piece](#) opposing efforts to expand the death penalty in Virginia. As Mr. Whitehead explains, some of the proposals being considered would add fire marshals, assistant fire marshals, auxiliary police officers, and uncompensated auxiliary police officers to the capital murder statute. Another bill would abolish Virginia's "triggerman rule" by making accomplices in capital murder cases eligible for the death penalty. He succinctly laid out the case against expansion, before concluding, "[a]t a time when Virginia lawmakers are being forced to eliminate thousands of jobs, slash agencies' spending and trim millions from education and Medicaid programs for the indigent, elderly and disabled, the last thing our representatives need to be doing is adding to the tax burden by expanding the scope of the death penalty." The Constitution Project's Death Penalty Committee issued a recommendation, in [Mandatory Justice: The Death Penalty Revisited](#), that the death penalty's application be limited to a narrow set of crimes. The Virginia proposals would go well beyond what the recommendation urges.

- The Constitution Project is now on YouTube! For videos of our recent events, check out channel at <http://www.youtube.com/user/ConstitutionProject>.

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](#).