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From the President's Desk

It is disappointing, to say the least, that 8 ½ years after the 9/11 attacks, our nation's leaders and elected officials continue to create fears about public safety - fears that are often based on conjecture or have no support at all - to justify new proposals that violate our most basic constitutional safeguards.

By now you know that Attorney General Eric Holder recently said that the administration will seek to "clarify" the public safety exception to the *Miranda* warning requirements. It is not at all clear that this proposal will apply only to terrorism suspects (including U.S. citizens) or whether this potential erosion of an important constitutional safeguard will extend to ordinary criminal cases as well. The proposal followed similar calls from members of Congress in the immediate aftermath of the arrest of the suspect in the Times Square bombing attempt. Senators Joseph Lieberman (I-CT) and Scott Brown (R-MA) also proposed stripping the citizenship of suspected terrorists, without even requiring a criminal conviction as a predicate.

Just today, our Liberty and Security Committee released a statement on the citizenship proposal, denouncing it as unnecessary and plagued with constitutional concerns (more detail below). It is distressing that some in the administration have said that they will consider the citizenship proposal, which instead should be rejected outright.

Two things in particular worry me about these proposals, and so many

others like them. First is the lack of any demonstrated need to modify the law, or any evidence that the proposed changes would have any beneficial effect on a proven gap in the law. Second is the danger that precedents created by our treatment of suspected terrorists will erode longstanding and essential constitutional safeguards for all criminal suspects.

News

Constitution Project Releases *Statement Opposing the Terrorist Expatriation Act*

Earlier today, the Constitution Project's bipartisan Liberty and Security Committee released a [Statement Opposing the Terrorist Expatriation Act](#), in response to legislation introduced by Senators Joseph Lieberman (I-CT) and Scott Brown (R-MA) and Representatives Jason Altmire (D-PA) and Charlie Dent (R-PA), shortly after the failed bombing attempt in New York's Times Square. The *Statement* explains the serious constitutional problems raised by this bill and ultimately urges Congress to reject this proposal. In particular, the 28 members of the committee joining the statement point out that citizenship is a fundamental constitutional right that cannot be taken away unless it was unlawfully obtained or voluntarily renounced.

Our [press release](#) quotes William H. Taft, IV, legal advisor for the U.S. State Department during the George W. Bush administration and Deputy Secretary of Defense during the Reagan administration, and member of the Liberty and Security Committee, as saying, "[s]adly, although cloaked in patriotism, this legislative proposal is actually ugly demagoguery that should be rejected by Congress. Our law already provides harsh punishment for U.S. citizens who commit terrorist acts."

Constitution Project Troubled by Recent Proposals to Weaken *Miranda* Requirements

On May 10th, the Constitution Project released a [statement](#) expressing deep concerns about Attorney General Eric Holder's suggestion that the constitutional rights recognized by the Supreme Court in *Miranda v. Arizona* should be narrowed by legislation giving law enforcement officials more flexibility when interrogating terror suspects. **Project President Virginia Sloan** said, "Any exception to *Miranda* based on the type of offender or type of offense is unnecessary and dangerous. An exception to the *Miranda* requirement already exists, allowing for immediate interrogation to protect the public safety, and by all accounts, it appears to be working. With this exception already in place, there has been no demonstration of a legitimate need to further loosen the *Miranda* requirements."

The debate over *Miranda* generated significant news coverage. Virginia was quoted in a May 9th *New York Times* [article](#) as saying that to justify any changes in the law, supporters needed to identify a clear problem with

continued adherence to *Miranda* and then set forth a clear justification for change, and that so far, that has not been the case. **Senior Policy Counsels Sharon Bradford Franklin and Laura Olson** took to the airwaves to raise similar concerns. Sharon appeared on NPR's "[Talk of the Nation](#)," where she also discussed the Project's concerns with Senator Lieberman's Terrorist Expatriation Act bill, while Laura was interviewed by [Sirius Radio](#) and the [Paul Harris Show](#) in St. Louis.

Constitution Project Files *Amicus* Brief Asking Supreme Court to Hear Case of Darick Demorris Walker, Scheduled for Execution Today

On May 13th, the Constitution Project filed an *amicus* brief with the United States Supreme Court on behalf of Darick Demorris Walker, asking the Court to consider his death penalty appeal. Mr. Walker, who is on death row in Virginia, is scheduled to be executed today. Police reports obtained by his attorneys after trial indicate that an eyewitness who testified at trial did not actually see the suspect, but rather heard the intruder's voice from another room. The prosecution did not turn over this key evidence to the defense before trial, despite the fact that it discredited the eyewitness and was thus constitutionally required to be disclosed pursuant to the Supreme Court's decision in *Brady v. Maryland*.

The brief, which can be viewed [here](#), also notes the completely inconsistent decisions reached by the United States Court of Appeals for the Fourth Circuit in this case. Previously, the Fourth Circuit held that the prosecution knew about this evidence but failed to disclose it to Mr. Walker, thereby undermining confidence in the verdict. However, after sending the case back to a district court for fact-finding, the case again reached the Fourth Circuit. A different panel of judges of the Court arrived at a decision inconsistent with the Court's prior ruling, holding there had been no violation of *Brady*.

According to the brief, this second Fourth Circuit decision severely undermines the rule of law, suggesting that the administration of the death penalty is being determined by the personal opinions of individual judges rather than the impartial application of the law to the facts. In the Constitution Project's Death Penalty Committee's 2006 report, [Mandatory Justice: The Death Penalty Revisited](#), the Committee made specific recommendations for improving the fairness of the capital punishment system. In particular, *Mandatory Justice* stresses that the prosecution must take care to ensure that capital criminal defendants receive all exculpatory evidence, and that special care be taken to ensure that capital defendants are not convicted on the basis of unreliable eyewitness testimony.

News in Brief

- In the wake of the failed Times Square bombing, the federal government is again examining ways to improve its use of terrorist watch lists. *The Washington Post* [reported](#) on May 6th that the

government initiated a new policy requiring all airlines to check the no-fly list within two hours of being notified that a name was added to the list through a special process that indicates a high risk. Before the change, airlines had 24 hours to check the no-fly list.

Congressional hearings held earlier in the year, after the attempted Christmas Day bombing, touched upon many of the concerns and recommendations outlined in the Constitution Project's report, [*Promoting Accuracy and Fairness in the Use of Government Watch Lists*](#). The report calls on the government to reform how individuals are included on terrorist watch lists and to improve the accuracy of procedures for inter-agency sharing of watch list information. The Constitution Project made the report available at these hearings and will continue working with members of the administration and Congress to implement the report's recommendations.

- Constitution Project Liberty and Security Committee member Bob Barr, a former Republican member of Congress from Georgia and U.S. Attorney, wrote two [commentary pieces](#) that appeared in the *Atlanta Journal-Constitution* last week. Both involve the failed bombing attempt in New York City's Times Square and the appropriate legal response. In his May 10th article, Barr [wrote](#), "Whether we like it or not, the Times Square bomber is an American citizen. Detaining and prosecuting individuals such as these in accord with well-established and constitutionally-based laws and procedures is not just the right choice, it's the only choice." And in his May 12th piece, responding to some of the legislative proposals limiting constitutional rights, Barr [said](#), "Hopefully, before such myopic and wholly unnecessary limitations on our Bill of Rights are enshrined in law, what true constitutionalists remain in the Congress will make their voices heard and stop such dangerous tinkering with these vital liberties."
- As readers know, President Obama nominated Solicitor General Elena Kagan to replace Justice John Paul Stevens on the United States Supreme Court. If confirmed, Ms. Kagan would be the first justice without any judicial experience to join the high court since 1971. Asked about this issue by a reporter with the [Dayton Daily News](#), Virginia said she is "not sure how we got into this posture where we choose only from the judiciary. It's good to have people with a variety of different experiences."
- Professor Goodwin Liu's nomination to the U.S. Court of Appeals for the Ninth Circuit was approved by Senate Judiciary Committee on May 13th. During Professor Liu's confirmation hearings, the Constitution Project sent [a letter](#) to the Senate Judiciary Committee that rebutted attacks on his death penalty views. Although the letter did not take a position on whether Professor Liu should be confirmed, it did explain why these attacks were unfounded and an improper basis for decision. The letter was signed by 27 former judges and prosecutors. Senate Judiciary Committee Chairman

Patrick Leahy (D-VT) cited the letter during the committee's April 16th hearing. Two co-chairs of the Project's Death Penalty Committee, former Texas Governor Mark White and former Chief Justice of the Florida Supreme Court Gerald Kogan [sent a similar letter](#) to the Senate Judiciary Committee, applauding Professor Liu's commitment to ensuring the constitutional rights of those facing the death penalty.

- Yesterday, Michael German, former FBI agent and now Policy Counsel with the ACLU, and Richard Rossman, former U.S. attorney in Michigan and chief of staff of the Criminal Division of the U.S. Department of Justice in the Clinton administration, had an opinion piece published in the Capitol Hill newspaper *Roll Call*. Their piece, titled "[Keep Constitution Intact When Interrogating Terrorists](#)," made the point that "[t]here are lessons to be learned from [the attempted Times Square bombing]. But those lessons can be learned without denigrating the laws and police procedures that have proved effective in capturing and convicting those who would do us harm, and in providing information to prevent future attacks. Standing up to terrorists doesn't require surrendering the Constitution."
- The United States Supreme Court ruled on Monday in *Graham v. Florida* that a sentence of life without the possibility of parole violates the Eighth Amendment when imposed on an offender under the age of 18 for a non-homicide offense. In 2009, the Constitution Project organized a letter from 20 former and current judges and prosecutors encouraging changes in laws across the country so that no offender under the age of 18 would be subject to a sentence of life without parole. *Graham* did not address juvenile life-without-parole sentences for crimes involving homicide, so in many states, that remains a possibility for certain juvenile defenders even after Monday's decision.
- The Constitution Project's Clearinghouse of New Voices for Criminal Justice Reform recently sent out the inaugural edition of its new email newsletter, *Unlikely Allies*. The monthly newsletter will be used to update advocates from around the country about the "unlikely allies" who are speaking out in favor of criminal justice reforms in areas such as the right to counsel, the death penalty, our criminal sentencing laws, and a wide array of other issues. These unlikely allies include conservatives and liberals alike who are current and former prosecutors, judges, police officers and other law enforcement officials, legislators, and victim advocates. If you are interested in receiving the *Unlikely Allies* newsletter, or in becoming a member of the Clearinghouse, please send an email to **Senior Policy Counsel Mary Schmid** at mschmid@constitutionproject.org.

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

The Constitution Project's mission is to promote and defend constitutional safeguards. Since our founding in 1997, we have created coalitions of respected leaders from across the political spectrum, advancing their consensus recommendations for policy reforms. Our advocacy and public education efforts, influential *amicus curiae* briefs, and respected scholarship have helped to create public support for those reforms.