



June 3, 2010

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From the President's Desk

Last week, Thomas W. Hillier, II, the Federal Public Defender for the Western District of Washington and a member of the Constitution Project's Sentencing Committee, testified before the U.S. Sentencing Commission at a hearing on mandatory minimums. The Commission invited the Constitution Project to testify and we were glad to have Tom represent the group. (See details of his testimony below).

I was gratified that during the hearing, the Constitution Project was singled out for praise by Jonathan Wroblewski, the Justice Department's *ex officio* member on the Commission, who hailed our Sentencing Committee for its ability to forge substantive sentencing policy recommendations despite its bipartisan and diverse membership. Mr. Wroblewski said it was rare to find organizations able to build consensus on policy issues like sentencing.

This is an exciting time to be active in criminal justice reform. Policymakers in states from Texas to Rhode Island are trying new approaches to reducing crime while reducing their prison populations and corrections budgets. These efforts are succeeding with the support of conservative and liberal stakeholders and advocacy groups. We are excited to play a leading role in fostering new and stronger connections between unlikely allies through our Clearinghouse for Criminal Justice Reform, and we are grateful that policymakers are taking notice of our effort to find bipartisan solutions to some of our nation's toughest challenges in this area.

Upcoming Events

- On Tuesday, June 8th, the Constitution Project's National Right to Counsel Committee Co-Chair, Robert M.A. Johnson, will discuss the findings and recommendations in the Committee's report, [*Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*](#), at an event in Minneapolis, MN sponsored by the Minneapolis Lawyer Chapter of the American Constitution Society. Johnson, the District Attorney for Anoka County, Minnesota, will be joined by the Chief Public Defender from Hennepin County, Minnesota, William A. Ward, and an Assistant Public Defender from Hennepin County, Minnesota, Kaarin Nelson, in a presentation on the systematic neglect of the constitutional right to counsel in criminal proceedings. For more information about this event, contact Mary Schmid, mschmid@constitutionproject.org.
- On Thursday, June 10th at 2 p.m., as part of the National Press Club's Newsmaker series, the Constitution Project will join with Human Rights First in releasing *Habeas Works: Federal Courts' Proven Capacity to Handle Guantanamo Cases*, a whitepaper organized by the two organizations and endorsed by 16 former judges. Stay tuned for more details in a formal invite from us in the coming days.
- On Tuesday, June 15th, House Judiciary Committee Chairman John Conyers (D-MI) and Crime, Terrorism and Homeland Security Subcommittee Chairman Bobby Scott (D-VA) will host the "Constitutional Right to Counsel Summit." The event, which is open to the public, will take place from 2 to 5 p.m. in Room 2141 of the Rayburn House Office Building. The Summit will bring together members of Congress, congressional staff, judges, prosecutors, scholars, public defenders, and other legal practitioners to discuss the impact the current public defense crisis is having on the effective operation of states' criminal justice systems. The Summit will also examine the federal government's role in ensuring that every state meets its Sixth Amendment responsibility to provide competent counsel in criminal cases. **Constitution Project President Virginia Sloan**, National Right to Counsel Committee members Alan Crotzer and Norman Lefstein, and our 2010 Constitutional Champion Award recipient, George Kendall, will all participate in panel discussions at the Summit. We hope to see you there.

CP News

Constitution Project Dismayed by D.C. Circuit's Refusal to Further Examine Uighurs' Cases

On May 28th, the Constitution Project released a [statement](#) expressing disappointment in the [decision](#) by the U.S. Court of Appeals for the District

of Columbia Circuit not to order a new fact-finding hearing for the five Chinese Muslims, known as Uighurs, still unlawfully detained at the Guantanamo Bay detention facility. Equally troubling was the majority's decision to reinstate the D.C. Circuit's broad prior ruling that federal courts lack the authority to order the release of non-citizens being held by the federal government into the United States. The D.C. Circuit was acting in response to a U.S. Supreme Court order in March vacating the court's earlier decision and ordering the D.C. Circuit to determine what further proceedings were appropriate. Although the Supreme Court had accepted the case for review in the fall of 2009, by early 2010, each of the Uighurs then remaining at Guantanamo had received offers of resettlement in other countries, and the Court directed a review of the implications of these developments.

Constitution Project **Senior Counsel Sharon Bradford Franklin** was quoted in an [article](#) in the *Christian Science Monitor* on May 28th as saying, "The five Uighurs should have been given an opportunity to prove in court that they have not yet received an appropriate resettlement offer. We are also disturbed by the court's decision to reinstate its broad earlier decision. The court could have decided the case on narrower grounds based upon the recent resettlement offers, rather than unnecessarily, and in our view wrongfully, holding that courts lack the power to order release in the United States as a remedy for unlawful detention."

Prior to the Supreme Court's action in March, the Constitution Project, along with several other nongovernmental organizations, filed an [amicus brief](#) in the Supreme Court in support of the Uighurs, arguing that the courts do have the power to order release as a remedy in a *habeas* case, and that failure to grant this power would undermine the Supreme Court's *Boumediene* decision, which recognized the rights of the Guantanamo detainees to challenge their detentions in federal court.

Constitution Project Committee Member Testifies before the U.S. Sentencing Commission on Mandatory Minimums

As mentioned above, Thomas Hillier, the Federal Public Defender for the Western District of Washington and member of the Constitution Project's Sentencing Committee, [testified](#) before the United States Sentencing Commission on May 28th. Mr. Hillier told the Commission members that the number of federal mandatory minimum sentences should be dramatically reduced. The hearing was held pursuant to a congressional directive requiring the Commission to report to the House Judiciary Committee on federal mandatory minimum sentences.

The Constitution Project's Sentencing Committee concluded in 2006 that mandatory minimums are at odds with a federal sentencing guidelines system that is designed to allow for a proper balance between consistency and individualization of sentences. In his [testimony](#), Mr. Hillier said that the most troubling aspect of mandatory sentences is the inappropriate skewing of the balance of power, which gives a disproportionate amount of power to the prosecutor. He observed that, in his individual experience, mandatory minimums create the perception of injustice in the eyes of both

the public and individual defendants and thus erode confidence in our criminal justice system, and that the threat of mandatory minimums are regularly used to induce pleas in situations in which the penalty would be unfair and unjustified based on the facts of the alleged crime. As a result, he testified, the truth-seeking function of our criminal justice system is threatened.

The Constitution Project's Sentencing Committee is a bipartisan and politically diverse group of policy experts, including current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts. In 2005 and 2006, the Committee issued two reports outlining principles for the design of and recommendations for the reform of criminal sentencing systems: [*Principles for the Design and Reform of Sentencing Systems*](#) and [*Recommendations for Federal Criminal Sentencing in a Post-Booker World*](#).

News in Brief

- On Tuesday, the U.S. Supreme Court ruled that in order to claim one's *Miranda* right to remain silent, a person in custody must verbally declare the intent to invoke that right. In her dissenting opinion in the case, [*Berghuis v. Thompkins*](#), Justice Sonia Sotomayor said that the Court's decision "turns *Miranda* upside down," by requiring "[a] suspect who wishes to guard his right to remain silent [to] counter-intuitively, speak."
- On May 29th, an [opinion piece](#) by National Right to Counsel Committee member Tony Fabelo and Texas State Senator Rodney Ellis appeared in the *Houston Chronicle* calling for more public defenders in Texas. Referring to a hearing held by the Texas Senate Criminal Justice Committee on the quality of indigent defense in the state, Mr. Fabelo and Senator Ellis wrote, "Witnesses testified that there has been increasing scrutiny of state indigent defense systems around the country, including by the National Right to Counsel Committee, a prominent, bipartisan group that has documented how indigent defense systems nationally are struggling with inadequate funding, poor quality of legal representation, excessive workloads and lack of independence."
- On May 28th, the *Washington Post* made public the final report of the Guantanamo Review Task Force; the [full report](#), which was completed in January, was not sent to Congress until just recently. According to the *Post*, the final report "recommends that 126 of the detainees be transferred either to their homes or to a third country; that 36 be prosecuted in either federal court or a military commission; and that 48 be held indefinitely under the laws of war. A group of 30 Yemenis was approved for release if security conditions in their home country improve." According to [*The New York Times*](#), "the report's disclosure comes as the Senate Armed Services Committee said it had voted to bar the construction of a

military detention facility in Thomson, Ill., in a further blow to the Obama administration's fading hopes to shutter the Guantánamo prison."

- The Constitution Project's **Supreme Court Fellow Steve Vladeck**, professor at American University's Washington College of Law, commented on a new proposal in Congress to direct the Inspector General of the Defense Department to investigate the conduct and practices of lawyers who represented detainees at Guantanamo Bay. Steve's [opinion piece](#), which appeared on the blog, *Balkinization*, on May 25th, concluded: "I had hoped (perhaps naively) that the [dust-up earlier this year](#) over the 'al Qaeda 7' (and the [emphatic response thereto](#)) had finally put to bed the repeated attacks on lawyers that have arisen since Cully Stimson's [spurious critique](#) of the role of D.C. law firms in Guantánamo litigation in January 2007. But so long as Congress is seriously considering language like this, it seems that such lawyers will continue to have to defend *themselves* as much as they (and in order to) defend the rights of their clients." On a related note, the American Bar Association sent a [letter](#) to all members of Congress opposing the proposed legislation.
- On May 24th, Constitution Project Senior Counsel Sharon Bradford Franklin spoke on a panel about the increasing use of license plate reading (LPR) camera systems, at the International Association of Chiefs of Police's annual Law Enforcement Information Management conference in Atlanta. She spoke about how license plate content can be personally identifying information and how jurisdictions should develop written guidelines to protect privacy rights. Her remarks reflect the recommendations put forth by the Project's Liberty and Security Committee in its report [Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties](#).
- On May 21st, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the petitioners, non-Afghan detainees at Bagram Air Field in Afghanistan, cannot challenge their detention in U.S. courts as have detainees in Guantanamo Bay. In *Al Maqaleh, et al. v. Gates, et al.*, the judges distinguished between the two sets of detainees by stating that Afghanistan is a war zone, whereas the United States essentially controls Guantanamo Bay. On November 6, 2009, the Constitution Project, People For the American Way, The Rutherford Institute, and Reprieve filed an [amicus brief](#) in the case. While the groups took no position on whether detainees held at the prison in Bagram have a constitutional right to *habeas corpus*, the brief urged the court to reject the government's "practicality" arguments opposing *habeas* rights for the Bagram detainees. The brief pointed out the similarities between *habeas* litigation on behalf of Guantanamo Bay detainees and potential *habeas* litigation on behalf of detainees held at Bagram, and described how the practical obstacles cited have already been addressed by the district courts throughout the

Guantanamo Bay detainee litigation. As we urged, the D.C. Circuit did not, in fact, rely on these practicality arguments in reaching its decision. In response to the appeals court decision, Liberty and Security Committee member Richard Epstein wrote a [commentary piece for *Forbes* magazine](#), where he said, "*Al-Maqaleh* sets a dangerous precedent that encourages the worst form of strategic behavior by U.S. government officials. Kiss the government's constitutional troubles goodbye by holding in Bagram all aliens captured outside U.S. territory."

- A recent article in the *National Law Journal* [reports](#) that the backlog in immigration courts has hit a record high. The article notes that, as a result of the large backlog, waiting times continue to lengthen, with the average time pending for cases at 443 days. Especially because many of the waiting litigants are being held in immigration detention, this report highlights the need for the reforms urged in the Constitution Project's December 2009 report, [Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings](#).

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.