



March 5, 2009

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From the President's Desk

As the Obama administration begins to formulate policy, it has taken some very positive steps forward, including executive orders on Guantanamo, torture, and transparency. At the same time, it has rejected several opportunities to renounce policies of the former administration that have undermined our constitutional system. In this and a previous newsletter, we describe disappointing decisions on the state secrets privilege, on the *al-Marri* case, and on access to post-conviction DNA evidence. No matter which party controls the White House and Congress, the Constitution Project will remain vigilant against measures that compromise our constitutional values. President Obama must fulfill the promises he made during the campaign and when he took the oath of office – to “preserve, protect, and defend the Constitution of the United States.” ~ Ginny Sloan

Upcoming Events

National Security Courts Panel Discussion on March 20

The Constitution Project, Human Rights First, and the Georgetown Center on National Security and the Law will co-host a panel discussion that will explore the legal and constitutional issues raised by proposals to create national security courts and legalize a system of indefinite preventive detention. The panel discussion will examine some of the questions about detention and trials for accused terrorists that remain unanswered after the release of President Obama's executive orders addressing some of these issues. The discussion will take place from noon until 1:30 p.m. at Georgetown University Law Center's Hart Auditorium. Lunch will be served immediately after the event. RSVP to rsvp@constitutionproject.org with your name, the number of attendees, and the words "National Security Courts Panel Discussion." The Constitution Project has previously condemned proposals for national security courts and preventive detention in its report "[A Critique of National Security Courts.](#)"

Panelists:

David Laufman, Attorney, Kelley Drye & Warren LLP; former Assistant United States Attorney for the Eastern District of Virginia who prosecuted terrorism cases

Deborah Pearlstein, Associate Research Scholar in Law and Public Affairs Program, Woodrow Wilson School, Princeton University

Gabor Rona, International Legal Director, Human Rights First

Matthew Waxman, Associate Professor of Law, Columbia Law School, former Deputy Assistant Secretary of Defense for Detainee Affairs under President George W. Bush

Moderator, **Stephen Vladeck**, Associate Professor of Law, American University Washington College of Law, who was the primary researcher and drafter of our report

Annual Constitutional Champions Awards Dinner on April 2

Our annual awards dinner will take place at the Renaissance Mayflower Hotel in Washington, D.C. on Thursday, April 2, 2009. Please join us in honoring **Alberto Mora**, former General Counsel, Department of the Navy, and **Craig Watkins**, District Attorney for Dallas County, Texas. Mr. Mora led a multi-year effort within the Department of Defense to oppose coercive interrogation techniques at Guantanamo Bay. Mr. Watkins created a "conviction integrity unit" within the District Attorney's office that uses DNA evidence to investigate claims of wrongful conviction. The unit's work resulted in six exonerations in the last two years. The Capitol Steps will provide entertainment. [RSVP here.](#)

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Right to Counsel Press Briefing is Coming Mid-March

In mid-March, the Constitution Project's Right to Counsel Committee will release a new report on the right to counsel. Drafted by a [bipartisan committee](#) of experts that reviewed indigent defense systems throughout the nation, the report addresses the crisis in public defense and contains urgently needed consensus recommendations for reforms. More information to come.

News

Constitution Project Joins Call for Investigation of Post 9-11 Detainee Policies

Leaders from across the political spectrum and 18 organizations, including the Constitution Project, called for a non-partisan presidential commission to investigate the detention, treatment, and transfer of detainees following the September 11 terrorist attacks. CP also joined a statement by members of the “Davis Group,” composed of military and legal experts, which sets forth recommendations on how such a commission should be constituted.

On Wednesday, **Senator Patrick Leahy** (D-Vt.) held a Senate Judiciary Committee hearing to consider the creation of an investigating commission. In his statement accompanying the notice of the hearing, Senator Leahy noted the support of respected groups, including Human Rights First and the Constitution Project. **Thomas R. Pickering**, former Undersecretary of State for Political Affairs and a member of the CP’s Liberty and Security Committee, testified. The Constitution Project submitted written testimony, as did former FBI Director and current Liberty and Security Committee member **William S. Sessions**. In a commentary on *Huffington Post*, CP President **Virginia Sloan** explained that we can only reform our failed policies once we have fully identified them.

Crime Summit Considers “Smart on Crime” Criminal Justice Recommendations

The Honorable **Robert C. “Bobby” Scott** (D-Va.), Chair of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, held a crime summit entitled “Smart on Crime Policies: Increase Public Safety, Reduce Costs, and Improve Lives” on Tuesday, March 3. This summit explored the issues addressed in “Smart on Crime: Recommendations for the Next Administration and Congress,” a policy roadmap drawn from the shared knowledge and experience of a broad coalition of leading organizations and individuals devoted to improving our criminal justice system. The Constitution Project coordinated this report, which included more than 25 organizations and individuals working to develop a criminal justice policy roadmap for decision makers. Many of the speakers and panelists contributed to “Smart on Crime,” and the three panels addressed Prevention and Intervention, Sentencing and Alternatives, and Reentry and Collateral Consequences. The event was standing room only, and Chairman Scott announced that he wants to host these kinds of summits on a regular basis.

Obama Administration to Criminally Prosecute Al-Marri

The Obama administration filed charges in a civilian criminal court against Ali Saleh Kahlah al-Marri, who had been classified by the Bush administration as an “enemy combatant” and has been detained at a Navy brig in Charlestown, South Carolina since 2003. The Constitution Project issued a statement in support of the decision to prosecute, as Mr. Marri, a legal U.S. resident, will now be granted his day in court. CP also called on the Obama administration to publicly renounce the claim that the government has the power to hold a legal U.S. resident captured at his home in the U.S. in military detention without ever giving him the chance to defend himself in court. In addition, the statement urged the administration to seek to have the appellate court decision upholding this policy vacated, so that the erroneous judicial opinion upholding indefinite military detention without trial does not stand as court precedent. Unfortunately, however, the Justice Department has also asked the Supreme Court to dismiss Mr. Marri’s case before the Court in *Al-Marri v. Spagone*, without renouncing the detention policy or seeking to have the appellate court decision vacated.

The High Court must now decide whether to proceed with the oral arguments currently scheduled for April 27. Mr. Marri’s attorneys urged the Court to hear his legal challenge despite the administration’s move, arguing that the government has failed to renounce the option of returning him to military detention if he is found innocent or finishes his sentence. The Constitution Project filed an *amicus* brief on the merits of this case, urging the Court to strike down as unconstitutional the indefinite military detention without trial of a legal U.S. resident. The Constitution Project had previously filed a brief requesting that the Court grant *certiorari*.

Justice Department Opposes Post Conviction DNA Testing

On Monday, the Supreme Court heard oral arguments in *District Attorney’s Office for the Third Judicial District v. Osborne*, a case concerning whether the Constitution’s due process clause requires that DNA evidence be provided to an inmate after conviction. The state of Alaska has denied William Osborne’s request to pay for access to critical evidence that could prove his innocence. **William S. Sessions**, a former FBI director and federal judge and member of the Constitution Project’s Death Penalty Committee, wrote an op-ed in *Slate* in which he criticized the Justice Department for reaffirming the Bush administration’s decision to weigh in on Alaska’s side. As Judge Sessions explained, “Evidence of innocence does—and must—matter to all of us, whenever it is presented.”

Texas Judge Faces Judicial Conduct Charges After Death Penalty Case

The Texas State Commission on Judicial Conduct filed charges against Judge **Sharon Keller** of the Texas Court of Criminal Appeals on February 19. The charges stem from Judge Keller's alleged mishandling of an emergency appeal in a death penalty case. Early on September 25, 2007, the U.S. Supreme Court granted *certiorari* in a case that focused on the constitutionality of lethal injection. Attorneys for Michael Richards, who was scheduled for execution at 6 p.m. that day, raced to file a request for a stay with the court. When computer problems threatened their ability to file before 5 p.m., they requested a few minutes extension, which Judge Keller denied because the court clerk's office closed at that hour. Mr. Richards was executed that evening. Every other inmate seeking a stay because of the Supreme Court's decision to consider the lethal injection issue was successful. The Constitution Project's Death Penalty Committee released the report "Mandatory Justice: The Death Penalty Revisited," detailing much-needed reforms of the death penalty system.

Circuit Court Refuses to Release Uighur Detainees

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit released an opinion in *Kiyemba v. Obama*, overturning a district court order to release seventeen Chinese Muslims, known as the Uighurs, who were being held at Guantanamo. The district court had previously found that no legal basis exists for the executive branch to indefinitely detain individuals whom the government openly admits are not 'enemy combatants.' The appellate court reversed this judgment, claiming that the trial court could not force the executive branch to release the Uighurs into the U.S. The Constitution Project had filed an amicus brief urging the D.C. circuit to uphold the district court's release order. Despite the ruling, President Obama still has the independent authority to release the detainees into the United States. In November, the Constitution Project coordinated a statement of ten prominent conservatives calling for the Administration to end the Uighurs' indefinite detention.

News In Brief

- In a *Huffington Post* op-ed, Constitution Project President **Virginia Sloan** expressed disappointment in the Obama administration's position on the state secrets privilege in the case of *Mohamed v. Jeppesen Dataplan*.
- As discussed in this news [story](#), CP Senior Policy Counsel **Sharon Bradford Franklin** spoke on the civil liberties implications of a proposed license plate scanner system at a Takoma Park, Maryland forum on February 25.
- JURIST, a web-based legal news service, published an op-ed on preventive detention by former Representatives **Mickey Edwards** (R-Ok.) and **David Skaggs** (D-Co.), who serve on CP's Liberty and Security Committee.

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