

## From the desk of Virginia Sloan

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Dear Friend,

### Breaking News

#### Federal Judge Rules in White House/HJC Contempt Case

From [Politico](#):

A federal judge [ruled](#) Thursday that top advisers to President Bush are not immune from congressional subpoenas, striking a blow to former White House Counsel Harriet Miers, current White House Chief of Staff Josh Bolten and other current and former administration officials who have claimed executive privilege in refusing to testify before Congress.

The House Judiciary Committee wanted to question Miers about the firing of nine former U.S. attorneys and review White House paperwork related to their dismissal. The Bush administration argued that the documents and the former aide were protected under separation of powers and refused to allow Miers or Bolten to respond to the subpoenas. Bolten, as White House chief of staff, was subpoenaed by the panel for documents.

## In the Halls of Congress

### Biden Introduces Justice Integrity Act

On July 10, Senators Joseph Biden (D-DE), Arlen Specter (R-PA), Benjamin Cardin (D-MD), and John Kerry (D-MA) introduced the Justice Integrity Act, which would establish advisory groups in ten federal districts, under the supervision of the U.S. Attorney General, to study and determine the extent of racial and ethnic disparities in the criminal justice system. The advisory groups would issue public reports on the results of their findings, and make specific recommendations to help eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities. [\*Mandatory Justice: The Death Penalty Revisited\*](#), the report of our Death Penalty Committee, recommended that each capital punishment jurisdiction "implement a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system." In particular, the Committee recommended the "rigorous gathering of data" on the role of race in the system and bringing "members of all races into every level of the decision-making process."

### State Secrets Protection Act Hearing

Earlier today, the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on the State Secrets Protection Act of 2008 (H.R. 5607), legislation introduced by the Subcommittee's Chair, Representative Jerrold Nadler (D-NY). The Constitution Project submitted a [statement](#) to the Subcommittee urging support for the legislation, as did [William S. Sessions](#), member of our Liberty and Security Committee and Coalition to Defend Checks and Balances and former federal judge and FBI Director. In his statement, Judge Sessions told members of the Subcommittee that "granting executive branch officials unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse." Witnesses at the hearing included Bruce Fein, former Associate Deputy Attorney General and member of our Coalition to Defend Checks and Balances, and Steven Shapiro, Legal Director at the American Civil Liberties Union. Last year, the Constitution Project's Liberty and Security Committee and Coalition to Defend Checks and Balances issued "[Reforming the State Secrets Privilege](#)," a statement calling for legislation to reform the privilege.

## At City Hall

### Public Comment on VIPS Program

As I reported previously, the D.C. City Council's Committee on Public Safety and the Judiciary held a public hearing on June 2<sup>nd</sup> on the proposed Video Interoperability for Public Safety (VIPS) program, designed to centralize monitoring of more than 5,200 public video surveillance cameras in the District of Columbia, including those in and around schools, public housing, and residential neighborhoods. After the hearing, D.C.'s Homeland Security and Emergency Management Agency (HSEMA) published proposed rules for the VIPS program in the D.C. Register, and on July 17<sup>th</sup>, the Constitution Project submitted [comments](#) on the proposal. We noted that to the extent that the new rules "create operating guidelines and implement privacy protections where none previously existed, the Constitution Project fully supports that effort. However, there is no need to create a vast network centralizing the monitoring of over 5,200 cameras in order to implement uniform operating guidelines." In our comments, we also pointed out the "vast" gaps remaining and the need to create guidelines to address the issues raised by the very fact of creating such an extensive network of cameras - such as imposing limits on which agencies have access to which cameras.

## In the Courts

### *Habeas* Cases Move Forward in DC District Court

In response to Senior U.S. District Judge Thomas F. Hogan's order, on Friday, July 25, counsel for the Guantanamo detainees and for the government filed briefs in the U.S. District Court for the District of Columbia proposing procedures that the court should follow when hearing the *habeas* petitions of these detainees. The briefs attempt to define the contours of the constitutional right to *habeas* review as recognized by the Supreme Court in *Boumediene v. Bush*, and, not surprisingly, the parties have dramatically different visions of what process is due the detainees. Counsel for the detainee petitioners described procedures that would enable a detainee to conduct a "searching, independent inquiry into the lawfulness of his detention" sufficient to enable the Court to determine if the government has the lawful authority to detain the prisoner. Counsel for the detainees also argued that the majority of procedural issues should be decided on a case by case basis. Counsel for the government, on the other hand, proposed a far more limited process that would apply uniformly to all of the detainee cases.

The issues briefed included: discovery requirements, including the rights of prisoners to demand information from the government; the basis for seeking a court hearing on the evidence presented; the basis for allowing out-of-court statements, including hearsay evidence; the right to confront or subpoena witnesses to appear; and the standards of proof, including who bears the burden of proof. Judge Hogan is coordinating the vast majority of the approximately 200 cases filed in federal District Court; he may decide to establish procedures that would govern all these cases or he may determine that these decisions must be made on a case by case basis. Although there is no deadline for Judge Hogan to rule on the proposed procedures for these cases, he has repeatedly emphasized that these cases are on a "fast track" and a ruling is expected shortly.

## In the Courts (continued)

### Louisiana Files for Rehearing of *Kennedy*

When, on June 25, the Supreme Court [ruled](#) in *Kennedy v. Louisiana* that a state law making the rape of a child a capital crime was in violation of the Constitution's prohibition against cruel and unusual punishment, few thought that would be the end of the story. But nobody could have predicted the strange course of events that followed. Shortly after the decision was announced, the U.S. Solicitor General's office issued an unusual statement in which it acknowledged failing to properly brief the Court on a federal law that makes the rape of a child a capital crime in the armed services. Earlier this month, the State of Louisiana asked the Court to rehear the case, arguing that the existence of the law could have affected the ultimate decision. On Monday, the Solicitor General's office also filed a [brief](#) with the Court urging it to rehear the case.

The rape of a child is most certainly a horrific crime that deserves a swift and firm punishment, but the Constitution Project's Death Penalty Committee has long [opposed](#) the use of capital punishment in any case not involving homicide. It is hard to imagine that a federal law applying only to the military, and that was apparently unknown to *any* of the parties in *Kennedy*, could have any impact on the Court's decision that the Louisiana law was inconsistent with an overwhelming national consensus that capital punishment is an inappropriate penalty for any kind of rape.

## Above the Fold

### *ACSblog*: National Security Courts

On July 18, ACSblog featured a guest column by Rule of Law Policy Counsel Becky Monroe discussing the recent [report](#) of our Liberty and Security Committee and Coalition to Defend Checks and Balances condemning national security courts. Becky wrote that "As we confront enemies and threats unlike any we have ever known before, our military tactics must change, but our constitutional obligations do not."

### *The Capital Times*: War Powers Should be Shared

On July 25, an [op-ed](#) by Benson Scotch, former executive director of the Vermont Civil Liberties Union and staff counsel to Senate Judiciary Committee Chair Patrick Leahy (D-VT), appeared in the Madison, WI, *Capital Times*. In the commentary, which originally appeared in the Burlington, VT, *Free Press*, Scotch criticized a recent report on war powers released by the National War Powers Commission of the Miller Center, and urged readers to "look instead to the work of the Constitution Project, an independent Washington think tank that in 2005 published a comprehensive and balanced report, also authored by a distinguished panel, titled '[Deciding to Use Force Abroad: War Powers in a System of Checks and Balances](#).'"

## Verbatim

"If we can apply the policy of cruelty to detainees, it is only because our Founders were wrong about the scope of inalienable rights. With the adoption of this policy our founding values necessarily begin to be redefined and our constitutional structure and the fabric of our legal system start to erode." - [Alberto Mora](#), member of the Constitution Project's Coalition to Defend Checks and Balances and former General Counsel to the United States Navy, in testimony before the Senate Armed Services Committee, June 17, 2008.

Sincerely,

A handwritten signature in cursive script that reads "Virginia E. Sloan".

Virginia E. Sloan