

From the desk of Virginia Sloan

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Resources

Dear Friend,

In the Halls of Congress

Helsinki Commission Evaluates Guantanamo Options

On Tuesday, the Commission on Security and Cooperation in Europe (also known as the Helsinki Commission) held a hearing on "Guantanamo Detainees after *Boumediene*: Now What?" Members of the Commission, all members of Congress, heard testimony from experts on the ability of traditional legal frameworks to handle terrorism-related prosecutions. [Gabor Rona](#), International Legal Director of Human Rights First, told the Commission that "the complex real world in which we live has fortunately, and over considerable time, given us a suitably complex architecture of overlapping legal frameworks" under which to prosecute terrorism-related crimes. Matthew Waxman, a Columbia Law School professor who served in the State and Defense Departments and National Security Council in the current administration, testified that closing Guantanamo will be difficult, but that the US must figure out how to close the facility as part of our efforts to combat terrorism. Last month, the Constitution Project issued its white paper, [A Critique of "National Security Courts,"](#) arguing that the unprecedented hybrid tribunals proposed by some scholars and executive branch officials would be both unnecessary and unconstitutional.

Senate Judiciary Committee Reviews Detainee Policies

Yesterday, the Senate Judiciary Committee convened a hearing on "[How the Administration's Failed Detainee Policies Have Hurt the Fight Against Terrorism: Putting the Fight Against Terrorism on Sound Legal Foundations.](#)" Kate Martin, Director of the Center for National Security Studies and member of the Constitution Project's Liberty and Security Committee, told members of the Committee that ignoring "both the law of war and constitutional requirements" has "been disastrous." Ms. Martin and [Col. \(ret.\) William Gunn](#), USAF, who formerly served as Chief Defense Counsel in the Department of Defense Military Commissions, both called for a new detainee policy that respects the rule of law while permitting us to aggressively and legally pursue and prosecute those guilty of terrorism-related crimes.

Around the Region

Maryland Launches Death Penalty Study Commission

On July 10, Maryland Governor Martin O'Malley announced the formation of a state death penalty study commission. Governor O'Malley appointed former U.S. Attorney General Benjamin Civiletti to head the commission, which is charged with examining issues including disparities in the application of the death penalty, the cost differential between capital punishment and life imprisonment, and the impact of DNA evidence. The commission, like the Constitution Project's Death Penalty Committee, will include a diversity of members, including law enforcement officials, prosecutors, an exoneree, victim rights advocates, and others representing pro- and anti-death penalty positions.

In the Courts

DC District Court Hears *Hamdan* Arguments

This morning, Judge James Robertson of the U.S. District Court for the District of Columbia refused to stay the pending military commission proceedings against Salim Hamdan. Mr. Hamdan's successful challenge to the *habeas corpus*-stripping provisions of the Detainee Treatment Act of 2005 and the Presidential order of 2001 establishing military commissions resulted in the landmark 2006 Supreme Court decision in *Hamdan v. Rumsfeld*, striking down that commission system. Congress responded by passing the Military Commissions Act of 2006 (MCA) which again sought to strip the rights of Guantanamo detainees to file *habeas* petitions and which authorized a system of military commissions modeled closely on the system struck down by the Court in the *Hamdan* case. Now, in the wake of the Court's decision in *Boumediene v. Bush*, which again restored the ability of detainees to pursue *habeas* petitions, Mr. Hamdan's lawyers are challenging the constitutionality of the current military commission system established by the MCA. This morning, Mr. Hamdan sought a preliminary injunction to block his military commission trial, which is scheduled to begin on July 21, until Judge Robertson rules on his *habeas* challenge to the legality of the military commission system. He argues that if the military commission proceeds before he can challenge the legality of the commission system itself, he will lose any meaningful right to *habeas corpus*. Mr. Hamdan's attorneys argued in filings before Judge Robertson that "[r]equiring Hamdan to participate in the commission in advance of his *habeas* hearing would thus create a vicious catch-22, forcing Hamdan to either abandon one of the few possible defenses in his trial, or to forfeit much of his *habeas* hearing and thereby waive his right to challenge the . . . flawed determination of enemy combatancy." At the conclusion of the hearing today, Judge Robertson denied the preliminary injunction, ruling against Mr. Hamdan in an oral opinion from the bench. The judge said that he would issue a written opinion by tomorrow morning, enabling Mr. Hamdan to appeal to the D.C. Circuit.

In the Courts (continued)

Fourth Circuit Upholds Power of President to Detain Civilians Seized in the U.S.

On Tuesday, the Fourth Circuit sitting *en banc* issued its ruling in *Al-Marri v. Pucciarelli*, upholding the power of the President to detain a civilian seized in the U.S. as an enemy combatant but also holding that Mr. Al-Marri must be given the opportunity to challenge his designation as an enemy combatant. In September 2001, Ali Saleh Kahleh Al-Marri, a citizen of Qatar, lawfully entered the U.S. on a student visa with his wife and five children so he could study for a master's degree from Butler University in Peoria, Illinois. He was initially taken into FBI custody in December 2001 and, since June 2003, he has been detained as an "enemy combatant" in military custody in a Navy Brig in South Carolina. Mr. Al-Marri has remained in solitary confinement in the Brig for the last five years and alleges that he has been tortured and subjected to other inhumane treatment.

As I previously reported in this newsletter last summer, a panel of the Fourth Circuit hearing Mr. Al-Marri's *habeas* challenge to his detention had [ruled in his favor](#), finding that the government did not have the authority to seize and indefinitely detain a civilian who was captured within the United States, but the Fourth Circuit agreed to rehear the case with the full court sitting *en banc*. In the 216-page opinion released on Tuesday, a narrow majority (5-4) held that the President does have the authority to hold Mr. Al-Marri as an enemy combatant in military detention if the allegations against him can be adequately demonstrated, but a different narrow majority (5-4) also held that he had *not* been afforded sufficient process to challenge his enemy combatant status. Although the Court concluded that Mr. Al-Marri had to be given the opportunity to challenge that status, the sharply divided court's decision to uphold the President's power to designate even citizens as enemy combatants is of deep concern. We expect that Mr. Al-Marri will ask the U.S. Supreme Court to review the portion of the decision upholding the President's power to detain civilians seized inside the U.S.

With a Little Help from Our Friends

Baker-Christopher Commission on War Powers

On July 8, the Miller Center's National War Powers Commission, co-chaired by former Secretaries of State James A. Baker and Warren Christopher, released its [final report and recommendations](#). The Constitution Project's War Powers Committee, which previously issued [Deciding to Use Force Abroad: War Powers in a System of Checks and Balances](#), immediately welcomed the Baker-Christopher Commission's contribution to the national debate about war powers, but also expressed serious concerns with the Commission's approach.

Specifically, we are concerned with the report's treatment of the power to declare war as one held by the executive branch in consultation with Congress. The Constitution Project's War Powers Committee notes that Article I of the Constitution makes clear that deciding whether and when to declare war is the power and responsibility of Congress and Congress alone. Moreover, the Baker-Christopher Commission's proposed legislation - the War Powers Consultation Act - includes language that would further consolidate the war powers authority in the hands of the President, and undermine the Constitution's division of authority. We hope that our report, the Baker-Christopher Commission report, and our concerns with it will help renew a much-needed conversation on the subject.

Cole Receives Lifetime Commitment to Justice Award

On June 15, David Cole, professor of law at the Georgetown University Law Center and co-chair of the Constitution Project's Liberty and Security Committee and Coalition to Defend Checks and Balances, received the American-Arab Anti-Discrimination Committee's Lifetime Commitment to Justice Award. David, and his co-counsel, Marc Van Der Hout, were honored for their work defending a group of immigrants known as the LA 8. Members of the group, comprising seven Palestinian men and a Kenyan woman, were arrested in 1987 for associating with and distributing the magazines of a Palestine Liberation Organization faction. The U.S. government claimed that the faction was advocating "world communism," making affiliation with it a deportable offense under the McCarthy-era McCarran-Walter Act. Cole and Van Der Hout spent 21 years defending the LA 8 on a *pro bono* basis. Their efforts included several appeals to the U.S. Court of Appeals for the Ninth Circuit and an appeal to the U.S. Supreme Court. In October 2007, after an immigration judge dismissed the deportation case for prosecutorial misconduct, the government agreed to drop all charges and to stop seeking deportation.

Above the Fold

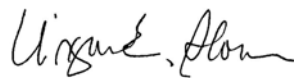
*Viewsd*ay: Hindsight's 20/20

The coverage of the Constitution Project's concerns with the Baker-Christopher Commission's recommendations included stories in [The New York Times](#) and [Reuters](#). On the editorial blog of *Newsday*, Michelle Chen [broke down the arguments](#) for and against the Commission's recommendations, writing that "Foresight may be the best check on reckless warfare, and not surprisingly, it's the hardest to legislate."

Verbatim

"The Global War on Terrorism is a battle for security that challenges us to adhere to our fundamental principles. Respect for law, including international human rights norms and the law of war, is critical to this battle." - [Col. \(ret.\) William Gunn](#), USAF, before the Senate Judiciary Committee.

Sincerely,



Virginia E. Sloan