

From the desk of Virginia Sloan

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Dear Friend,

New White Paper

Constitution Project Condemns "National Security Courts"

On Monday, June 23, the Constitution Project condemned proposals to create a system of "national security courts" in a new white paper, "[A Critique of 'National Security Courts.'](#)" In recent years, and particularly in the aftermath of the Supreme Court's recent decision in *Boumediene v. Bush* affirming the constitutional rights of "enemy combatants" to challenge their detentions through *habeas corpus*, some scholars and government officials have called for the creation of these courts. These specialized hybrid tribunals would review the preventive detention of suspected terrorists (both within and outside of the territorial United States), conduct the detainees' criminal trials, or, in some proposals, both.

A bipartisan coalition of political leaders, national security experts, former judges, and legal scholars - all members of the Constitution Project's Liberty and Security Committee or Coalition to Defend Checks and Balances - rejected such proposals, contending that "they neglect basic and fundamental principles of American constitutional law, and they assume incorrectly that the traditional processes have proven ineffective. ... We believe that the government can accomplish its legitimate goals using existing laws and legal procedures without resorting to such sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries." The signers describe the ability of traditional civilian and military courts to prosecute those suspected of terrorism and go on to recommend that Congress reject any proposals to create "national security courts."

In the Halls of Congress

House Approves Surveillance Legislation

On Friday, June 20, the House of Representatives voted to approve legislation amending the Foreign Intelligence Surveillance Act (FISA) that would grant sweeping wiretapping authority to the federal government. Although the House bill includes more privacy protections than the now-expired Protect America Act, it would in many cases permit wiretapping of Americans who are not suspected of specific crimes or involvement in terrorism, so long as the technology is targeting the people overseas with whom they are communicating, rather than the Americans themselves. The bill would also grant retroactive immunity to the telecommunication companies that facilitated the warrantless wiretapping programs over the last 7 years, and thereby ensure the dismissal of all cases pending against these companies. The Senate is set to consider its version of the legislation soon.

In the Courts

SCOTUS Rules on Death for Non-Homicidal Rape

On June 25, the Supreme Court set an encouraging precedent in its [5-4 decision](#) in *Kennedy v. Louisiana* that the death penalty may not be imposed for non-homicidal crimes. Patrick Kennedy was convicted of raping his eight-year-old stepdaughter and sentenced to death under a Louisiana law that allows prosecutors to seek the death penalty for those convicted of raping a child under the age of twelve. The Court found that the law violates the Eighth Amendment's prohibition of "cruel and unusual punishment," and reversed the lower court's decision and remanded the case.

The Constitution Project's Death Penalty Committee - comprising supporters and opponents of capital punishment, and co-chaired by Gerald Kogan, former Chief Justice of the Florida Supreme Court, and Beth Wilkinson, the prosecutor who secured a death sentence for Oklahoma City bomber Timothy McVeigh - previously called for a ban on death sentences for any crime not involving a homicide. In its report, "[Mandatory Justice: Eighteen Reforms to the Death Penalty](#)," the Committee found that "Anything less than categorical exclusion provides too great an opportunity for the unconstitutionally overbroad, random, arbitrary, and capricious application of the death penalty."

DC Circuit Rejects Detention of Parhat

In a major blow to the Bush administration's policy on detainees, the U.S. Court of Appeals for the D.C. Circuit has [ruled](#) that individuals cannot be labeled as enemies of the U.S. based on "bare assertions" not supported by "independent sources" that would make the claims reliable. This is the first decision by the D.C. Circuit reviewing a ruling by a Combatant Status Review Tribunal (CSRT) under the appeal procedures provided under the Detainee Treatment Act (DTA). This review process is the one the Supreme Court found was *not* an "adequate substitute" for *habeas corpus* review when it held in *Boumediene v. Bush* that the detainees have a constitutional right to pursue *habeas* petitions. But even under this limited review process, the D.C. Circuit found that the CSRT ruling finding that Mr. Parhat was an enemy combatant was unsupported by evidence. On June 20, the Circuit Court released the public, redacted version of its opinion, criticizing the threadbare justification of the detention of a Chinese national imprisoned at Guantanamo Bay, Cuba. The decision is hopefully the first among many in which civilian courts will closely analyze the claimed bases for "unlawful enemy combatant" designations.

District Court Rules in *Al-Haramain Islamic Foundation*

I had previously reported to you that last November, the U.S. Court of Appeals for the Ninth Circuit issued an [opinion](#) in *Al-Haramain Islamic Foundation v. Bush*, on whether an Islamic charity was able to pursue its challenge to the NSA's domestic surveillance program. In that decision, the Ninth Circuit [upheld](#) the executive branch's assertion of the state secrets privilege, finding it applied to a classified document filed under seal - which, according to the plaintiffs, demonstrates that they had been subject to surveillance under the NSA program - even though that document had previously been given to the plaintiff's lawyers by mistake. Accordingly, the court found that the plaintiffs did not have standing to sue by relying on this document, but the court sent the case back to the trial court to consider whether the plaintiffs might be entitled to relief under a different legal theory involving FISA's procedures to safeguard classified information.

In the Courts (continued)

Yesterday, the district court issued its decision on remand with a partial victory for the plaintiffs. The court held that "FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims." The court rejected the expansive view of executive power promoted by the government, holding that the President's authorities under Article II of the Constitution do not give him the power to overrule FISA. However, the court went on to conclude that "FISA nonetheless does not appear to provide plaintiffs a viable remedy unless they can show that they are 'aggrieved persons' within the meaning of FISA." The Court ultimately found that Al Haramain had not provided a sufficient showing that they were "aggrieved," but gave permission to re-file the complaint with more information.

Above the Fold

St. Petersburg Times: FL Justice System Fails

On July 1, a [column](#) by former Florida Supreme Court Chief Justice Gerald Kogan, the co-chair of the Constitution Project's Death Penalty Committee, called on Governor Charlie Crist to stay all executions in his state pending a thorough review of what Justice Kogan called Florida's "broken system of capital punishment." The column appeared just before Florida's first execution since the U.S. Supreme Court's ruling in *Baze v. Kentucky*, which rejected a lethal injection challenge and led to the lifting of *de facto* stays in place pending the Court's ruling.

Jurist: Habeas Affirmed

On June 19, a [commentary](#) in *Jurist* by Judge William S. Sessions, a member of the Constitution Project's Liberty and Security Committee and its Coalition to Defend Checks and Balances, and Lt. Col. Stephen Abraham, the first officer who served with the Office for the Administrative Review of the Detention of Enemy Combatants to publicly criticize the operations of the Combatant Status Review Tribunals, discussed the Supreme Court's restoration of *habeas corpus*. According to Judge Sessions and Lt. Col. Abraham, the time for congressional intervention in detainee policy has passed, and Congress should let the courts do their jobs.

With a Little Help from Our Friends

Attorneys Needed for Old Case Test Project

The Mid-Atlantic Innocence Project (MAIP) is seeking *pro bono* lawyers to help identify and notify individuals convicted of crimes in Virginia whose cases are included in a landmark DNA retesting program. This exciting project could involve as many as 2,166 individuals convicted of crimes in Virginia who are entitled to notification about their potential inclusion in this program. MAIP will provide training and resource materials to volunteers, who will then be asked to contact these individuals, inform them that potentially testable biological evidence exists in their cases, and advise them about possible next steps. Volunteer lawyers will not be expected to commit to assisting them with any appropriate future proceedings but will certainly have the option to do so if interested.

Participation in this project will not only ensure that the interests of these individuals are protected, but may also provide *pro bono* attorneys with an amazing experience -- the opportunity to represent an innocent person in his or her exoneration. Interested attorneys should review [this letter](#) and contact MAIP per the letter's instructions. (I am pleased to serve on MAIP's Board of Directors.)

We're Growing!

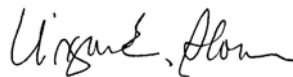
Constitution Project Welcomes Becky Monroe

I am delighted to announce that Becky Monroe has joined the Constitution Project's staff as Rule of Law Policy Counsel. Becky joins the Constitution Project from Bet Tzedek Legal Services in North Hollywood, California, where she was Director of the Employment Rights Project. Becky previously served as a clerk to Judge Richard A. Paez of the U.S. Court of Appeals for the Ninth Circuit, and is a graduate of Yale Law School, where she was Student Director of the Legal Services Clinic, and recipient of the C. LaRue Munson Prize for outstanding clinic work. You may be hearing from Becky soon and hope you will join me in welcoming her.

Verbatim

"Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true. See LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) ('I have said it thrice: What I tell you three times is true.')." ~ Judge Merrick B. Garland, writing for the United States Court of Appeals for the D.C. Circuit in *Parhat v. Gates*

Sincerely,



Virginia E. Sloan