

From the desk of Virginia Sloan

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Dear Friend,

In the Halls of Congress

Senate Hearing on Detainee Policy

On Tuesday, June 17, the Senate Committee on Armed Services held the first in a series of hearings on "[The Treatment of Detainees in U.S. Custody](#)." Documents and testimony elicited by the Committee indicate that approval of the so-called enhanced interrogation techniques did not originate with low level DOD and military employees. Rather, many high-level officials in the executive branch were involved, and some warned against using those techniques. Those warnings appear to have gone unheeded. As former General Counsel of the Department of the Navy and current Constitution Project Coalition to Defend Checks and Balances member Alberto Mora [told](#) members of the Committee, "Albert Camus cautioned nations fighting for their values against selecting those weapons whose very use would destroy those values. In this War on Terror, the United States is fighting for our values, and cruelty is such a weapon." According to press accounts, former General Counsel of the Department of Defense William J. Haynes II seemed to have trouble recalling the details surrounding the approval of these techniques

In the Courts

Supreme Court Restores *Habeas Corpus*

In a [landmark decision](#) on Thursday, June 12, the United States Supreme Court restored the *habeas corpus* rights eliminated by the Military Commissions Act. In a 5-4 decision in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. U.S.*, the Court reversed a lower court ruling and found that detainees have a constitutional right to challenge their detentions in federal court. Moreover, the Court found that the existing system of hearings established by the MCA and the Detainee Treatment Act is not an "adequate substitute" for the constitutional right of *habeas corpus* and that those two laws violated the Constitution's Suspension Clause, which allows *habeas* to be suspended only in times of rebellion or invasion.

The Constitution Project organized two *amicus curiae* - or "friend of the court" - briefs urging the Court to find that the detainees are entitled to *habeas*: one on behalf of [seventeen nongovernmental organizations](#), including Human Rights Watch, Human Rights First, the Rutherford Institute, and the Constitution Project, and the other on behalf of [twenty former federal judges](#) appointed by Presidents Johnson, Nixon, Ford, Carter, Reagan, George H.W. Bush, and Clinton. Last year, the Project's bipartisan Liberty and Security Committee and Coalition to Defend Checks and Balances issued a "[Statement on Restoring Habeas Corpus Rights Eliminated by the Military Commissions Act.](#)"

The Supreme Court's decision puts to rest the insidious notion that a president - like a monarch or dictator - has the unchecked power to lock people up and throw away the key simply on the president's say-so. We are monitoring responses to the decision from the Bush administration and Congress. And not surprisingly, the decision has become fodder for the presidential campaign. Senator John McCain has called the decision "one of the worst decisions in the history of this country." Senator Barack Obama praised the decision, saying that "we can abide by due process and abide by basic concepts of rule of law and still crack down on terrorists."

Mixed Decision for Americans Detained in Iraq

Immediately after announcing its decision in *Boumediene*, the Court released a 9-0 [opinion](#) in *Munaf v. Geren* and *Geren v. Omar*, in which it found that federal courts have jurisdiction to consider a *habeas* petition of a U.S. citizen detained by U.S.-led coalition forces in Iraq. The Constitution Project joined with the Rutherford Institute in filing an [amicus curiae brief](#) on behalf of the petitioners, arguing that although the government "dressed up that detention with a multinational-forces fig leaf," this did not make the denial of access to the federal courts constitutional.

Unfortunately, the Court went on to rule that federal judges considering Mr. Munaf's and Mr. Omar's *habeas* petitions do not have the authority to bar their transfer to Iraqi authorities to face prosecution or punishment for crimes allegedly committed in that country in violation of Iraqi laws. As such, the Court's decision may not protect Shawqi Ahmed Omar and Mohammad Munaf from being transferred out of U.S. custody and thus away from the jurisdiction of U.S. courts. Mr. Munaf had previously been convicted by an Iraqi court, although his conviction was overturned on appeal. Mr. Omar has been criminally charged by Iraq but not yet tried.

Above the Fold

McClatchy: Beyond the Law

Today, McClatchy Newspaper's Washington Bureau released the final segment of its [groundbreaking, eight-month investigation](#) of the detention system created after the Sept. 11 terrorist attacks. The investigation describes an appalling situation: the U.S. has imprisoned innocent men, subjected them to abuse, stripped them of their legal rights and allowed Islamic militants to turn the prison camp at Guantanamo Bay, Cuba into a school for jihad.

With a Little Help from Our Friends

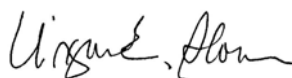
CP Joins Pew, Federalist in presenting *Hein* Panel

On Tuesday, the Constitution Project co-sponsored a panel on the Supreme Court's decision last year in [Hein v. Freedom From Religion Foundation](#), along with the Pew Forum on Religion & Public Life and the Federalist Society. In the *Hein* case the U.S. Supreme Court held that taxpayers do not have "standing" and thus could not pursue a lawsuit claiming that conferences administered under the Bush Administration's Office of Faith-Based and Community Initiatives violated the First Amendment's Establishment Clause. Alex Luchenitser of Americans United for Separation of Church and State, Ira "Chip" Lupu of The George Washington University Law School, Walter Weber of the American Center for Law and Justice, and Robert Tuttle of The George Washington University Law School discussed the implications of the decision, which narrowed a twenty-year old doctrine that has enabled taxpayers to challenge government spending programs that fund religious groups and activities under the Establishment Clause. The panelists also compared this doctrine to other contexts, such as environmental law, in which litigants may be able to challenge government programs without demonstrating a direct, concrete and personal harm to themselves.

Verbatim

"Security subsists, too, in freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. ... Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch." ~ Justice Anthony Kennedy, writing for the Court in *Boumediene v. Bush* and *Al Odah v. U.S.*

Sincerely,



Virginia E. Sloan