

The Constitution Project



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From the President's Desk

If you wanted to craft a legislative proposal that was likely to suffer a swift and certain demise, you would be hard pressed to top a bill that *reduces* mandatory prison sentences for illicit drug users. And if you wanted to ensure defeat, you might seek approval for the bill just months before a highly contentious mid-term election.

These were the challenges confronting sentencing reform advocates as a long overdue bill to reduce the sentencing disparity between crack and powder cocaine offenses went before the full U.S. House on Wednesday. And rather than go down in flames, the bill was approved *unanimously*. (See full story below).

How did this stunning victory, which would have seemed implausible just a few years or even months ago, come about? Victory has many fathers, as the old expression says, but there is no denying that what made the difference was the overwhelming support the bill had

gathered from law enforcement officials, experts, and advocates from across the political spectrum. Economic and social conservatives joined civil and human rights groups in building a compelling moral, social, and fiscal argument against the existing crack/powder sentencing disparity. The politicians followed suit.

You don't have to be a wild-eyed optimist to be encouraged by the crack reform story. It confirms for many of us the value in working hard to forge common ground on issues that, at least on the surface, appear to divide us. I am proud of the role that the Constitution Project played in supporting the sentencing disparity reform bill, and I want to congratulate all of the organizations and individuals - including the members of Congress - who came together to make this important reform a reality.

Upcoming Event

Constitution Day 2010 is approaching. On September 17th, we will co-host an event with the Georgetown Center on National Security and the Law to call attention to the important liberties and safeguards enshrined in our nation's enduring charter. We will present our annual Constitutional Commentary award and then host a panel discussion entitled, "The Right to a Fair Trial: Should the Rules in Terrorism Cases Be Different from those in Other Criminal Prosecutions?" Details as follow:

September 17, 2010

9:30 am - 1:00 pm

Georgetown University Law Center, Washington, DC

A light lunch will be served.

Confirmed panel members include:

- **David Keene**, Chair American Conservative Union, and co-chair of the Constitution Project's Liberty and Security Committee;
- **Denny LeBoeuf**, Staff Attorney for the ACLU National Security Project and Director of the ACLU's John Adams Project;
- **Brad Wiegmann**, Principal Deputy Assistant Attorney General in the National Security Division of the Department of Justice; and
- **David Cole** (moderator), Professor of constitutional law, criminal procedure, and national security at Georgetown Law

and co-chair of the Constitution Project's Liberty and Security Committee.

[More details](#) about the event will be available soon.

CP News

Bill to Reform Crack Cocaine Sentencing Penalties Signed into Law

On Tuesday, President Obama signed into law a bill to reduce the sentencing disparity for crack and powder cocaine offenses from 100:1 to 18:1. In other words, under prior law, the sentence for possession of *five* grams of crack cocaine, was equivalent to that for possession of *five-hundred* grams of powder cocaine. The legislation also repeals the 5-year mandatory minimum sentence for first-time simple crack possession, marking the first time a mandatory minimum sentence has been repealed since the Nixon Administration.

The bill was approved unanimously by both chambers; the Senate in March, the House last Wednesday. After the House vote, **Constitution Project President Virginia Sloan** was [interviewed](#) by the Associated Press. She said, "For Congress to take a step toward saying 'we have made a mistake' and this sentence is too severe ... is really remarkable."

The Project has long opposed the crack-powder disparity. In 2006, for example, the Project's Sentencing Committee released [Recommendations for Sentencing in a Post-Booker World](#), a report that included the following statement: "The Committee is unanimously of the view that the 100-1 weight ratio upon which guideline and mandatory minimum sentences for powder and crack cocaine are based is unjustifiable as a matter of policy. The ratio continues to trouble many because it has a highly disproportionate impact on minorities." Earlier this year, we organized [a letter](#) from former federal judges and prosecutors in support of the original version of the Senate bill, which eliminated the crack/powder sentencing disparity entirely.

Constitution Project Files *Amicus* Brief in Support of the Right to Counsel in Civil Contempt Case

On July 29th, the Constitution Project filed an *amicus* brief in the United States Supreme Court in support of a petition for a writ of certiorari asking the Court to accept review of a decision of the South Carolina Supreme Court. In that decision, the South Carolina court held that an indigent defendant in a civil contempt proceeding had no constitutional right to counsel -- despite being sent to jail for one year -- on the basis that the proceeding was not criminal but instead involved enforcement of child support obligations.

South Carolina takes the minority view that a defendant's right to counsel depends on whether the matter is criminal or civil. Twenty-two federal courts of appeals and state courts of last resort, however, have applied U.S. Supreme Court precedent and determined that the standard for the constitutional right to counsel is not whether the matter is "criminal" or "civil," but whether the defendant's liberty is at stake. The Constitution Project's *amicus* brief argues that it is the defendant's liberty interest, and not the denomination of "civil" or "criminal" that triggers the right to counsel. In June, the Constitution Project's Right to Counsel Committee reconvened to approve a new recommendation applicable to this case. That recommendation states that, "[e]xcept in direct summary contempt proceedings, states should ensure that, in the absence of a valid waiver of counsel, quality representation is provided to all persons unable to afford counsel in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature" and is available [here](#).

The Project's *amicus* brief, a copy of which can be found [here](#), was drafted with the generous assistance of David Raim, Joy Langford, and Kate McSweeney of the law firm Chadbourne & Parke's Washington, DC office. The case is *Turner v. Price*.

Constitution Project Joins Former Military Leaders, Diplomats, Judges, and Prosecutors in Support of Consular Access Legislation

The Constitution Project, along with a number of former military leaders, diplomats, judges and prosecutors, has called upon members of the Senate to support legislation to protect consular access rights. Specifically, the proposed legislative provision would give foreign nationals who have been sentenced to death or a term of life in prison, an opportunity to seek review of their cases in U.S. federal court based upon claims they were denied access to their country's consul, in violation of the Vienna Convention on Consular Relations.

In 2008, the U.S. Supreme Court decided *Medellín v. Texas*, a case in which a Mexican national on death row in Texas challenged his conviction on the basis that he was not afforded his right of consular notification and access while in law enforcement custody. The Court held that the International Court of Justice's (ICJ) 2004 decision in *Avena and Other Mexican Nationals (Avena)* requiring the United States to provide further "review and reconsideration" of the convictions of petitioner Medellín and 51 other Mexican nationals on death row in the U.S., was not binding federal law. Therefore, the Court held that absent implementing legislation passed by Congress and signed by the President, it was not enforceable by federal courts against Texas. This effectively barred Medellín and others who had previously been denied their consular notification rights from seeking judicial review of these violations of the Vienna Convention, and cleared the way for Medellín's execution in August of 2008.

In December 2009, the Constitution Project joined more than a dozen human rights and civil liberties groups on [a letter](#) to Attorney General Eric Holder and Secretary of State Hillary Clinton to express deep concern over the ongoing failure of the United States to abide by the ICJ's decision. The letter urged the Attorney General and Secretary of State to promote passage of legislation implementing the ICJ's binding judgment.

Now comes word that Congress is finally considering legislation to address this issue. Included in the Senate's version of the State Department and Foreign Operations appropriations bill for fiscal year 2011 (S. 3676) is a provision that would provide foreign nationals denied their right to consular notification and access a meaningful opportunity to seek review of their convictions in federal court. Specifically, the provision would allow U.S. federal courts to review claims of individuals sentenced to a term of life in prison or death, when they assert that denial of their consular rights under the Vienna Convention resulted in actual prejudice to the criminal conviction or sentence. If enacted, the provision would demonstrate to foreign governments the United States' good faith in upholding its consular access obligations, increasing the likelihood that foreign governments will honor their obligations to providing consular notification and access to Americans in their custody.

To demonstrate support for this legislative fix, the Constitution Project recently helped to secure the following letters of endorsement to Congress: a letter from former diplomats and State Department officials, including Ambassadors David E. Birenbaum and David Charles Miller, Jr., and William H. Taft, IV, Legal Advisor,

Department of State, George W. Bush administration, all three of whom are members of the Project's Liberty and Security Committee; and Ambassador Harry Barnes, a member of the Project's Death Penalty Committee; a letter from former military leaders, including Lawrence B. Wilkerson, Col, USA (Ret) a member of the Liberty and Security Committee; a letter from former prosecutors and judges, including former Governor Mark White and former Bexar County, Texas District Attorney Sam D. Millsap, Jr., respectively, a chair and member of the Death Penalty Committee; and a letter from Project President Ginny Sloan citing a recommendation from our Death Penalty Committee's 2006 report, *Mandatory Justice*, calling for enforcement of the Vienna Convention on Consular Affairs.

Members of the Constitution Project's Liberty and Security Committee Condemn Attacks on Lawyers Representing Terrorism Suspects

On July 29th, a high-powered roster of 24 American lawyers, policymakers and scholars, all members of the Constitution Project's Liberty and Security Committee, joined forces to condemn attacks on lawyers representing terrorism suspects. In a report entitled *Prosecute Terrorism Suspects, Not Their Lawyers*, Committee members provided the context for their concerns about the escalation in attacks on these lawyers and the chilling effect these actions could have on future representation of "unpopular defendants." The statement also sounds the alarm over a controversial provision in the House version of the National Defense Authorization Act that is "so broad that it would require the DOD Inspector General to launch a full-scale investigation of the conduct of any current or former lawyer for a Guantanamo detainee." Ultimately, the statement calls upon all policymakers "to focus on the actual threats posed by terrorists, rather than policies and public pronouncements that attack lawyers for doing nothing more than what their ethics, the federal Constitution, and the rule of law require."

News in Brief

- Last week, the Constitution Project joined more than a dozen civil liberties organizations on a letter sent to members of Congress urging them to oppose any blanket ban on transfers of Guantánamo detainees to the United States. The July 28th letter pointed out that such a ban would block transfers for *any* purpose, including for purposes of prosecution in federal court. A copy of the letter can be found [here](#).

- On July 27th, leaders on the House Judiciary Committee sent a letter to the General Accountability Office formally requesting a study of the current state of indigent defense systems around the country. The letter also directs GAO to identify the disparity between federal funding for states to provide counsel for indigent defense and federal funding for prosecutions and law enforcement activities. **Constitution Project Government Affairs Counsel Christopher Durocher** worked with Judiciary Committee staff to ensure that the study request will elicit the most detailed information possible regarding state expenditures of federal criminal justice grant funds and the Department of Justice's evaluations of those expenditures. A copy of the Judiciary Committee letter can be found [here](#).
- The Washington Post published [an op-ed](#) by Professor David Cole, co-chair of the Project's Liberty and Security Committee, on Sunday, August 1st about the need for an investigation into allegations of torture at Guantanamo and elsewhere after 9/11. From Cole's piece: "Here Obama should take a page from David Cameron, Britain's new Conservative prime minister. ... His political position could hardly be more tenuous. ... Yet shortly after he took office, Cameron announced an official public inquiry into allegations of high-level British complicity in the torture of terrorism suspects, saying, 'The longer these questions remain unanswered, the bigger the stain on our reputation as a country that believes in freedom, fairness and human rights grows.'"

More information is available on the [Constitution Project's website](#), including how to [subscribe to our newsletter](#) and a way for you to [show your financial support](#).

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

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