

The Constitution Project



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From the President's Desk

It's not every day that you get a chance to help save a life.

Most of our work at the Constitution Project involves finding and promoting bipartisan solutions to disputes that implicate constitutional values and safeguards. The debates can sometimes seem academic, but the outcomes carry real consequences for real people. Our efforts on behalf of individual death row inmates are unique, however, because we know the names and stories of the people involved and because the stakes are literally life and death.

Kevin Keith was supposed to be executed by the State of Ohio yesterday. He was sentenced to death in 1994 after being convicted of killing three people. After he was convicted, however, Mr. Keith's attorneys discovered important new evidence and found that some of the evidence used to convict him was faulty. We grew concerned that no court of law had considered the cumulative exculpatory evidence that was suppressed during his trial and discovered post-trial. When his lawyers asked for help, we organized a letter from 31 former judges and prosecutors from across the country who urged Ohio Governor Ted Strickland to grant clemency to Mr. Keith. The letter, which was sent on August 9th, was featured in a *New York Times* story entitled, "[Unusual Alliance Protests Execution](#)."

On September 2nd, less than two weeks before Mr. Keith was

scheduled to be executed, Governor Strickland announced that he was commuting Mr. Keith's sentence from death to life in prison without parole. His life was spared. Just as important, his lawyers immediately announced that they would seek a new trial for Mr. Keith to consider all available evidence.

We do not know whether Mr. Keith is actually innocent. And our hearts go out to the victims and their families. We are certain, however, that procedural barriers should not prevent an individual who has been sentenced to death from introducing newly discovered exculpatory evidence. And we firmly believe that post-conviction review should be provided in capital cases where there are credible claims of innocence.

We commend Governor Strickland for commuting Mr. Keith's sentence, especially in the midst of a highly contentious re-election campaign. And we are both gratified and humbled at the thought that the bipartisan support we helped generate contributed to this positive outcome.

Upcoming Events

Last Chance to RSVP for Tomorrow's Constitution Day Event

Tomorrow, **Charlie Savage**, the Pulitzer-Prize winning New York Times reporter, who was our first honoree, will present our 2010 *Constitutional Commentary Award* to **Michelle Alexander**, author of the acclaimed book, *The New Jim Crow*. In its choice of Ms. Alexander, our distinguished Selection Committee noted, "Her book contains a powerful message that deserves more conversation and study. Ms. Alexander's provocative premise-that the War on Drugs targets black men and through the criminal justice system traps them forever in second class status-makes a disturbing read that raises numerous constitutional questions."

Following the award presentation, we will 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?" Tickets are still available, so please RSVP to join us.

September 17, 2010
9:30 am - 1:00 pm

Georgetown University Law Center, Washington, DC

A light lunch will be served.

The panelists are:

- **David Cole** (moderator), Professor of Law, Georgetown University Law Center, and co-chair of The Constitution Project's Liberty and Security Committee;
- **James S. Gilmore, III**, former Governor of Virginia and Chair of the Congressional Advisory Panel on Terrorism (the "Gilmore Commission");
- **Denny LeBoeuf**, Staff Attorney for the ACLU National Security Project and Director of the ACLU's John Adams Project;
- **Grover Norquist**, President, Americans for Tax Reform;
- **Brad Wiegmann**, Principal Deputy Assistant Attorney General in the National Security Division of the Department of Justice

Right to Counsel Panel Discussion on September 23rd

Next Thursday, September 23rd, from 10am to 12pm, the Constitution Project and the Florida Bar-Criminal Law Section will present a panel discussion on the right to counsel at the Hilton Orlando, as part of the 2010 Florida Bar Midyear Meeting. The two-hour discussion will include varying viewpoints on this critical issue, including perspectives from current and former judges, prosecutors, an exoneree, and public defense counsel. The program will address the indigent defense crisis in Florida, focusing on specific recommendations for reform in the Sunshine State.

Last year, the Constitution Project's National Right to Counsel Committee published its seminal report on indigent defense issues entitled *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*. The Committee documented disturbing evidence that states and localities are not providing competent counsel, despite the constitutional requirement that they do so. The report sets forth 22 consensus recommendations to achieve reform in the country's indigent defense systems, ranging from independence, workload, compensation, and litigation. Two members of the Right to Counsel Committee-Bruce Jacob, Dean Emeritus and Professor of Law at Stetson University College of Law and former Assistant Attorney General for the State of Florida, as

well as Alan Crotzer, who served 24 years in Florida prisons before being exonerated based on DNA evidence in 2006-will participate in the September 23rd panel discussion. Joining them will be Justice Gerald Kogan, former chief justice of the Florida Supreme Court and co-chair of the Constitution Project's Death Penalty Committee.

CP News

Constitution Project Expresses Dismay After Federal Court Dismisses Rendition Case Bases on State Secret Privilege

On September 8th, an eleven-judge (or *en banc*) panel of the U.S. Court of Appeals for the Ninth Circuit held that the government's broad assertion of the "state secrets" privilege requires dismissal of a lawsuit alleging that the plaintiffs were tortured through the government's "extraordinary rendition" program. The full [court opinion](#) court opinion in *Mohamed v. Jeppesen Dataplan* replaces the [decision](#) of an earlier three-judge panel that had rejected the government's broad claims of government secrecy.

Mohamed v. Jeppesen Dataplan concerns allegations by five people that defense contractor Jeppesen Dataplan, a subsidiary of Boeing, flew them to a foreign country where they were tortured as part of the CIA's extraordinary rendition program. The Bush administration intervened in the case on behalf of Jeppesen, seeking dismissal of the lawsuit on the basis of the state secrets privilege. In advance of the oral argument before the Ninth Circuit, we sent a letter to Attorney General Holder, citing our Liberty and Security Committee's 2007 report, *Reforming the State Secrets Privilege*, and urging him to renounce the Bush administration's overbroad secrecy claims previously made in the case, and to consent to have the trial judge assess what evidence is actually subject to the privilege. Unfortunately, the Obama administration adopted the Bush administration's broad claim for dismissal of the entire lawsuit, claiming the very subject matter is a state secret.

We are disturbed that the Ninth Circuit adopted the overly-expansive state secrets claim urged by the Department of Justice. The opinion requires dismissal of the case before the trial court can even review the evidence privately, and make an independent assessment of whether the case may be tried. This broad secrecy

doctrine provides the government with immunity from claims of torture, and undermines accountability and the rule of law. In the wake of this decision, we intend to continue to work with our allies to convince Congress to pass legislation to restore the role of the courts as a check on executive power.

News in Brief

On Tuesday, a Los Angeles Times [story](#) about the lack of legal assistance available for illegal immigrants being held in rural jails referred to a recent Constitution Project report on the topic. According to reporter Ken Dilanian, "The issue of lawyers for immigrant detainees is not new. Last year, the Constitution Project, a bipartisan legal group that promotes the right to legal counsel, argued in a report that the government should consider public funding for legal aid to detained immigrants." Find our 2009 report, *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, by clicking [here](#).

We are continuing to press the administration for greater transparency and reform of the system of "controlled unclassified information," as outlined in our Liberty and Security Committee's 2009 report, [Reining in Excessive Secrecy](#). On September 5th, **Constitution Project Senior Counsel Sharon Bradford Franklin** was quoted in a *Federal Times* [story](#) about the Obama administration's efforts to draft an executive order to protect "sensitive but unclassified" information while increasing government transparency. In the *Times* story, Sharon said: "I think they are getting a lot of conflicting pressures that they are trying to work through." The story continued, "The Project is among numerous groups talking to the administration on a draft executive order that aims to tame the hodge-podge of 107-plus designations that control "sensitive but unclassified" information. In addition to those labels, there exist more than 130 sets of handling requirements."

On September 7th, OpenTheGovernment.org-a coalition of more than 70 groups advocating for open government-released its [2010 Secrecy Report Card](#), a quantitative report on indicators of government secrecy. The report chronicles trends in classified and declassified information, the cost of keeping secrets, the Freedom of Information Act (FOIA), signing statements, use of state secrets, and

more. This report covers the last three months of the Bush Administration and the first nine months of the Obama Administration. According to Patrice McDermott, Director of OpenTheGovernment.org, "Encouraging trends are evident in these early months of the Obama Administration, in both FOIA and in general secrecy. In general, after hitting high water marks during the Bush Administration, statistics indicate the creation of new national security secrets is slowly ebbing."

Two new reports about the constitutional right to counsel are out. The CATO Institute recently released a new Policy Analysis entitled "Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System." The paper, which can be found [here](#), was authored by two law professors, Stephen J. Schulhofer of New York University School of Law and David D. Friedman from Santa Clara University School of Law. The authors acknowledge the problem of inadequate funding for indigent defense systems, but argue that the most important reform is to give poor defendants the freedom to choose their attorney. The CATO paper cites the Constitution Project's 2009 report, [*Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*](#). *Justice Denied* was also cited by The Innocence Project in its new [report](#) that analyzes the success of post-conviction ineffective assistance of counsel claims for the first 225 individuals eventually exonerated by DNA evidence. The report finds that while about one-fifth of these exonerated individuals pursued appellate claims based on ineffective assistance of counsel, appeals courts rejected the vast majority (81%) of these claims.

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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