

The Constitution Project



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From the President's Desk

Over the past two weeks, we hosted three public education events, all of which are described in some detail below. These types of events are a favorite tool in the Constitution Project's advocacy toolbox. They enable us to bring smart minds and different voices to the important debates of the day.

As with our committees, we rely on the volunteer efforts of so many dedicated public servants and experts in the field to produce these public forums. I am grateful that so many knowledgeable-and busy-individuals made time to help us put on these events.

Our Constitution Day event has become one of our signature events, and I want to thank our excellent panelists and *Constitutional Commentary Award* winner Michelle Alexander for their participation. This is the second year in a row that we have co-sponsored the event with the Georgetown Center on National Security and the Law and the Georgetown University Law Center and so I want to once again extend my special appreciation to them for hosting this year's event.

CP News

Landmark Legislation Opens Door for State Indigent Defense Reform

On September 27th, Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, introduced the Justice for All Reauthorization Act (S. 3842), which is available [here](#). After over a year of negotiations, its introduction signals the willingness of members of Congress to address some of the critical needs of the nation's broken indigent defense system.

The Constitution Project worked with the Committee, as well as the Department of Justice, on a variety of the bill's provisions, which would improve the fairness and efficiency of the criminal justice system. Among other provisions, the bill authorizes the Department to sue states that fail in their constitutional obligation to provide competent counsel to indigent defendants, including those being tried for capital crimes; provides \$5 million annually to the Department for training and technical assistance to help states develop constitutionally adequate indigent defense systems and avoid the need for such litigation; and includes language to reauthorize the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program.

The legislation also requires states to submit strategic plans for their criminal justice systems, including indigent defense, in order to qualify for federal criminal justice grants. According to **Christopher Durocher, Government Affairs Counsel** for the Constitution Project, "For the first time, states that receive federal grants, will be required to bring all stakeholders to the table--victims, defenders, prosecutors and law enforcement--to develop a strategic plan that brings greater accountability and transparency to the process. Under this legislation, the federal government won't dictate the specifics of these plans, but it will increase transparency in the way states spend federal money, and hold them accountable if they do not live up to their constitutionally-mandated obligation to provide an indigent defense system that works for everyone."

Notably, the bill also includes an exception to the Capital Representation Improvement Grant's requirement that capital training money be allocated equally between a state's prosecutors and defenders. The amendment would allow the Attorney General, upon a showing of good cause, to determine a fair allocation of the funding between prosecutors and defenders. A release from Senator Leahy's office describing the importance of this bill is available [here](#).

Constitution Project Hosts Spirited, Informative Constitution Day Event

On September 17, the Constitution Project hosted its annual

Constitution Day event. This year's event was webcast live to law schools across the country to enable them to provide educational programming on the Constitution in honor of Constitution Day. Pulitzer-Prize winning *New York Times* reporter Charlie Savage presented our 2010 *Constitutional Commentary Award* to Michelle Alexander, author of the acclaimed book, *The New Jim Crow*. In her compelling remarks, Ms. Alexander said:

We have all been complicit in the emergence of mass incarceration in the United States. We have turned a blind eye to those labeled "criminals," and viewed them, the "others," as unworthy of our concern. Some of us have been complicit by remaining silent, even as we have a sneaking suspicion that something has gone horribly wrong. This book is an effort to break that silence and to help inspire a collective awakening to what we have done. In the so-called era of colorblindness, we have become blind not so much to race, but to the reemergence of caste in America.

The slightly abridged text of her remarks can be found by linking [here](#) to the Nieman Foundation for Journalism at Harvard University.

After Ms. Alexander's remarks, the audience heard a very lively and informative discussion on this year's topic, "The Right to a Fair Trial: Should the Rules in Terrorism Cases Be Different from Those in Other Criminal Prosecutions?" David Cole, Georgetown University Law Center professor and co-chair of the Constitution Project's Liberty and Security Committee, moderated a spirited debate involving James Gilmore III, former Governor of Virginia and chair of the Congressional Advisory Panel to Assess Domestic Capabilities for Terrorism Involving Weapons of Mass Destruction; Denny LeBoeuf, Director of the ACLU's John Adams Project, which defends Guantanamo detainees; Grover Norquist, President of Americans for Tax Reform; and Todd Hinnen, Deputy Assistant Attorney General, National Security Division of the U.S. Department of Justice.

Media coverage included a story in the Voice of America (VOA) News that contained an interview with Project President Virginia Sloan. The VOA News story can be found [here](#), or click [here](#) for a webcast of the entire event.

Capitol Hill Briefing Provides Ground Level Perspective of GTMO Military Commissions

Yesterday, the Constitution Project and the National Institute of Military Justice (NIMJ) co-hosted a discussion on Capitol Hill entitled, "On the Ground in Guantánamo: Recent Observers Report on Military Commissions, Efficacy of Legal Process." A distinguished panel of former military leaders and others who recently visited Guantánamo Bay shared their insights and observations on the problems with the military commissions, and the need to ensure that the criminal trials of the Guantanamo detainees are conducted in traditional federal criminal courts.

Constitution Project Senior Counsel Sharon Bradford Franklin delivered opening remarks and then turned the discussion over to moderator Jonathan Tracy, Assistant Director of NIMJ and former judge advocate in the United States Army. The panelists were: David R. Irvine Brig. Gen. (Ret.), U.S. Army; Ronald Meister, former Navy JAG officer and judge; Gary Solis former judge advocate with the U.S. Marine Corps; and Steve Vladeck, Professor of Law at American University Washington College of Law and the Project's Supreme Court Fellow.

The panel was particularly timely given the start this week of the trial of Ahmed Ghailani in federal district court in New York. Amazingly, since the Guantanamo detention facility opened in 2002, this is the first criminal trial of a Guantanamo detainee to be conducted in our traditional federal civilian courts. At the briefing, each of the panelists explained different problems with the military commissions, including their ad hoc nature and lack of guiding legal precedent, the lack of authority under the law of war to charge certain offenses as war crimes, and the threat to American military personnel who may receive reciprocal treatment by other countries. The panelists agreed that the criminal trials of detainees should be conducted in traditional federal civilian courts, and urged the congressional staffers that Congress should not pass legislation that would interfere with the administration's ability to conduct prosecutions in federal civilian courts. In particular, panelists criticized provisions of the House version of the National Defense Authorization Act (NDAA) that would impose such restrictions.

Constitution Project Files *Amicus* Brief in Death Penalty Case out of Eleventh Circuit

Last week, the Constitution Project, joined by 28 former federal and state judges, prosecutors, and other government officials, filed an *amicus* brief in support of a petition for *certiorari* filed by Alabama

death row inmate William Glenn Boyd. Boyd was convicted in 1987 of eight counts of murder. His trial counsel had never tried a capital case before and conducted no investigation into mitigating evidence. Still, the jury voted to sentence Boyd to life, but the trial judge overrode the jury verdict, as permitted by Alabama state law, and sentenced Boyd to death.

Post-conviction investigation revealed a tragic upbringing marked by abuse and neglect, and the federal district court judge during federal *habeas* proceedings ruled that Boyd's death sentence should be overturned. However, the Eleventh Circuit, over dissent, reversed, relying on its own "rule" that some crimes are so bad that no unrepresented mitigation can ever make a difference. Our *amicus* brief urges the Supreme Court to protect the principle that a capital defendant may not be sentenced to death without an individualized determination that the death penalty is the appropriate punishment for his crime. The Constitution Project would like to thank Skadden, Arps, Slate, Meagher & Flom LLP, and in particular attorneys Clifford Sloan and Brian Wallach, for their *pro bono* assistance in drafting the brief.

News in Brief

- The Constitution Project submitted a written statement to Congress on the need to reform the Electronic Communications Privacy Act (ECPA) in connection with a September 22nd Senate Judiciary Committee hearing on "The Electronic Communications Privacy Act (ECPA): Promoting Security and Protecting Privacy in the Digital Age." The next day, we filed a similar statement in connection with a hearing of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties on "ECPA Reform and the Revolution in Cloud Computing." Our testimony shared the four principles that the Constitution Project and the Digital Due Process Coalition, of which the Project is a member, believe should guide a legislative effort to update ECPA, to ensure that the Act's privacy protections extend to current and emerging wireless and internet technologies. Our proposed reforms would provide critical safeguards that are needed to ensure a proper balance of the interests of private parties, constitutional liberties, and national security.

- On September 23rd, we joined the Florida Bar-Criminal Law Section to present a panel discussion on the right to counsel as part of the 2010 Florida Bar Midyear Meeting. Two members of our 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-participated in the discussion. They were joined by Justice Gerald Kogan, former chief justice of the Florida Supreme Court and co-chair of the Constitution Project's Death Penalty Committee. Over 50 people attended the event, which highlighted the indigent defense crisis in Florida. All of the panelists favorably referred to our National Right to Counsel Committee's 2009 report, [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#).
- The Constitution Project joined more than 30 open government groups on a letter in support of legislation to promote greater government transparency. The bill would require that any report required by statute to be issued to Congress and releasable under the Freedom of Information Act (FOIA) be posted on a website managed by the Office of Management and Budget (OMB). These reports contain a wealth of information that enable the public to better understand how well federal agencies are (or are not) fulfilling their respective missions, from ensuring the safety of our drugs and food supply, to protecting the environment, to monitoring the soundness of our financial institutions. The legislation, H.R. 6026, would make it easier for the public to find this information and use it to hold officials accountable for their actions. A copy of the group's letter can be found [here](#).
- This week, both the Senate and the House approved the "Reducing Over-Classification Act" (H.R. 553) to curb over-classification of documents by the U.S. intelligence community. In its July 2009 report, [Reining in Excessive Secrecy: Recommendations for Reform of the Classification and](#)

[Controlled Unclassified Information Systems](#), our Liberty and Security Committee expressly called for new legislation to achieve this goal and to create clear procedures for sharing classified information within the government. Several provisions of H.R. 553 are consistent with our committee's recommendations and advance that objective. For example, as recommended in our report, the bill requires evaluations of classification policies and practices by the Inspectors General of each federal agency that is authorized to classify materials. Similarly, the bill requires training and incentives programs to assure information and materials are classified for the right reason - to protect sources and methods. The bill is expected to be signed into law within days.

- Last week, the Justice Department filed a brief arguing that a lawsuit filed on behalf of U.S. citizen Anwar al-Aulaqi should be dismissed based upon the state secrets privilege. The lawsuit challenges the executive branch's asserted authority to carry out "targeted killings" of U.S. citizens located far from any armed conflict zone. Although the Constitution Project has not taken any position on the underlying issues in the lawsuit, the Project opposes reliance on the state secrets privilege to block litigation of these important constitutional issues. An [article](#) in *The Nation* covering this development in the litigation quotes **Project Senior Counsel Sharon Bradford Franklin** as stating: "We're not surprised but very disappointed that the administration chose to assert the state secrets privilege and argue that this case should be dismissed on that basis."

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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