



January 17, 2008

From the desk of Virginia Sloan

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Dear Friend,

What You Don't Know Can Hurt You

Please join the Constitution Project next Thursday, January 24, 2008, at 12:00 PM, as we sponsor "[What You Don't Know Can Hurt You: Congress, the Courts, and the State Secrets Privilege](#)," a panel discussion on the state secrets privilege, its application by the courts, and legislative efforts to reform it. Increasingly since September 11th, the executive branch has asserted the state secrets privilege to prevent legal challenges to national security programs. By accepting these claims as valid on their face, courts have blocked the public scrutiny that ensures that the government is accountable for its actions. Panelists will explore potential reforms to the privilege to simultaneously protect individual rights and national security, and preserve access to the courts.

Please note that the panel has been moved from the First Amendment Lounge of the National Press Club to the Murrow Room on the same floor. A light lunch will be served. There is no charge for attendance. Please [RSVP](#) at your earliest convenience, as seating is limited.

In the Halls of Congress

Upcoming Hearings on the State Secrets Privilege

Shortly after the Constitution Project's panel discussion on the state secrets privilege, both the House and Senate will hold their own hearings on the subject. We will continue to use this space and our website to keep you informed about legislative efforts to reform the privilege.

In the Courts

Disappointing Decision in *NIMJ v. DOD*

On January 11, the U.S. Court of Appeals for the D.C. Circuit [affirmed](#) a lower court decision denying the National Institute of Military Justice's (NIMJ) Freedom of Information Act request for communications between the Department of Defense (DOD) and several private individuals regarding the creation of military commissions to try suspected terrorists.

Prior to the President's November 2001 order authorizing the creation of military commissions, DOD solicited advice from several private individuals who were acknowledged by then-Defense Secretary Rumsfeld to have played an important role in development of the rules. In an [amicus brief](#) filed with the D.C. Circuit, the Constitution Project asked the court to rule in favor of NIMJ and provide much needed transparency to the military commission rulemaking process. The Constitution Project's brief argued that transparency in the rulemaking process is an essential mechanism for such oversight, especially considering the lack of other checks on commission rulemaking. Although military commissions are now governed by the Military Commissions Act of 2006 (MCA), the very same issues of transparency are implicated by the MCA.

The Constitution Project is grateful to Karen S. Bloom and Hector Oropeza of the law firm Fried, Frank, Harris, Shriver, & Jacobson LLP, and their former colleague Michael L. Waldman, for representing the Constitution Project in this matter, and to Professor Peter Raven-Hansen of George Washington University Law School for his guidance in developing the brief.

SCOTUS Grants *Cert* in *Kennedy*

On January 4, the Supreme Court decided to hear *Kennedy v. Louisiana*, a case that could dramatically expand the reach of the death penalty. Patrick Kennedy was sentenced to death after being convicted of raping his eight-year-old stepdaughter. He is the only individual now on death row in any state for a non-homicide. In 1977, the Supreme Court decided in *Coker v. Georgia* that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." The victim in *Coker* was an adult; Louisiana contends that because the victim in *Kennedy* was a child, *Coker* does not apply. In an important [amicus brief](#), the National Association of Social Workers and a group of sexual assault crisis centers argued that the Louisiana law will encourage offenders to kill their victims to prevent them from reporting the rape. "[Mandatory Justice: The Death Penalty Revisited](#)," the report of our Death Penalty Committee, urges that capital punishment be limited to certain cases - all involving murder - so that only the "most heinous offenses and most culpable offenders" are death-eligible.

Above the Fold

Talking Justice: Electoral Politics and the Rule of Law

I wrote in my January contribution to [Justice Talking's blog](#), that "[w]hile the prominent political issues (the Iraq war, immigration, education, etc.) are indeed important, how the next president interprets his or her powers under the Constitution will dramatically affect whether and how they address all other issues, and whether and how our rights are protected."

San Jose Mercury News: Death Penalty Needs Reform, if Not a Ban

On January 10, 2008, the *San Jose Mercury News* editorial board called for reform of California's capital punishment system. The prior afternoon, Gerald Kogan, co-chair of the Constitution Project's Death Penalty Committee and former Chief Justice of the Florida Supreme Court, [testified](#) before the California Commission on the Fair Administration of Justice on the urgent need for reforms of the state's death penalty. The [editorial](#) cites the Constitution Project's recommendations for reform, laid out in "[Mandatory Justice: The Death Penalty Revisited](#)." Arguing that our Death Penalty Committee "provides a useful framework," the editorial specifically calls for a restriction on the kind of offenses eligible for the death penalty, oversight to ensure uniformity in prosecutions and sentences, and a more expedient appeals process.

With a Little Help from Our Friends

Do We Need a New National Security Court?

On February 1, 2008, the American University Washington College of Law Program on Law and Government and the Brookings Institute will co-sponsor a conference on "[Terrorists and Detainees: Do We Need a New National Security Court?](#)" Judge Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia and member of the Constitution Project's Liberty and Security Committee and our Coalition to Defend Checks and Balances, will join a panel on "War or Crime? The Legal Framework for Detaining and Prosecuting Enemy Combatants." David Cole, a professor at Georgetown University Law Center and co-chair of our Liberty and Security Committee, will speak on "A National Security Court for Detention Decisions." Admission is free but registration is required.

The Supreme Court & Challenges to Execution by Lethal Injection

On January 23, 2008, from 9 a.m.-2 p.m., the Columbia University Center for Bioethics will hold a "[Symposium on the Supreme Court & the Legal, Medical & Ethical Challenges to Execution by Lethal Injection](#)" in the Law Library Faculty Room at Columbia University. [Registration](#) for the symposium is free, but seating is limited.

Verbatim

"In this case, ... the government asks us to stretch Exemption 5 beyond its breaking point, to cover *everyone* an agency asks for advice. The government's argument flatly ignores the statute's text, as well as our obligation to construe FOIA exemptions narrowly." - Judge David S. Tatel, in his dissent in *NIMJ v. DOD*.

Sincerely,


Virginia E. Sloan