

The Constitution Project



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From the President's Desk

It is often said in government that personnel is policy. That's especially true of the Constitution Project. In fact, while we work actively in support of broad constitutional principles - protecting individual liberty, due process and equal justice, promoting the rule of law, and maintaining the separation of powers - the specific policies we advocate within these contours are developed by the former government officials, professors, and other policy experts who serve on our various committees.

Their voluntary and generous service is what makes us run, and we are very grateful for their continued involvement in and commitment to the important policy debates of our time. In the past couple of months alone, we have been honored to welcome the following distinguished individuals to our Liberty and Security Committee:

- **David Miller**, a former Special Assistant to President George H.W. Bush for National Security Affairs, and Ambassador to Tanzania and then Zimbabwe during the

Reagan administration;

- **Nancy Soderberg**, President of Connect US Fund and Distinguished Visiting Scholar at the University of North Florida and former Alternative Representative to the UN with rank of Ambassador and Deputy Assistant to President Clinton for National Security Affairs;
- **Philip Giraldi**, a contributing editor for *The American Conservative Magazine*, antiwar.com, and *Campaign for Liberty*; a Fellow with the American Conservative Defense Alliance; and a former operations officer specializing in counter-terrorism, Central Intelligence Agency, 1975-1992; United States Army Intelligence; and
- **Mary McCarthy**, an attorney and former Associate Deputy Inspector General, Investigations CIA 2004-2006; Visiting Fellow, Center for Strategic and International Studies, 2002-2004; Senior Policy Planner, Directorate of Science and Technology, CIA 2001-2002; Senior Director, Special Assistant to the President, National Security Council, 1998-2001; Director of Intelligence Programs, National Security Council 1996-1998; National Intelligence Officer of Warning, (Deputy 1991-1994), 1994-1996.

Our Criminal Justice Program contains equally expert and prominent individuals, who we will highlight in future newsletters. In the meantime, we are very happy to welcome these new all-stars to our team. The quality of our reports, our arguments, and our contributions to the public debate are all vastly improved by the deep bench of experts who participate in the Constitution Project's work.

Upcoming Events

- On Saturday, August 7th, **Constitution Project President Virginia Sloan** will moderate "A Conversation with Larry Tribe" as part of the American Bar Association's (ABA) Annual Meeting in San Francisco. This will be a one-on-one interview with Professor Tribe, who is the senior counselor for Access to Justice at the U.S. Department of Justice. Access to Justice is a recently formed office tasked with, among other things, providing advice, views, alternatives and recommendations regarding the Department's commitment to improving indigent defense and enhancing the delivery of legal

services to the poor and middle class. The program will provide Ms. Sloan and attendees an opportunity to hear about the office's work and ask Professor Tribe about the specific measures his office and the Department are undertaking to address the many access to justice that our country faces. For those of you attending the ABA annual meeting, the conversation will be held from 2:00 pm - 3:30 pm at the Moscone Center West, room 3020, Third Floor.

- On Thursday, June 29th, Rhoda Billings, co-chair of the Constitution Project's National Right to Counsel Committee, will discuss the findings and recommendations in the Committee's report, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, at an event in Raleigh, NC sponsored by the North Carolina Lawyer Chapter of the American Constitution Society. Justice Billings, the former Chief Justice of the North Carolina Supreme Court and Professor Emeritus at Wake Forest University School of Law, will be joined by Thomas K. Maher, Executive Director of the Office of Indigent Defense Services and Senior Lecturing Professor at Duke University School of Law, in a presentation on the systematic neglect of the constitutional right to counsel in criminal proceedings. For more information about this event, contact Mary Schmid, mschmid@constitutionproject.org.
- In 2004, under the leadership of the late Senator Robert Byrd (D-WV), Congress passed a law declaring September 17th Constitution Day. As in years past, the Constitution Project will [co-host an event this September 17th](#) 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. The event will be held from 9:30 am - 1:00 pm at Georgetown University Law Center in Washington, DC. Following the presentation of our annual Constitutional Commentary award (the awardee will be announced soon!), a panel discussion entitled "The Right to a Fair Trial: Should the Rules in Terrorism Cases Be Different from those in Other Criminal Prosecutions?" will take place. Confirmed panel members include Brad Wiegmann, Principal Deputy Assistant Attorney General in the National Security Division of the

Department of Justice; Denny LeBoeuf, Staff Attorney for the ACLU National Security Project and Director of the ACLU's John Adams Project; 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. The panel promises to present a range of views on whether and to what extent terrorism suspects should be subject to different or modified rules for their criminal trials, and the extent to which relaxed or different rules for terrorism suspects may ultimately "seep" into the traditional criminal justice system. [More details](#) about the event are coming soon in this newsletter and on our website, www.constitutionproject.org.

CP News

Federal Court Handling of Detainee *Habeas* Cases Focus of Hill Briefing

On Monday, the Constitution Project and Human Rights First co-hosted a briefing on Capitol Hill addressing the record of federal courts in handling Guantánamo detainee *habeas* cases. The briefing follows last month's release of [Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases](#), a report from sixteen former federal judges examining the Guantánamo *habeas* litigation, which concluded that judges are playing their proper and historic judicial roles in deciding these cases. The message of both the report and the congressional staff briefing is that it would be unnecessary and unwise for Congress to enact new legislation to govern these Guantánamo *habeas* cases.

A capacity crowd at the Capitol Visitor Center heard from Constitution Project Board Member Timothy Lewis, former federal prosecutor, Federal District Court Judge, and former Judge to the U.S. Court of Appeals for the Third Circuit, and Douglas K. Spaulding, counsel to several Guantánamo detainees, who provided their expertise regarding the federal courts' proper handling of detainee *habeas* litigation. **Constitution Project Senior Policy Counsel Sharon Bradford Franklin** moderated the event, which was videotaped by C-SPAN and can be viewed [here](#).

Also on Monday, the *National Law Journal* published an [opinion](#)

[piece](#) by former judges John Gibbons and William S. Sessions, two of the judges endorsing the *Habeas Works* report. In the op-ed describing this report, the judges wrote, "we demonstrate that federal judges are fully capable of handling *habeas* cases and are carrying out their appropriate historic constitutional role in doing so. Deciding *habeas* petitions has been within the regular and proper role of courts dating back to the signing of the Magna Carta." Judge Sessions, a former Chief Judge of the Western District of Texas as well as Director of the FBI, is a member of the Constitution Project's Board of Directors and Liberty and Security Committee, while Judge Gibbons, a former Chief of the U.S. Court of Appeals for the Third Circuit, serves on our Death Penalty Committee.

Constitution Project Organizes Supreme Court Term Review on Capitol Hill

The Constitution Project helped organize a briefing held on July 21st on some of the most important criminal law cases decided in the 2009-2010 Supreme Court term. The event, which was moderated by **Project President Virginia Sloan**, was hosted by Representatives Jerrold Nadler (D-NY), Chair, House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties and Robert C. "Bobby" Scott (D-VA), Chair, House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Panelists were the Constitution Project's Supreme Court Fellow, Professor Steve Vladeck of American University's Washington College of Law and Bryan Stevenson, Executive Director, Equal Justice Initiative of Alabama, Professor of Law, New York University, and Constitution Project Right to Counsel Committee member.

The focus of the panel discussion was major criminal justice cases from the recently concluded Supreme Court term, including *Graham v. Florida*, which held life-without-parole sentences for juvenile offenders to be unconstitutional at least in non-homicide cases; *Holder v. Humanitarian Law Project*, the decision upholding the constitutionality of the material support statute; and *Holland v. Florida*, and *Wood v. Allen*, two cases that addressed the Anti-Terrorism and Effective Death Penalty Act and access to federal courts through *habeas corpus* review for individuals convicted in state criminal courts. The panelists also discussed the "honest services" issue raised in an appeal by Jeffrey Skilling, Enron's former CEO.

Constitution Project Urges Senate Armed Services Leaders to

Reject Investigation of Guantánamo Detainee Attorneys

We recently helped facilitate a letter to the Senate Armed Services Committee Chairman Carl Levin (D-Mich.) and Ranking Member John McCain (R-Ariz.) from more than a dozen teachers of professional responsibility and others who specialize in prosecuting or defending lawyers subject to disciplinary charges, malpractice claims or other matters implicating professional standards. The signatories expressed strong concerns about a proposal in the House version of the Department of Defense (DoD) reauthorization bill that would require the department's Inspector General to conduct an investigation of the conduct of lawyers who have defended detainees at Guantánamo Bay, Cuba, to determine whether their representation of their clients has "interfered" with operations of the DoD, violated "any policy" of the DoD, violated any law of the United States or otherwise "generated any material risk" to any member of the Armed Services. The letter urges the Chairman Levin and Senator McCain to oppose adding any comparable provision to the Senate version of the authorization bill or to any conference bill.

The letter's authors argue that the House DoD provision violates not only core principles of lawyering embodied in the rules of professional conduct, but also the Due Process Clause of the Constitution of the United States. They said that the proposal would render it impossible for lawyers to fulfill the requirement that they maintain professional independence; create an impossible, almost certainly unwaivable, conflict of interest (because DoD lawyers would be in the position of investigating their adversaries); and violate the principles of due process and fairness because the investigation is mandated without cause and is not conducted by neutral third parties. The letter, a copy of which can be found [here](#), was sent on July 13th.

Former prosecutor and retired judge Bruce Einhorn wrote [an op-ed](#) about the House provision that was posted July 6th on the legal news site, JURIST. He wrote, "Our Constitutional system of justice recognizes that defense counsel in criminal cases should never be subject to government diktat on how they should advise their clients or conduct themselves as zealous advocates in opposition to the state's role as prosecutor. That is why the American Bar Association, the American College of Trial Lawyers, and dozens of former judges and prosecutors, including officials from the Ronald Reagan and George H.W. Bush Administrations, organized by the non-partisan Constitution Project have all publicly opposed" the House-passed proposal.

Constitution Project Files Comments Urging Federal Government to End NSEERS Program

The Project's Liberty and Security Committee's first report on immigration issues was our 2008 report on [*The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations*](#). One of the programs criticized in that report is the National Security Entry-Exit Registration system (NSEERS) program, which requires noncitizens from 24 predominantly Arab and Muslim countries to register with the federal government. The U.S. Immigration and Customs Enforcement published a Notice in the Federal Register seeking comments on the NSEERS program, and on July 6, 2010, we filed comments in response to this notice. Our comments pointed out that "NSEERS and similar programs which single-out individuals based solely on their citizenship or nationality . . . unnecessarily infringe on the civil liberties of innocent people [and] are also ineffective counter-terrorism tools." We urged the government to end this program. A copy of our submitted comments can be found [here](#).

News in Brief

- "Budget Cuts Put State Public Defense Systems Under Stress" is the title of an article in the July/August edition of [Capitol Ideas](#), a magazine published by the Council of State Governments. After noting that states that fail to adequately fund or administer their public defense systems could face consequences, the author quoted **Constitution Project Senior Counsel Mary Schmid**: "When state legislatures refuse to provide adequate funding to indigent defense systems, as they are constitutionally obligated to do, states face the real possibility of litigation . . . , as we're seeing now in states like Michigan, New York and Florida."
- We were recently excited to report that the Michigan Supreme Court had unanimously affirmed the Michigan Court of Appeals' ruling in *Duncan v. Michigan*, rejecting the State of Michigan's request to dismiss a lawsuit brought by eight indigent defendants on behalf of themselves and a putative class of indigent defendants in three Michigan counties. Earlier this year, the Constitution Project had joined the National

Association of Criminal Defense Lawyers, Brennan Center for Justice, and NAACP Legal Defense & Educational Fund, in filing an [amicus brief](#) in the case that urged the court to decide that those bringing the case had stated a sufficient claim for relief. Unfortunately, last Friday, the Michigan Supreme Court inexplicably reversed itself in a 4-3 decision and granted relief to the State, ruling that plaintiffs' claims are not justiciable. As the three dissenting justices noted, the order "slams the courthouse door in plaintiffs' face for no good reason."

- "Give us your tired, your poor, your huddled masses..." That's right: The Constitution Project is looking for interns! Specifically, we are now accepting internship applications for the fall semester, which will begin late August/early September. The Project offers internships to undergraduate students, recent graduates transitioning to graduate programs, and law students for our public policy, communications, and public interest law internship positions. Full- and part-time hours are available. Please click here to learn more about these exciting opportunities to [join our dedicated team](#).

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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