

# The Constitution Project



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## From the President's Desk

Can you recall a time in recent history when constitutional interpretation was at the heart of so many political debates of the day? Open the paper (or web browser) and just look at the top stories and the constitutional disputes behind them: Do people of the same gender have a constitutional right to marry? What part of our government has the authority to enforce the nation's civil immigration laws? Does the Constitution guarantee citizenship to any person born in the United States? If our budget should be balanced, how should we make sure that it is?

Many of these debates, and many before them, have taken the form of proposals to amend the U.S. Constitution. While the Constitution Project doesn't take a position on the merits of any constitutional amendment proposal, we believe that the dialogue these debates engender provides us with an invaluable teaching opportunity. Consideration of changes to our founding charter should be driven, not by dueling sound bites, but by review of thoughtful guidelines, like those crafted by the Constitution Project's very first bipartisan committee of experts. [Great and Extraordinary Occasions:](#)

[Developing Guidelines for Constitutional Change](#) was developed over a decade ago by the nation's most respected legal scholars and practitioners. As journalists cover these debates and as policymakers discuss them, I hope that these unique guidelines will help to frame the dialogue. Recently I conducted background briefings with reporters from the *Associated Press*, *Politico*, and the *Wall Street Journal* to explain that the framers of our Constitution created an amendment process that was deliberately quite difficult, and that they expected those entrusted with amending our founding document to exercise restraint, using the amendment process only on the "great and extraordinary occasions" described by James Madison.

## Upcoming Event

We are delighted to announce that we 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. 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."

I would like to take this opportunity to thank Selection Committee Chair Rosemary Freeman (Publicworks and member of CP's Policy Advisory Committee), Judge John Coughenour (District Judge of the U.S. District Court for the Western District of Washington), Dan Fromkin (*Huffington Post* Senior Washington Correspondent), Eileen O'Connor (Counsel at McDermott, Will & Emory) and Ben Shute (Rockefeller Brothers Fund Program Director) for their generosity in dedicating so much of their time to this important process.

We will also 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.

Panelists:

- **David Keene**, Chair, American Conservative Union, and Co-Chair, the Constitution Project's Liberty and Security Committee;
- **Denny LeBoeuf**, Staff Attorney, ACLU National Security Project and Director, ACLU's John Adams Project;
- **Brad Wiegmann**, Principal Deputy Assistant Attorney General, National Security Division of the Department of Justice; and
- **David Cole** (moderator), Professor, Georgetown University Law Center, and Co-Chair, the Constitution Project's Liberty and Security Committee.

## CP News

### **Constitution Project Organizes Letter in Support of Clemency Petition for Ohio Death Row Inmate**

The Constitution Project recently organized [a letter](#) to Ohio Governor Ted Strickland from 31 former judges and prosecutors that urges the governor to grant clemency to death row inmate Kevin Keith. Mr. Keith is scheduled to be executed on September 15th.

The August 9th letter from the former judges and prosecutors reads, in part:

"While we take no opinion on the ultimate merits of his claims or on whether Mr. Keith is actually innocent, we are gravely concerned that Mr. Keith will be executed despite the failure of any court of law to cumulatively consider exculpatory evidence that was suppressed during Mr. Keith's trial. Since the trial, attorneys for Mr. Keith have discovered numerous pieces of new evidence, including new evidence that shows that the eyewitness identification used to convict Mr. Keith was faulty and improperly influenced; new evidence that an alternative suspect made a statement that he was paid to commit the crime for which Mr. Keith now stands to be executed; and new evidence that contradicts the forensic evidence introduced by the State at trial. Mr. Keith also has an alibi for the time of the crime that is supported by four witnesses."

A *New York Times* [story](#) referencing the Constitution Project-organized letter noted that Mr. Keith has lost both state and federal appeals, including an effort to get his case heard by the U.S.

Supreme Court. The story also quotes Governor Strickland's spokeswoman as saying that "the governor finds some of the circumstances in Mr. Keith's case troubling."

### **Constitution Project President Ginny Sloan Interviews DOJ Access to Justice Senior Counselor Laurence Tribe**

On August 7th, **Constitution Project President Virginia Sloan** interviewed Laurence Tribe, Senior Counselor to the Justice Department's Access to Justice Initiative, as part of the American Bar Association's Annual Meeting in San Francisco. The [video-taped interview](#) covered a wide variety of topics, including the progress being made by the Initiative, a recently formed office tasked with strengthening indigent defense resources and enhancing the delivery of legal services to the poor and middle class.

### **Constitution Project Files [Amicus Brief](#) in U.S. Supreme Court in Case of Death Row Inmate Whose Claims Were Barred Due to Mailroom Mistake**

Last week, the Constitution Project filed an *amicus* brief in the United States Supreme Court in support of death row inmate Cory Maples, whose *habeas corpus* petition was not filed on time because of a mistake made, in part, by the mailroom at his *pro bono* lawyers' former law firm. The two attorneys who had been representing the inmate had left the firm. As a result, when a court in Alabama sent to the firm copies of a ruling in the case that denied relief to Maples and thus started the clock for filing his federal *habeas* petition, the firm's mailroom clerk returned the unopened letters to the court, noting simply that the attorneys were no longer with the firm. The court clerk who received the mailroom's reply did nothing to ensure that the lawyers were notified and the time for Maples to file his petition expired. The federal district court in Atlanta refused to waive the deadline, and the Eleventh Circuit affirmed. *The New York Times* reported on the development in a recent [story](#).

Our brief stated what we believe to be an obvious proposition: "A man should not be executed because, through no fault of his own, he never received notice of a deadline-triggering court order." A copy of the full brief can be found [here](#). We are grateful to Jonathan S. Franklin and Mark Emery of the law firm Fulbright & Jaworski for assisting the Project in drafting and filing its brief.

- On August 11th, *Politico* [reported](#) that South Carolina Senator Lindsey Graham introduced legislation that "would set standards and rules for legal challenges brought by prisoners at Guantánamo as well as other suspected enemy fighters whom U.S. forces may capture in the future." Senator Graham's bill, named the Terrorist Detention Review Reform Act, would, "for the first time, have Congress define a profile for an enemy combatant subject to detention, determine how much evidence the government needs to keep a prisoner locked up and authorize courts hearing such cases to consider involuntary statements made by detainees on the battlefield." The Constitution Project recently joined with Human Rights First to issue a report from sixteen former federal judges, examining the Guantánamo *habeas* litigation and concluding that judges are playing their proper and historic judicial roles in deciding these cases. We released [Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases](#) on June 10th. In it, the former federal judges conclude that attacks on the judiciary's ability to review *habeas* cases are unfounded, as are calls for congressional intervention: "Congress could, within limits, write a new detention standard for the courts to apply. Congress could, within limits, write different procedural rules to govern this litigation. But such a course is at once unwise and unnecessary: unwise because it would bring us back to square one just when the courts are finally beginning to resolve these cases; and unnecessary because the federal bench, as it has done for centuries, is steadily developing a coherent and rational jurisprudence."
- Bob Barr, former Republican Congressman from Georgia, authored an [op-ed](#) published in the *Fulton County Daily Report* last week. A member of the Constitution Project's Death Penalty [Committee](#), Barr criticized fellow Republicans for attacking a candidate for Georgia attorney general based on his failure to support legislation that would have allowed a judge to override a jury's recommendation that a defendant not receive the death penalty. He writes: "Many lawyers—including me and state Sen. Preston Smith, who is one of two Republican attorney general candidates in the runoff—support the death penalty, but believe also that its use must be carefully considered. We therefore have opposed efforts to cavalierly loosen the circumstances under which this ultimate penalty can

be imposed. We do this not because we are "soft" on crime, but because we have high regard for the fairness of the process and understand the finality of the death sentence itself."

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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