

APRIL 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

The more things change, the more they stay the same. In 2005, TCP's bipartisan War Powers Committee published [Deciding to Use Force Abroad: War Powers in a System of Check and Balances](#). In its preface, the Committee—composed of some of the nation's leading war powers scholars and policy experts—observed, “On nearly every occasion in which the U.S. military has been sent into combat over the past few decades, including our recent engagements in Afghanistan and Iraq, disputes about the proper division of war powers—about the roles of each branch in making the decision for war—have come to the forefront.” Fast forward to today, and we are witnessing another national debate over the constitutionality of U.S. military action—this time, in Libya.

As the debate over President Obama's decision to take military action in Libya without authorization from Congress continues to rage, TCP has again, stepped forward to provide the media, lawmakers and the public with much needed context on this issue. We quickly mobilized TCP War Powers Committee Co-Chairs, former Members of Congress Mickey Edwards (R-OK) and David Skaggs (D-CO), as well as renowned war powers expert and TCP Scholar in Residence Louis Fisher to speak with reporters. In stories in the [Wall Street Journal](#), [ABC](#), [NPR](#) and the [Seattle Times](#), they stated that taking military action without congressional approval is unconstitutional, an assertion reiterated by TCP Senior Policy Counsel Sharon Bradford Franklin in a [Los Angeles Times story](#).

There is no more important decision a nation can make than the one to use military action. This is why the Constitution requires that the nation's *elected representatives* make a decision of this magnitude. When the Executive Branch acts without the approval of Congress, the people's voices are ignored and we trample on the Constitution. [Deciding to Use Force Abroad: War Powers in a System of Check and Balances](#) is as current as ever, and we will continue to use it to educate the public and to call on Congress to reassert its authority on this most important of issues.

Last Call for Our Constitutional Champion Award Gala Reception

The Constitution Project's 4th annual *Constitutional Champion Award* gala reception will take place on April 14th, less than two weeks away. This year, we are so pleased to honor Judge Patricia Wald for her career-long work to safeguard our Constitution and for her invaluable service to our nation.

Our unique celebration will feature a gala reception showcasing local, organic and sustainable fare from the region. The event will be held on the beautiful rooftop of the Jones Day law offices, with an exceptional view of the U.S. Capitol. If you haven't [registered](#) yet, please do so now.

Significant Developments Involving Death Penalty

The month of March was filled with important developments in area of capital punishment. First, on March 9th, Illinois Governor Pat Quinn signed a bill to abolish the death penalty in the state. TCP President Ginny Sloan [responded](#) to the governor's action by noting that it raised the stakes for other states wrestling with broken death penalty systems.

Legislators in Texas appear to be asking the same questions. On March 29th, former Texas Governor Mark White, a co-chair of TCP's Death Penalty Committee, sent a letter to that state's lawmakers who are considering a bill to impose a two-year moratorium on executions while a new commission considers whether more safeguards are needed to promote accuracy and fairness in the death penalty's administration. Governor White wrote, “One need not support the abolition of the death penalty to support the establishment of this Commission and the examination of such safeguards. Accuracy and fairness in the justice system are ideals upon which we all can agree, regardless of our diverging viewpoints on the death penalty itself.” His letter was reported in the [Fort Worth Star-Telegram](#) and [Dallas Morning News](#) blog.

Alleged 9-11 Mastermind Case to be Heard by Military Commission

On April 4, 2011, the Obama administration announced that it would try Khalid Sheikh Mohammed (aka KSM)—the self-described mastermind of the 9/11 attacks—before a military commission. In an interview with [CNN](#), TCP Policy Counsel Mason Clutter said, “Our civilian justice system has a proven capacity to handle complex terrorism cases.” In a public [statement](#), TCP

urged the administration to work with Congress to build consensus for the use of civilian courts to try terrorism cases noting, “removing the option of using our traditional criminal justice system from our national security toolbox denies us one of our most effective counterterrorism tools.

The announcement of KSM's military trial came less than a month after President Obama signed an Executive Order to resume such trials for Guantanamo detainees. In a JURIST [commentary](#), TCP Liberty and Security Committee member Lt. Col. Stephen Abraham (US Army, ret.) criticized the President's March 7th Order for not addressing “the fundamental question of whether a person held at Guantanamo has been lawfully detained.” TCP Policy Counsel Mason Clutter told the [Los Angeles Times](#) that, by barring the transfer of any detainees from Guantanamo, Congress bears some responsibility for the president's unsuccessful effort to close the detention center and try detainees in civilian courts.

On March 17th, the House Armed Services Committee held a [hearing](#) on the president's Executive Order. At the hearing, two officials from Department of Defense testified that the Obama administration had not foreclosed using civilian trials for terror suspects and remains committed to closing Guantanamo. Later that week, John Brennan, the chief counterterrorism advisor to President Obama, forcefully supported the use of our traditional federal criminal courts to try terrorism suspects during a [speech](#) at the Brennan Center in New York City.

Supreme Court Considers Immunity and Detention Authority

On March 2nd, the Supreme Court heard oral argument in *Ashcroft v. al-Kidd*. The case is brought by Mr. al-Kidd, a U.S. citizen who was preventively detained under the material witness statute in 2003, and the question before the Court is whether former Attorney General Ashcroft has either absolute or qualified immunity. On January 28, 2011, TCP filed an [amicus brief](#) in the case. TCP's brief does not take a position on the ultimate question of immunity, but supports Mr. al-Kidd by explaining the limited scope of the Executive's detention authority. TCP's Liberty and Security Committee had released a [Report on Post-9/11 Detentions](#) condemning this use of the material witness statute in 2004, and in its 2008 report, [A Critique of National Security Courts](#), the Committee had explained that preventive detention is only constitutionally permissible in very narrow circumstances.

Event to Explore New Territory for the Constitutional Right to Counsel

Several states have created *de facto* “debtors’ prisons” in which individuals too poor to pay their fines or other court-ordered obligations are incarcerated for failure to pay, without being afforded the opportunity to be represented by counsel. Whether there is a constitutional right to counsel in such civil cases is at issue in *Turner v. Rogers*, currently pending before the U.S. Supreme Court. The Court heard oral argument in the case on March 23rd. In *Turner*, the South Carolina Supreme Court held that an indigent defendant in a civil contempt proceeding had no constitutional right to counsel—despite his being sent to jail for one year—on the basis that the proceeding was not criminal but instead involved enforcement of child support obligations. TCP filed an [amicus brief](#) in the U.S. Supreme Court at the request of Mr. Turner's lawyers based on a new recommendation of its National Right to Counsel Committee that states provide lawyers in any proceeding—whether civil or criminal—if the defendant is at risk of incarceration.

On April 25th, we invite you to join TCP and the Washington Council of Lawyers for a discussion about how the constitutional guarantee of counsel applies in both criminal and civil cases, as well as the implications that *Turner* could have on the expansion of this right. The event will be held from 12:00-2:00 p.m. at the law offices of DLA Piper in Washington, DC, located at 500 Eighth Street, NW. Panelists are Catherine Carroll, Partner at Wilmer Hale and Pro Bono Counsel for Michael Turner; Jo-Ann Wallace, President of the National Legal Aid & Defender Association; Debra Gardner, Legal Director of the Public Justice Center and Coordinator of the National Coalition for a Civil Right to Counsel; and moderator Mary Schmid Mergler, Senior Counsel to the Constitution Project's Criminal Justice

Accountability Groups Win Important Case at Court of Appeals

On March 21st, the U.S. Court of Appeals for the Second Circuit ruled that plaintiffs including lawyers for Amnesty International have standing to bring a constitutional challenge to a government surveillance program. In reversing the district court's decision, the Court of Appeals ruling is a victory for checks and balances of governmental authority.

TCP joined a handful of non-governmental organizations in an [amicus brief](#) in the case (*Amnesty International et al. v. McConnell / Clapper*). The underlying suit is a constitutional challenge to recent amendments to the Foreign Intelligence Surveillance Act, or FISA. Specifically, the FISA Amendments Act of 2008 legalized a modified version of the National Security Agency's (NSA) warrantless wiretapping program. While our *amicus* brief did not take a position on the merits of the constitutional challenge, we urged the court to take a broad view of standing in order to preserve checks and balances, particularly where, as

Program. Drinks and dessert will be provided; bring your own lunch if desired. To RSVP, please email rsvp@constitutionproject.org.

in this case, the legislation itself limited judicial review.

Hill briefing on Need to Update Electronic Privacy Laws

On March 8th, several conservative groups including TechFreedom, CEI and ATR, sponsored a briefing for Hill staff on the need to reform the Electronic Communications Privacy Act (ECPA). TCP has been working on this goal as part of the Digital Due Process coalition of over 30 technology companies and privacy advocacy organizations. ECPA needs to be updated to ensure that traditional Fourth Amendment protections continue to apply to electronic communications in the digital age. TCP Board Member and Liberty and Security Committee Member Mickey Edwards kicked off the briefing as the lead speaker. A former Member of Congress and member of the Republican leadership, he urged staffers to explain to their bosses that privacy as against the government is a conservative value and ECPA is in urgent need of reform.

Experts Examine Accountability in Protecting Human Rights

On March 15th, Georgetown Law Center's Human Rights Institute and Center on National Security and the Law joined Human Rights First in hosting the Samuel Dash Conference on Human Rights. The title of this year's event was "*The Role of Accountability in Protecting Human Rights and National Security*" Among the panelists in the day-long event was TCP's Scholar-in Residence and noted constitutional scholar, Louis Fisher, who participated in the panel entitled "Addressing the State Secrets Privilege."

New Interview Focuses on Mass Incarceration in U.S.

Every month we showcase a videotaped [interview](#) on our Web site with a national leader on criminal justice or rule of law issues. This month, Judge Patricia Wald, who will receive TCP's *Constitutional Champion Award* on April 14, shares her thoughts on the causes of America's overincarceration problem. View previous [interviews](#) with TCP Board chair Stephen Hanlon, TCP Board Members Judge William S. Sessions, Mickey Edwards, and Mariano-Florentino Cuellar, and FAMM president Julie Stewart.

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