

MAY 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

Like all Americans, I was gratified to learn the news late Sunday evening that Osama bin Laden had finally been brought to justice. I hope that this event will facilitate the healing process for the thousands of our citizens who were directly affected by the unspeakable tragedies perpetrated by bin Laden, including those of September 11, 2001, and will help the country as a whole move on from these terrible events.

But by Monday, our time of national unity was over, as a drumbeat of speculation began about whether torture may have played a role in the capture and killing of bin Laden. In the days that followed, some pundits and advocacy groups have ratcheted up their rush to judgment—not because they possess the facts—but because they appear eager to advance a particular political agenda; namely that "enhanced interrogation," "harsh interrogation techniques," or "torture" are effective. And some pundits have simply assumed—without the full story—that bin Laden's death demonstrated the effectiveness of these techniques. In a [statement](#) released this week, I noted that such baseless speculation is as reckless as it is counterproductive.

Since the attacks on 9/11, TCP has raised concerns about allegations over some U.S. counterterrorism practices, including those involving the treatment of detainees at Guantanamo Bay, and called for the government to fully investigate those charges. When it became clear that neither the Obama administration nor Congress would conduct such an investigation, TCP decided to create its own. Late in 2010, we launched our bipartisan Task Force on Detainee Treatment, whose mission is to bring to the American people a comprehensive understanding of what is known, and what may still be unknown about the past and current treatment of detainees under the Obama, Bush and Clinton administrations. The 13-member Task Force, including former intelligence and national security officials, as well as former Members of Congress from Republican and Democratic administrations, judges, doctors and academics has one mandate—to follow the facts.

The debate over America's detainee treatment practices is a vital one. Let's give it the serious and [accurate](#) scrutiny it deserves.

Bin Laden Death Prompts Call for Restoration of Bill of Rights

In the wake of the capture and killing of Osama bin Laden, Bob Barr, a former Member of Congress (R-GA) and a member of TCP's Liberty & Security Committee, called on lawmakers and the president to support a restoration of our rights stripped away in the aftermath of 9/11, and in particular a "repeal of those provisions of the USA PATRIOT Act set to expire at the end of this month." In a [column](#) published by the *Atlanta Constitution Journal*, Barr decried such practices as warrantless wiretapping and secret no-fly lists as violations of the Fourth Amendment.

'Smart on Crime' Hill Briefing to be Held on June 8th

TCP will host a briefing that will highlight cost-effective and evidence-based solutions to the major problems facing the nation's criminal justice system. The briefing follows the launch of the [Smart on Crime](#) Coalition's seminal report recommending improvements across many areas of the criminal justice system. More details about the event, including the renowned experts and practitioners who will serve as panelists, will be available soon.

Judge Patricia Wald honored with 2011 Constitutional Champion Award

On April 14th, TCP honored Judge Patricia McGowan Wald with its 2011 Constitutional Champion Award during a gala reception at the Jones Day law firm in Washington D.C. The program highlighted Judge Wald's decades of public service, including her work on the U.S. Court of Appeals for the District of Columbia Circuit—the first woman ever appointed to that bench—and her service on the International Criminal Tribunal in The Hague. Following TCP

Virginia Sloan and Judge Wald

President Virginia Sloan's opening [remarks](#), one of Judge Wald's former clerks, Stanford Law Professor Lawrence C. Marshall, lauded her as an exceptional mentor and teacher. A commemorative [video](#) featuring Judge Wald's family, friends and colleagues, was also shown. Judge Wald closed the program with an acceptance [speech](#) that was greeted with sustained applause from the audience of nearly 300. Guest and *Huffington Post* reporter Dan Froomkin showcased Judge Wald's remarks in a [piece](#) on NiemanWatchdog.org.

Constitutional Debate over Libya Continues

On April 18th, *Roll Call* published an [op-ed](#) by the co-chairs of TCP's War Powers Committee, former congressmen **Mickey Edwards** (R-OK) and **David Skaggs** (D-CO), about the president's decision to use military force in Libya without prior congressional authorization. The authors dismissed efforts to justify the lack of congressional approval, noting, "As we begin to sort out the implications and consequences — intended and unintended — of our military action in Libya, the nation would still be well-served by the debate that should have happened before the Tomahawk missiles were launched. Congressional leadership should schedule action on a resolution authorizing the United States role in Libya and cause Congress to fulfill, however belatedly, its responsibility under the Constitution."

On May 16th, TCP Scholar in Residence, **Louis Fisher** will also lend his expertise to this debate by participating in a panel discussion at the Woodrow Wilson International Center for Scholars entitled, "Congress, the U.N. and the War Power: From Korea to Libya." Other panelists include former U.S. Secretary of Defense **William S. Cohen**, and Bush Administration Deputy Assistant Attorney General for the Office of Legal Counsel **John Yoo**.

Inaugural TCP Annual Report Published

We have released our first Annual Report—available [online](#). It offers readers—both new friends and those already familiar with our mission and work—an overview of the scholarship, policy reforms, advocacy and public education initiatives that support our criminal justice and rule of law programs. We hope you will take this opportunity to learn more about TCP, let us know how we're doing, and whether you would like to support our work.

Panel Examines Legislative Efforts to Reshape Detainee Policy

On May 3rd, TCP convened an esteemed panel of experts to discuss legislation introduced in Congress that, if enacted, would have enormous implications on U.S. Guantanamo detention policies as well as the nation's trial and detention policies globally. The panelists were: **Stephen Abraham**, Lieutenant Colonel (Ret.), U.S. Army Intelligence Corps (Reserves); **Miriam A. Krinsky**, Assistant U.S. Attorney, Central District of California, 1987-2002; Chief, Criminal Appellate Section, 1992-2002; and **Mary O. McCarthy**, Of Counsel, Law Office of Michael R. McCarthy; Associate Deputy Inspector General, Investigations, Central Intelligence Agency, 2004-2006, and Senior Director, Special Assistant to the President, National Security Council, 1998-2001. Mr. Abraham and Ms. McCarthy serve on TCP's Liberty and Security Committee while Ms. Krinsky is a member of the Criminal Sentencing Committee. **TCP Counsel Mason C. Clutter** served as moderator for the panel. The briefing, which took place on Capitol Hill, also involved an examination of the role of our traditional criminal justice system in trying terrorism suspects as well as the issue of holding detainees indefinitely without charge.

More Robust Measures to Reduce Over-Classification Urged

On April 27th, TCP posted comments on the National Archives' "[Transforming Classification Blog](#)" of the Public Interest Declassification Board (PIDB). The PIDB is soliciting public comments on a series of proposals for reforming the system of classifying national security information to reduce the problem of over-classification. In our comments, TCP applauded several of the PIDB's suggestions, but urged that stronger measures are needed to ensure that the public interest in releasing information be taken into account whenever classification and declassification determinations are made. TCP also recommended that the periods of time for "automatic declassification" should be shortened. TCP's comments were based on our Liberty and Security Committee's 2009 report, [Reining in Excessive Secrecy](#).

Decision to Suspend NSEERS Program Welcomed

Experts Explore New Territory for the Constitutional Right to Counsel

On April 27th, the U.S. Department of Homeland Security's (DHS) announced that it is removing all 25 previously listed countries from the list of countries whose nationals are required to comply with special registration procedures under the National Security Entry-Exit Registration System (NSEERS) program. The effect is to suspend the program, since no one is now required to comply with the registration requirements or with travel limitations that had been imposed by this program. TCP's Liberty and Security Committee had criticized the NSEERS program in its 2008 report on [*The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations*](#), and on July 6, 2010, TCP filed [comments](#) with the U.S. Immigration and Customs Enforcement urging that the program be abolished. TCP's July 2010 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. "

On April 25th, TCP and the Washington Council of Lawyers co-sponsored a discussion about how a pending U.S. Supreme Court decision may modify the contours of the constitutional guarantee of counsel. In *Turner v. Rogers*, 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. After the U.S. Supreme Court granted review, TCP filed an [amicus brief](#) in the Supreme Court, arguing that when loss of liberty is at stake, indigent individuals should be entitled to appointed counsel regardless of whether the proceeding is denominated as "civil" or "criminal." The Supreme Court heard oral argument in the case on March 23rd, and a decision is expected by the end of this term. Participants in our April 25th panel discussion were **Catherine Carroll**, Partner, Wilmer Hale and Pro Bono Counsel for Petitioner Michael Turner; **Jo-Ann Wallace**, President, National Legal Aid & Defender Association; and **Debra Gardner**, Legal Director, Public Justice Center and Coordinator, National Coalition for a Civil Right to Counsel. **TCP Senior Counsel Mary Schmid Mergler** served as moderator.

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