

June 2011

## On My Mind: Monthly Message from TCP President Virginia Sloan

On Friday, May 20th, President Obama wrote to congressional leaders that he did not need congressional authorization for U.S. military action in Libya. His letter suggested that the limited participation of U.S. troops—providing “non-kinetic support to the NATO-led operation”—did not trigger the War Powers Resolution.

We think the president is wrong. Two days before he sent his letter, members of TCP's War Powers Committee sent a [letter](#) to President Obama urging that he immediately seek congressional authorization if he plans to continue America's military operations in Libya. In a [statement](#) released the same day, TCP affirmed that, while “United Nations Security Council and NATO approvals may have significance under international law, they have no bearing on the legality of the use of force under the Constitution of the United States.”

TCP experts have been speaking out on this issue since the Libyan operation began. Most recently, TCP Board Member and War Powers Committee Co-Chair Mickey Edwards told [National Public Radio](#), “If Congress does not approve, it is an unconstitutional reach of power by the president.” On May 16th, TCP Scholar in Residence and War Powers Committee Member Louis Fisher participated 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.” Mr. Fisher was joined on the panel by former CIA Director Porter Goss, former Bush Administration Office of Legal Counsel deputy John Yoo, and *CQ Weekly's* Senior Editor for Defense & Foreign Policy, Jonathan Broder. The panel's moderator, Don Wolfensberger, of The Congress Project, wrote a [summary](#) of the event.

## Searches without Reasonable Suspicion Focus of New Report

On May 18th, TCP's Liberty and Security Committee released a [report](#) on the Department of Homeland Security's policy permitting searches and seizures at the border—without reasonable suspicion—of devices such as laptops and cell phones. The Committee's [statement](#) said, “From October 1, 2008 to June 2, 2010, over 6,500 people, almost half of them U.S. citizens, were subjected to searches of their electronic devices upon crossing the border,” and it urged DHS to end its policy of searching electronic devices without reasonable suspicion of wrongdoing. Former FBI Director William S. Sessions, former head of border security at DHS and former Member of Congress (R-AR) Asa Hutchinson, and Mary McCarthy, a former CIA official, were among the 19 members of TCP's Liberty and Security Committee who developed the report's recommendations.

An *Associated Press* [story](#) highlighted the report's major findings and a *Los Angeles Times* [editorial](#)—also citing the report—called on Congress to pass legislation banning such searches. TCP Senior Counsel Sharon Bradford Franklin will soon meet with DHS officials to discuss the report and its recommendations for DHS policy changes.

## 'Smart on Crime' Briefing to be Held on Capitol Hill

Faced with budget crises and failures in the administration of justice, many states have implemented smart-on-crime policies to protect both public safety and taxpayer dollars. On June 8th, TCP and its allies will bring together a distinguished panel of state practitioners and policy experts to discuss their experiences with smart-on-crime approaches to criminal justice.

Confirmed panelists are: TCP Board Member David Keene, a member of the Right on Crime Coalition and former Chair of the American Conservative Union; Beverly Lake, Former Chief Justice of the North Carolina Supreme Court and founder of the North Carolina Innocence Inquiry Commission; Dr. Anne Morrison Piehl, economist at Rutgers and Princeton Universities and co-author of “Prison State: The Challenge of Mass Incarceration”; and A.T. Wall, Director, Rhode Island Department of Corrections. TCP Government Affairs Counsel Christopher Durocher will moderate. The briefing will be held at noon at the U.S. Capitol Visitor Center Meeting Room South. Lunch will be provided. [RSVP](#) to Adrienne Lee Benson today.

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## Faces of Reform

Suzanne E. Spaulding, Of Counsel at Bingham McCutchen and a TCP Policy Advisor and Liberty & Security member, [discusses](#) her concerns about America's "September 12th" mindset, in which constitutional protections and civil liberties are sometimes sacrificed in the name of national security.

## House Passes Open-Ended War Authorization Without Full Debate and Extends Gtmo Restrictions

On May 26th, the U.S. House of Representatives passed its version of the 2012 National Defense Authorization Act (NDAA). The bill includes harmful provisions that continue to ban traditional federal courts to try the remaining Guantanamo detainees and extend those restrictions to cover all non-citizen terrorism suspects, thereby requiring a military commission trial of all foreign terrorism suspects. The bill also contains a very controversial new provision (section 1034), which "affirms that the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces;" this provision was never the subject of independent hearings or a full public debate.

After the bill's passage, TCP released a [statement](#) expressing disappointment with the inclusion of these controversial provisions. Members of TCP's War Powers Committee had previously sent a [letter](#) to the House calling on Congress to "act to closely examine whether or not Section 1034 is appropriate." In its 2005 report entitled [Deciding to Use Force Abroad: War Powers in a System of Checks and Balances](#), the Committee recommended improvements to war powers decision-making designed to restore the proper roles of all three branches of government.

## Expiring PATRIOT Act Provisions Signed into Law

Despite calls from TCP and a wide coalition of civil liberties advocates to enact critical and urgently needed reforms to the PATRIOT Act, Congress voted last week to reauthorize the Act's three expiring provisions without incorporating any new safeguards. President Obama signed the reauthorization into law on May 27th.

TCP had argued that all three expiring provisions, the "business/library records," "roving wiretaps," and "lone wolf," should be allowed to sunset unless significant reforms were made to protect the rights of Americans. In addition, although it is not one of the expiring provisions of the Act, TCP is concerned about reforming the authority for National Security Letters (NSLs) to limit their scope and the potential for abuse. Several senators have filed amendments designed to incorporate such safeguards. TCP's recommendations were developed by our Liberty and Security Committee and contained in its 2009 report, [Statement on Reforming the Patriot Act](#).

## Detention of Terrorism Suspects: The Material Witness Statute, GTMO, and Future Policy

On May 17th, TCP gathered a distinguished panel of experts to discuss U.S. detention policy for terrorism suspects. Panelists covered a range of detention policies starting with the use of the material witness statute for preventive detention in the aftermath of September 11th — which is the subject of a Supreme Court challenge this term in *Ashcroft v. al-Kidd*. Mr. al-Kidd's counsel, Lee Gelernt of the ACLU, led a discussion of the case while the other panelists—retired federal judge James Robertson; former assistant general counsel of the CIA Suzanne E. Spaulding; American University law professor Steve Vladeck; and Bush's Homeland Security Advisor Kenneth Wainstein—provided a range of perspectives on U.S. detention of terrorism suspects. Judge Robertson and Ms. Spaulding are members of TCP's Liberty and Security Committee and Mr. Vladeck is TCP's Supreme Court Fellow. TCP Senior Counsel Sharon Bradford Franklin moderated the panel.

On May 31st, the Supreme Court decided the *al-Kidd* case,

## TCP Files Brief Arguing for Access to Courts Despite Mailroom Mix-Up

TCP, together with the Cato Institute and with the generous *pro bono* support of TCP *Amicus* Committee Member Jonathan Franklin and his colleagues at Fulbright & Jaworski L.L.P., submitted an *amicus* brief on May 25th in the U.S. Supreme Court case of *Maples v. Thomas*, a case in which a death row inmate was denied *habeas* review in federal court because of a mailroom mix-up. In *Maples*, the Eleventh Circuit held that Alabama death row inmate Cory Maples' federal *habeas* petition was not timely filed, and thus must be denied under the procedural default rules of the Antiterrorism and Effective Death Penalty Act (AEDPA). However, the failure to timely file the petition was not attributable to Maples, who never received notice of a deadline-triggering court order. Rather, his appellate attorneys, who had filed his state *habeas* petition alleging ineffective assistance of counsel at trial, then left their law firm without substituting counsel or leaving a forwarding address. A mailroom returned the order denying the state *habeas* petition to the court clerk unopened, and the court clerk who received the unopened envelope did nothing.

in which TCP had filed an [amicus brief](#). The Court held that former Attorney General Ashcroft is immune from legal challenge because the state of the law when Mr. al-Kidd was detained in 2003 was not “clearly established.” TCP’s brief had addressed the scope of the Executive’s detention authority. Four of the eight justices deciding the case (Justice Kagan was recused) wrote three separate opinions making clear that the Court was leaving that question open, and that the use of the material witness statute for preventive detention raises serious constitutional questions.

Meanwhile, appellate deadlines lapsed.

TCP’s brief argues that there is cause to excuse the procedural default under basic notions of procedural due process and in light of the fact that Maples’ counsel completely abandoned him. Further, if the default is not excused, Maples will be denied his right to meaningful access to the courts. TCP has filed two *amicus* brief in the case previously, both also with the generous assistance of *pro bono* counsel at Fulbright & Jaworski, available [here](#) and [here](#). Former Bush Solicitor General Greg Garre [represents](#) Mr. Maples.

## U.S. Supreme Court Decides One State Secrets Case, Declines Another

On May 23rd, the Supreme Court issued its decision in the consolidated cases *General Dynamics v. United States* and *Boeing v. United States*, cases in which defense contractors challenged the Government’s assertion of the state secrets privilege to block their defense in a contracting dispute. In an [opinion](#) focusing narrowly on the government contracting context, the Court held that when the privilege prevents full litigation of a defense in a contract case, neither party to the contract can benefit. TCP filed an [amicus brief](#) in the case, urging the Court to make clear that the doctrine is an evidentiary privilege and should not permit the Government to completely block litigation of entire cases or defenses. The brief was based on TCP’s Liberty and Security Committee’s 2007 report, [Reforming the State Secrets Privilege](#).

In a [statement](#) released the day of the decision, TCP Senior Counsel Sharon Bradford Franklin said, “Although the Court missed the opportunity to fully revisit and reform the state secrets doctrine, we are pleased that the opinion clearly distinguishes the situation of knowledgeable contractors who negotiate agreements with the Government and must be bound by them, from that of ordinary individuals who allege they were harmed by government misconduct. The Court explicitly stated that the impact of its ruling is limited to ‘contracting parties,’ and again reaffirmed that ‘the state secrets evidentiary privilege is not to be lightly invoked.’”

A week earlier, the Court denied *certiorari* in *Mohamed v. Jeppesen Dataplan*. The U.S. Court of Appeals for the Ninth Circuit had held that the government’s broad assertion of the state secrets privilege requires dismissal of a lawsuit alleging that the five plaintiffs were tortured through the government’s “extraordinary rendition” program. TCP filed an [amicus brief](#) asking the Court to accept review of the case. In a [statement](#), TCP expressed disappointment that the high court refused to accept review to consider the Ninth Circuit’s overly-expansive interpretation of the state secrets privilege. Ms. Franklin was interviewed for a story by [ABC-News](#).

In a related development, a group of over twenty nongovernmental organizations including TCP released a [letter](#) to Attorney General Eric Holder calling for reviews by agency inspectors general of the allegations in cases dismissed under the state secrets privilege.

## Prosecutors Push New Death Sentence for Delma Banks

On March 12, 2003, Delma Banks, Jr. was scheduled to be executed by the State of Texas for a 1980 murder. Just ten minutes before he was to be put to death, the U.S. Supreme Court granted a stay and agreed to hear the case. Eleven months later, the Court voted 7-2 to overturn Banks’ death sentence because of prosecutorial misconduct.

Mr. Banks’ case attracted considerable attention from unusual supporters. TCP coordinated an [amicus brief](#) urging the Court to hear the case from William S. Sessions; TCP Death Penalty Committee member and former FBI Director, former chief judge of the U.S. Court of Appeals for the Third Circuit John Gibbons; Right to Counsel Committee Co-chair Timothy K. Lewis, also a former Third Circuit judge, and Thomas P. Sullivan, then-co-chair of the Illinois Governor’s Commission on Capital Punishment and a former U.S. Attorney in Chicago. The same group filed an [amicus brief](#) on the merits, and when the Supreme Court overturned Mr. Banks’ death sentence, Judge Sessions stated, “This is a victory for justice. No one should be convicted and sentenced to death when there is serious and prejudicial prosecutorial misconduct involving the withholding of crucial evidence that might help clear the defendant.”

Last month, Mr. Banks was back in court as the original prosecutors sought a new trial on whether he should be sent back to

death row. George Kendall of Squire Sanders, who received TCP's *Constitutional Champion* award in 2010, continues to serve as Mr. Banks' attorney.

## **TCP Continues Efforts to Promote Greater Transparency**

On May 26th, TCP's Fried Frank Fellow, Alison Roach, presented TCP's recommendations for reforming overclassification at a meeting of the Public Interest Declassification Board (PIDB). The PIDB is an advisory committee established by Congress to promote public access to a thorough, accurate, and reliable documentary record of significant U.S. national security decisions and activities. TCP's recommendations in this area were first set forth in our 2009 report, [\*Reining in Excessive Secrecy: Recommendations for Reform of the Classification and Controlled Unclassified information Systems\*](#). Based on this report, TCP filed a white paper on the PIDB's "transforming classification" [blog](#).

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