

October 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

There have been several recent and high-profile developments in the administration of the death penalty. The first was the spontaneous ovation at a presidential debate after the mere mention that the State of Texas had executed 234 individuals during Governor Rick Perry's tenure. Governor Perry then defended the integrity of the Texas criminal justice system, unsurprisingly not commenting on the high rate of exonerations in his state. Over the next two weeks, the U.S. Supreme Court took the unusual step of granting stays to two different death row inmates in Texas. One, Duane Buck, had appealed his sentence because a psychologist was permitted at trial to testify that black men were more likely than other races to be repeat offenders after their release from prison. The second was Cleve Foster, marking the third time that the Supreme Court has stayed Foster's execution to review his claims of innocence and poor lawyering at trial.

The biggest story was the execution of Troy Davis. TCP had been involved in the Davis case for several years. Davis was convicted of shooting off-duty police officer Mark MacPhail in 1989, but his conviction was based almost entirely on the testimony of nine eyewitnesses. Seven of them later recanted their statements or changed their stories, and others came forward to identify another person (one of the two remaining eyewitnesses) as the actual murderer. At the urging of TCP and others, the U.S. Supreme Court took the extraordinary step of ordering an innocence hearing, but without establishing the standard the district court should use in reviewing the case. The judge who presided over that hearing used an extraordinarily high standard in ruling last year that Davis had not "clearly established" his innocence at the hearing, even though he remarked that the case against him "may not be ironclad." The Davis case, and so many others, weighed heavily on my mind as I listened to our outstanding Constitutional Commentary award winners [discuss](#) the sad reality of wrongful convictions. (See below for coverage of our Constitution Day event.)

Despite the tragic outcome in the Davis case, I am encouraged by the fact that the case may have raised public awareness of the flaws in our criminal justice system. This was in part due to the fact that so many prominent supporters, among them many TCP Committee members, spoke out publicly for clemency in the case. Numerous media outlets, including [The New York Times](#), [Wall Street Journal](#), and [MSNBC](#), highlighted the calls for clemency from [Bob Barr](#), a TCP Death Penalty Committee member and former Republican congressman and U.S. Attorney from Georgia; [Judge William S. Sessions](#), a TCP board member, former federal judge and director of the FBI; [Larry Thompson](#), former Deputy Attorney General under President George W. Bush and TCP Right to Counsel Committee member; [Justice Norman Fletcher](#), TCP Right to Counsel Committee member and former Chief Justice of the Georgia Supreme Court; [Mark White](#), co-chair of TCP's Death Penalty Committee and former Governor of Texas; [Tim Lewis](#), TCP board member and former federal judge and prosecutor; and [John Whitehead](#), TCP Death Penalty Committee member and head of the Rutherford Institute. TCP Senior Counsel Mary Schmid Mergler was interviewed for stories that appeared in [TIME magazine](#), and the [Los Angeles Times](#).

What's next for capital punishment in the United States? It's anyone's guess, but my hope is that the outpouring of concern over Troy Davis's case means that Americans will rethink our system and its many flaws.

Warrantless Location Tracking Violates Fourth Amendment, Says TCP Report

On September 21st, TCP's Liberty and Security Committee released a comprehensive [policy statement](#) condemning the warrantless use of powerful surveillance technologies, including Global Positioning System (GPS) tracking, by law enforcement officials. Committee members concluded that the prolonged use of electronic tracking technologies without a warrant violates the Fourth Amendment.

Former Members of Congress Asa Hutchinson (R-AR) and Mickey Edwards (R-OK), former U.S. Court of Appeals Judge Patricia Wald, former federal judge and FBI Director William S. Sessions, and David Keene, former Chair of the American Conservative Union, were among the 24 Committee members who joined in the report's call to "carry forward Fourth

Amendment safeguards into the Digital Age." Specifically, the Committee recommended that law enforcement officials should be required to obtain a warrant based upon probable cause before seeking GPS or other electronic location tracking information for a period of more than 24-hours, and to obtain a warrant before installing a tracking device on an individual's property. The Associated Press [covered](#) the report's release in a story that included quotes from Committee members Patricia Wald, David Keene, and Asa Hutchinson.

This November, in [United States v. Jones](#) the U.S. Supreme Court will hear argument on whether the installation of a GPS tracking device on a person's car and the monitoring of the car's location for four weeks, all without a valid warrant, violates the Fourth Amendment. On October 3rd, based upon the Liberty and Security Committee statement, TCP filed an [amicus brief](#) in this case in the U.S. Supreme Court, arguing that the installation and use of the GPS device at issue in *Jones* did violate the Fourth Amendment. We are grateful to Ropes & Gray LLP for their work on the brief. Furthermore, in its September 21st statement, the Liberty and Security Committee urged that if the Supreme Court fails to conclude that a warrant is required for such tracking, Congress should enact legislation establishing these warrant requirements. The statement also calls upon Congress to amend the Electronic Communications Privacy Act to require a warrant based upon probable cause in order to access location information obtained from a mobile communications device such as a cell phone.

High Court Hears Maples Appeal

On October 4, the Supreme Court heard Cory Maples' appeal, which former George W. Bush Solicitor General Gregory Garre, a partner at Latham & Watkins, argued on his behalf. Mr. Maples is on Alabama's death row after the federal courts refused to hear his *habeas corpus* petition because the statute of limitations had passed. Maples was originally represented by lawyers at a major New York law firm, who abandoned him when they left the firm without notifying him or the court. The firm's mailroom returned the lawyers' mail to the Alabama court clerk's office, including notice that his state appeal had been denied, thus beginning the running of the federal statute of limitations. The Alabama clerk's office also did nothing to notify Mr. Maples. Thus, without any knowledge by Mr. Maples, the statute of limitations ran and the federal courts refused to hear his petition. *The Washington Post* published not [one](#) but [two](#) stories that cited TCP's [amicus brief](#) filed on Mr. Maples' behalf. TCP has filed briefs at every step of the appeal with the generous assistance of Jonathan Franklin at Fulbright & Jaworski LLP.

TCP Files *Amicus* Brief in Case Challenging Suspicionless Searches of Electronic Devices at the Border

On September 22nd, TCP filed an [amicus brief](#) in the U.S. Court of Appeals for the Ninth Circuit in the case of *United States v. Cotterman*. This case involves the question of whether border officials may, without probable cause or even reasonable suspicion, search and seize an individual's laptop and hold it for two days while transporting it over 170 miles from the border. TCP's brief, written by the firm of Hogan Lovells LLP, urges the Court of Appeals to rehear the case *en banc* since it raises important issues concerning application of the Fourth Amendment. The brief argues that reasonable suspicion should be required before searches of electronic devices at the border, to ensure that Fourth Amendment safeguards continue to apply in the Digital Age and that the historical "border exception" to the Fourth Amendment continues to be a narrow one. The brief was based on TCP's Liberty and Security Committee's May 2011 report, [Suspicionless Border Searches of Electronic Devices: Legal and Privacy Concerns with The Department of Homeland Security's Policy](#).

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Prevention of Wrongful Convictions is Subject of TCP Constitution Day Event

Since the emergence of DNA testing, 273 individuals have been exonerated after DNA evidence proved their innocence. Countless other innocent individuals remain in jail, convicted of crimes that they did not commit, but in many of those cases, there is no biological evidence to test. On September 15th, TCP, Georgetown University Law Center, and the Mid-Atlantic Innocence Project recognized three authors—Jim Petro, Nancy Petro, and Brandon Garrett—for their significant contributions to the fight to remedy and prevent wrongful convictions and for their

respective books [*False Justice: Eight Myths that Convict the Innocent*](#) and [*Convicting the Innocent: Where Criminal Prosecutions Go Wrong*](#). The authors were presented with TCP's Constitutional Commentary Award and participated in a conversation led by Jeffrey Rosen of *The New Republic* and George Washington University Law School. The highly acclaimed program left many eagerly anticipating next year's event. To see highlights of the event, visit us on [Facebook](#) or view the [video](#) online. We are pleased that the event was webcast around the country to nearly 40 law schools and scores of other individuals have watched it as well.

On September 19th, TCP President Virginia Sloan [spoke](#) at a Constitution Day event at Oklahoma State University. Ms. Sloan spoke about the constitutional and civil liberty challenges the country still faces a decade after 9/11.

Panel Looks at Public Surveillance Systems

On September 19th, TCP Senior Counsel Sharon Bradford Franklin participated in a panel discussion sponsored by the Urban Institute, in connection with the release of their new report, [*Using Public Surveillance Systems for Crime Control and Prevention: A Practical Guide for Law Enforcement and Their Municipal Partners*](#). Ms. Franklin joined Nancy La Vigne, director of the Justice Policy Center at the Urban Institute; Jonathan Lewin, managing deputy director, City of Chicago Office of Emergency Management and Communications; Stephanie Rawlings-Blake, Mayor of Baltimore; and Mike Semel, deputy local editor, news and investigations, *The Washington Post*, on a panel to discuss the increasing use of surveillance cameras by cities looking to reduce crime. Ms. Franklin was quoted in a *Baltimore Sun* [story](#) about the release of the new report. TCP has remained active in helping localities develop constitutionally sound policies since the release of our 2006 report, [*Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties*](#).

TCP Newsmakers in Brief

- The co-chairs of the Task Force on Detainee Treatment, Asa Hutchinson, Eleanor Hill, and James Jones, wrote an [article](#) for an OSF compendium on the tenth anniversary of the 9/11 terrorist attacks. They argued that it is necessary to confront alleged past abuses and produce a comprehensive report "that protects the security, legality, and morality of our nation."
- On September 23rd, *The Houston Chronicle* published [an op-ed](#) by Asa Hutchinson that raises concerns about legislation in Congress to expand the use of indefinite detention for noncitizens who cannot be removed because their home countries will not accept them. Mr. Hutchinson is a member of TCP's Board of Directors and its Liberty and Security Committee. The Committee issued a report, [*Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*](#), in 2009.
- TCP Senior Counsel Sharon Bradford Franklin was quoted in a September 5th *National Law Journal* [article](#) titled, "Legal responses to 9/11 still in flux."
- TCP Government Affairs Counsel Christopher Durocher and Senior Criminal Justice Counsel Mary Schmid Mergler authored an [Issue Brief](#) for the American Constitution Society previewing the cases to be heard by the U.S. Supreme Court this upcoming term that concern the right to counsel.
- On September 30th, TCP President Ginny Sloan was [interviewed](#) by Voice of Russia's Carmen Russell-Sluchansky about the execution of Troy Davis and broader issues surrounding the death penalty.