

November 2011

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

I am delighted to report that The Constitution Project (TCP) was recently recognized as one of the [Top 16 Criminal Justice Nonprofits](#) in the nation. We were chosen for this honor by a panel of experts (including CEOs, legal professionals, and policy analysts) surveyed by Philanthropedia, a rating agency that uses peer review to identify and highlight the work of exceptional nonprofits.

Philanthropedia lauded TCP for “its innovative strategies, its well-respected and hard-working staff, and its ability to influence political leaders.” They noted TCP’s strong advocacy programs, our excellent legal analysis and our nonpartisan, non-ideological approach to criminal justice issues.

TCP is proud to be counted among such an elite group of organizations—all of which we admire, and many with which we work closely—such as the ACLU, The Innocence Project, the Southern Center for Human Rights, and the NAACP. This assessment and recognition of our strengths by independent experts is evidence of TCP’s unique and vital work; we hope you will help us to continue our efforts by [donating now](#).

Want your donation to have a little more impact? The Constitution Project is participating in a year-end contest sponsored by GuideStar, Philanthropedia’s parent organization. The non-profit with the greatest number of contributions made through their website will receive an additional bonus from GuideStar. [By donating \\$15 or more](#), you can help us win \$5,000.

## TCP Hosts an Event Noting 25th Anniversary of ECPA, Urges Lawmakers to Update Privacy Laws

ECPA

On October 27th, TCP hosted a “retro technology fair” and panel discussion on Capitol Hill to commemorate the 25th anniversary of the Electronic Communications Privacy Act (ECPA) and to demonstrate the urgent need to update it. Three members of TCP’s bipartisan Liberty and Security Committee – former Congressman Bob Barr (R-GA), former U.S. District Court Judge James Robertson, and former Legal Advisor in President George W. Bush’s State Department, William H. Taft, IV – joined Gregory Nojeim of the Center for Democracy and Technology for an informative discussion of the [reforms necessary to bring privacy laws into the digital age](#), including safeguards to limit the government’s access to digital information and protections against continuous electronic location tracking. TCP’s Senior Counsel Sharon Bradford Franklin moderated the panel discussion.

The panelists’ presentations reiterated our bipartisan Liberty and Security Committee’s [comprehensive policy statement](#) condemning the warrantless use of powerful surveillance technologies by law enforcement officials. In the report released in September, Committee members concluded that the prolonged use of electronic tracking technologies without a warrant violates the Fourth Amendment. Panelists also explained that a warrant should be required before the government can obtain the content of individuals’ private electronic communications.

The various “high tech” devices from the 1980s on display at the event, including a brick-sized cell phone and enormous “personal” computers, helped to demonstrate just how far technology has advanced since ECPA was originally passed. TCP, as part of the Digital Due Process Coalition, used the occasion to call on Congress to update privacy legislation to keep pace with technology. ECPA, which regulates the standards for government surveillance of electronic communications, has not been comprehensively updated since its enactment in 1986 and in its current form lacks essential legal safeguards, posing a serious threat to Americans’ privacy.

The day before the briefing, *The Hill* [published an op-ed](#) by two additional members of the Liberty and Security Committee, former Congressmen Mickey Edwards (R-OK) and Asa Hutchinson (R-AR). The two explained the need to reform ECPA and pointed out that the “principles for reforming ECPA are conservative ones – they are designed to safeguard fundamental constitutional rights and to provide clarity for businesses like technology companies and Internet service providers.”

## Legislation Threatens to Handicap Law Enforcement in Fight Against Terrorism

Less than two years after his attempt to blow up an airliner flying into Detroit on Christmas Day, 2009, Umar Farouk Abdulmutallab, the so-called “Underwear Bomber,” pleaded guilty to terrorism charges on the second day of his federal criminal trial. TCP Liberty and Security Committee member, and former chief of staff to Secretary of State Colin Powell, Col. Lawrence Wilkerson (U.S. Army Ret.) noted in [an op-ed](#) in the *Detroit Free Press* that the successful Abdulmutallab prosecution provides a strong reason to oppose legislation, currently pending in the U.S. Senate, limiting the role of traditional law enforcement in the battle against terrorism.

The Senate Armed Services Committee’s version of the 2012 National Defense Authorization Act (NDAA) includes a provision that requires any person who is determined to be a member of al-Qaida and has participated in planning a plot to attack the United States to be turned over to military custody. This provision would force the FBI and any other federal or state law enforcement officers to halt any investigation and interrogation of terrorism suspects in their custody, regardless of how fruitful those inquiries might be. Arguably, the bill would allow for the unprecedented, and indefinite, military detention of any civilian foreign national accused of terrorism, could trigger increased use of U.S. military force against civilians around the world, and might be construed to permit military investigation and detention of U.S. citizens on American soil.

Also speaking out in opposition to over-militarizing the arrest and prosecution of terrorism suspects were TCP Board member and former director of the FBI, Judge William S. Sessions; former chief judge of the U.S. Court of Appeals for the District of Columbia and former White House Counsel to President Clinton, Abner Mikva; and former chief judge of the U.S. Circuit Court of Appeals for the Third Circuit, John J. Gibbons. The three distinguished experts wrote an op-ed that was published on [October 7th in the Chicago Tribune](#), urging the White House and Congress to work together to revise the harmful provisions of the NDAA. As former federal judges, all three have worked shoulder-to-shoulder with the men and women of the criminal justice system and believe in their abilities to effectively protect the nation from terrorism.

## Don't Abandon U.S. Sentencing Commission, TCP Tells House Panel

Congress should not abolish nor take any drastic, far-reaching action to curtail the jurisdiction of the United States Sentencing Commission (USSC), TCP President Virginia Sloan [told leaders of the U.S. House](#) in October. The USSC is an independent agency of the federal judiciary, whose principal purpose is to “establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes.”

In an October 13th letter to the chair and ranking member of the House Subcommittee on Crime, Terrorism and Homeland Security, Sloan also warned against enacting new mandatory minimum sentences without exercising extreme caution. She noted that, while recognizing the legislative authority to adopt mandatory minimums, TCP’s [Sentencing Committee](#) concluded that they unnecessarily constrain sentencing judges, who have first-hand knowledge of the cases before them, and “thus [mandatory minimums] should be enacted only in the most extraordinary circumstances.”

## TCP is on [Facebook](#) and [Twitter!](#)

Friend or follow us to get instant updates on constitutional, rule of law, and criminal justice issues. Don't forget to tell us about the issues that are important to you!



## Support Our Work

Support TCP's work as we tackle the constitutional challenges of our time.

[Donate](#)

## Renowned Journalist and Researcher Join TCP's Task Force on Detainee Treatment

Photo

TCP is pleased to welcome [Neil A. Lewis](#), recently of *The New York Times* and Duke Law School, and [Katherine Hawkins](#), former detainee issue counsel for Burke PLLC, as investigators for the [Task Force on Detainee Treatment](#). The Task Force is an independent, bipartisan, blue-ribbon panel charged with examining the federal

government's policies and actions related to the capture, detention and prosecution of suspected terrorists in U.S. custody during the Clinton, Bush and Obama administrations. Created late in 2010, the goal of the Task Force is to provide the American people with a broad understanding of what is known—and what may still be unknown—about the past and current treatment of suspected terrorists detained by the U.S. government.

Both individuals bring a wealth of experience to the project. As a reporter with *The New York Times* and Reuters for nearly three decades, Lewis covered Guantanamo, the U.S. Supreme Court, and the U.S. Justice Department. In addition to the *Times*, his stories appeared in prestigious publications including *The New Republic*, the *Washington Monthly*, *Rolling Stone* and the *New York Times Book Review*. He also co-authored a book on Aldrich Ames, a high-ranking CIA official who was convicted of spying for the Soviet Union.

Hawkins has written extensively on detention and counterterrorism policies, focusing at various points in her career on rendition of prisoners, immigration and detainee treatment policy. She also contributed to two award-winning books: *The Dark Side*, by Jane Mayer; and, *Guantanamo and the Abuse of Presidential Power*, by Joseph Margulies.

Also in October, TCP's Task Force on Detainee Treatment hosted a discussion in Miami entitled, "Beyond Guantanamo: The Rule of Law and Why It Matters." Led by Task Force Staff Director Charlie Martel, and joined by legal practitioners, policy experts, community activists and journalists from across Florida, the evening resulted in a lively discussion of the Task Force and its work.

## Law Enforcement's Use of GPS Devices Violates Constitution, TCP Amicus Filing Asserts

In early October, The Constitution Project filed an [amicus brief with the U.S. Supreme Court](#) in the case of *United States v. Jones* condemning the serious privacy threat posed by law enforcement's use without a warrant of sophisticated electronic tracking devices. In his reply brief, the solicitor general of the United States responded in three separate instances to TCP's arguments. The U.S. Supreme Court will hear oral arguments in the case on November 8.

In this case, Antoine Jones challenged law enforcement's placing a GPS tracking device on his car and tracking his whereabouts continuously for 28 days without a valid warrant. The device allowed officers to collect a dossier of data on all of Jones' movements – those connected to his allegedly criminal actions and those completely unrelated – and, as a result, represented both an impermissible search and a complete disregard for his reasonable expectation of privacy, the TCP filing asserts.

In its brief, TCP states law enforcement's unlimited use of tracking devices "raises the specter of an Orwellian society," in which government agents can subject citizens to extensive monitoring using increasingly intrusive technology without any judicial oversight. The brief is based on TCP's [Statement on Location Tracking](#). We are grateful to the law firm of Ropes & Gray LLP for drafting the brief on our behalf.

"The Court now has the opportunity to ensure that advancing technology does not erode our Fourth Amendment safeguards, and to clarify that even in the public sphere, law enforcement should not be able to utilize sophisticated tracking devices without judicial oversight in the form of a warrant," said Sharon Bradford Franklin, senior policy counsel at TCP.

## TCP Welcomes New Director of Communications

### Photo

TCP is excited to welcome [Larry Akey](#) as the new director of communications. Prior to joining TCP, Larry worked as director of corporate communications for a mid-sized private education company, as vice president for state affairs at the U.S. Chamber's Institute for Legal Reform and as executive editor of *AHIP's Coverage*, an award-winning healthcare magazine. He has written for Secretary of Transportation Norman Y. Mineta, guided communications for U.S. Senator Conrad Burns (MT) and served as chief of staff to Congressman Rick Hill (MT). Before moving to the DC-area, Larry operated a full-service public relations and government affairs consulting firm in Helena, Montana, and also served as chief deputy to the Montana Secretary of State. Larry comes to us with extensive experience working on public policy and advocacy campaigns and we are very happy to have him on our team.

## TCP Newsmakers in Brief

- TCP Liberty and Security Committee member and Rutherford Institute President John W. Whitehead wrote an [opinion piece](#) for *The Huffington Post* about *United States v. Jones*, in which, as described above, the Supreme Court is considering whether the police may attach a GPS device to a suspect's vehicle and track his movements for over a month without a valid warrant. Like TCP, The Rutherford Institute filed an *amicus* brief in the case arguing that the surveillance violated the Fourth Amendment.
- On October 16th, the *Detroit Free Press* [ran a story](#) on the issue of warrantless location tracking that mentioned TCP's Liberty and Security Committee's work on the issue.
- *The Huffington Post* published an [opinion piece](#) by Judge Tim Lewis, co-chair of TCP's National Right to Counsel Committee and TCP Board member, highlighting [Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel](#), our 2009 landmark study on the ongoing failure to provide competent counsel to indigent defendants. Commenting on the recent execution of Troy Davis by the State of Georgia, Judge Lewis noted, "The attention of death penalty opponents brought out an impressive eleventh-hour legal defense team to plead his case on appeal; yet, ironically, had his defense been handled competently from the start, Davis might be alive today."
- [Secrecy News](#), a blog and newsletter written by Steve Aftergood of the Federation of American Scientists, highlighted the [TCP-organized coalition letter](#) to President Obama urging him to fill the remaining three vacancies on the Privacy and Civil Liberties Oversight Board (PCLOB). Created by Congress based on the recommendations of the bipartisan 9/11 Commission, PCLOB is designed to play a vital independent role in oversight of privacy and civil liberties. However, the Obama Administration's refusal to fill the remaining vacancies on the Board means the legislation that provided the PCLOB with independence and subpoena powers remains an unfulfilled promise.
- On October 28th and 29th, two TCP Board members, former Director of the FBI Judge William S. Sessions, and former Undersecretary of Homeland Security and Congressman Asa Hutchinson (R-AR), participated in a University of Pennsylvania Law School symposium entitled "Sentencing Law: Rhetoric & Reality."

ConstitutionProject.Org

