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Greetings!

January was a busy month around The Constitution Project. We released a comprehensive look at the Fourth Amendment privacy implications of cybersecurity proposals currently under consideration by the Obama Administration and Congress. Based on our earlier seminal work in the area of politics and justice, our Board weighed in on recent political attacks on judicial independence. And we hosted a debate between two eminent legal scholars on the constitutionality of President Obama's recess appointments.



January was also a good month for those of us concerned about flaws in the administration of the death penalty. Below you'll find an encouraging update on the case of Cory Maples, an inmate on Alabama's death row who missed an important appeal deadline after his lawyers abandoned his case without notifying him. In Delaware, the governor granted clemency to a convicted murderer based on concerns about the fairness of the sentencing process.

Finally, I want to make sure you mark your calendars now for our Annual Gala and for an exciting panel discussion we will be hosting in New York City on the recently-decided GPS location tracking case, both in March - see details below.

Sincerely,

Virginia Sloan
President, The Constitution Project

Congress Must Protect Privacy Rights in Cybersecurity Bill

Privacy and Technology

Congress must include strong privacy protections in any cybersecurity legislation it adopts, according to a [new report](#) issued in January by TCP's Liberty and Security Committee. Without

proper access, storage and use restrictions built into cybersecurity programs, government agents could have the ability to review the content of personal electronic communications, and Americans would be subject to "the equivalent of a perpetual 'wiretap' on their private communications and web browsing behavior," the report warns.

While acknowledging the importance of protecting government and private computer networks against cyber-attacks, TCP's report urged Congress to include robust privacy protections in any such legislation and offered 17 specific recommendations to protect Americans' constitutional rights and civil liberties. The report [received extensive coverage](#) in the media.

Leaders in both the Senate and the House have promised to consider comprehensive cybersecurity legislation in 2012, with Senate action expected this month. We expect TCP and its newly released report to be a significant part of the debate.

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"Justice over Technicalities" at U.S. Supreme Court

Death Penalty

On January 18th, the U.S. Supreme Court decided [Maples v. Thomas](#) in a 7-2 vote in favor of petitioner Cory Maples, who is on Alabama's death row. The decision held that a lower federal court could consider Maples' federal *habeas* petition despite the fact that he missed a filing deadline in state court, which normally would cause his federal claims to be procedurally defaulted (barred) in federal court. Maples missed the filing deadline because his lawyers left their law firm without notifying him or the courts. TCP has supported Maples since 2009, filing *amicus curiae* briefs in the [U.S. Supreme Court](#) and previously in the [Eleventh Circuit Court of Appeals](#). In a recent [statement](#), TCP President Virginia Sloan, said, "Certainly, when a death row inmate is completely abandoned by his volunteer, out-of-state counsel like Maples was, justice requires excusing the missed filing deadline," and lauded the Court for, "...prioritiz[ing] justice over technicalities, fundamental fairness over procedural rules." Ms. Sloan's sentiments were noted in a recent article in the [Los Angeles Times](#).

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Supreme Court Takes First Step to Uphold Privacy Right in the Digital Age in Location Tracking Case

Privacy and Technology

In one of the most talked-about court cases of this term, the Supreme Court issued [its opinion](#) in *United States v. Jones*, a case that asked whether the government needs a warrant to put a GPS tracker on an individual's car. Although the justices provided three separate opinions, the Supreme Court was unanimous in its decision: installing a GPS device on an individual's car and using it to track the car's movements counts as a search under the Fourth Amendment. TCP filed an [amicus curiae brief](#) in Jones's favor based on its [Statement on Location Tracking](#) issued last fall.

While welcoming the Court's decision, [TCP noted](#) the divergence in reasons the justices gave in reaching their conclusion. Justice Scalia's majority opinion provides a bright line Fourth Amendment rule that installing something on an individual's car constitutes a search, and therefore, under normal circumstances, the police must get a warrant before doing so. But so many surveillance technologies available today - and coming in the near future - would not require the police to perform the installation themselves. The majority opinion offers no privacy protection when police choose to

rely on, for example, GPS-enabled phones or already-installed location services like Onstar.

By contrast, despite the limits of the safeguards his opinion offers, Justice Alito's concurrence does contemplate the reality of tracking through the use of people's own phones and concludes that the act of "longer term GPS monitoring" of an individual, even when traveling on public roads, violates reasonable expectations of privacy. Ultimately, however, Fourth Amendment privacy safeguards will only apply in the digital age if the Court accepts the suggestion in Justice Sotomayor's separate concurrence - that it reconsider the rule that information loses its privacy protections once it is voluntarily disclosed to third parties.

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Delaware Governor Grants Clemency to Death Row Inmate

Death Penalty

In Delaware, Governor Jack Markell commuted the death sentence of convicted murderer Robert Gattis to life without parole. The state's Board of Pardons had recommended such action. To be clear, Gattis admitted his guilt in the 1990 murder of his then-girlfriend Shirley Slay. We applauded the governor's decision because the errors that marred Gattis's case mirrored the recommendations in TCP's Death Penalty Committee's [Mandatory Justice: The Death Penalty Revisited](#). That committee agreed that, whether one supports or opposes capital punishment, even in cases of unquestionable guilt, concerns about the fairness in the administration of the death penalty may warrant that a conviction or sentence be overturned.

Evidence of the extensive physical and sexual abuse that Gattis suffered as a child was never presented during the sentencing phase of his trial, despite the fact that such evidence should have been offered as mitigating evidence. Had the jury and judge heard the evidence of his abuse, the decision to impose the death penalty might have been different. The fact is that capital trials are often plagued by mistakes, some due to defense counsel's shortcomings and some to inadvertent human error and other factors. As *Mandatory Justice* notes, to have confidence in death sentences moving forward, we must fix these known flaws in our system. CNN included TCP's reaction in its [story](#) on the governor's decision.

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Eminent Legal Scholars Debate Obama Recess Appointments

Checks and Balances

President Obama ignited a significant controversy when he used recess appointments on January 4, 2012, to name Richard Cordray to head the new Consumer Financial Protection Bureau and to fill three vacancies on the National Labor Relations Board. President Obama claimed that he had the power to take these actions under the authority granted to the executive in Article 2, section 2 of the U.S. Constitution. Some Republican senators and others strongly objected, saying the Senate was in "pro forma" session so the recess appointment power could not apply.

On January 18, TCP hosted a [tele-debate](#) on the issue, featuring Professors Peter M. Shane, a Visiting Professor of Law at Harvard Law School, and Michael McConnell, the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School. The conversation was lively, with strong arguments on both sides. [Listen to the debate](#) and decide for yourself: which side got the better of the discussion?

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TCP Board Issues Statement on Judicial Independence

Checks and Balances

Alarmed by recent proposals to punish judges who author controversial or politically unpopular decisions, including through impeachment and related forms of removal from office, hauling judges before Congress to explain their reasoning in particular cases, or eliminating their constitutionally enshrined right to tenure during good behavior, TCP's Board of Directors issued a [policy statement on judicial independence](#). Based on the long-standing, seminal work of our Courts Committee's bipartisan, [Uncertain Justice](#), the Board noted that "when legitimate judicial criticism degenerates into a form of intimidation it threatens not only judicial independence, but also our individual rights and freedoms that only independent judges - operating as part of a third and co-equal branch of government - can protect."

In response to the statement, the *San Antonio Express-News* interviewed TCP Board member Asa Hutchinson for a [story](#) it did about recent attacks leveled at Judge Fred Biery, the chief federal judge for the Western District of Texas.

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2012 Constitutional Champions Gala in March

Upcoming Event

Mark your calendars now for our [2012 Constitutional Champions Gala Awards](#). The event will take place on March 29, 2012 from 6:30 to 9:30 pm. We are excited to present The Constitution Project's annual awards to David A. Keene, former chairman of the American Conservative Union, and the Digital Due Process Coalition, a diverse coalition of technology companies, privacy advocates, and think tanks. For more information about [sponsorship opportunities and program advertising](#), please contact Kelly Davies at 202-580-6942 or kdavies@constitutionproject.org.



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TCP to Host Location Tracking Event in New York

Upcoming Event

On March 6th, TCP will host a timely [panel discussion](#) at the Rockefeller Brothers Fund in New York City on location tracking issues. The public discussion will focus on *United States v. Jones*, a case involving the use by police of GPS tracking devices without a warrant. More broadly, we will look at how to preserve Fourth Amendment protections in the digital age. We aim to present a variety of perspectives and views on the issue. For more information, check our website at www.constitutionproject.org.

TCP Newsmakers in Brief

Current Events

- In an op-ed that appeared in [Roll Call](#) on January 19th, TCP Scholar in Residence **Louis Fisher** examined the history and constitutional parameters of legislative committee vetoes regarding agency spending. Mr. Fisher explains that committee vetoes give agencies "flexibility to carry out complex duties" and that they should not be eliminated. President Obama had raised objections to the committee vetoes while signing a budget bill on December 23, 2011.
- In a [Washington Post](#) article about a case brought by six Food and Drug Administration employees, TCP Senior Counsel **Sharon Bradford Franklin** commented on the scope of the government's authority to track the digital movements of its employees and how this type of surveillance should incorporate safeguards to avoid violating the Fourth Amendment.

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