

DECEMBER 2010

On My Mind: Monthly Message from TCP President Virginia Sloan

Since our [Web site](#) was re-launched last month, we have received invaluable input from so many of you. A news reporter said that while he always looked to our site as an important source of information on key constitutional issues, the information is now better organized and more accessible. Colleagues from a number of peer organizations said they enjoy our new *Faces of Reform* feature—videotaped interviews that showcase the people on the front lines of the fight to protect our civil liberties and reform the criminal justice system. The series currently features Julie Stewart, the Founder and President of Families Against Mandatory Minimums (FAMM). I encourage you to take a few minutes to hear about Julie's very [personal journey](#) to reform the nation's mandatory minimum sentencing laws. Please visit our Web site regularly to learn the latest news from TCP and the broader reform community. I hope you will keep letting us know how we are doing!

Ghailani Verdict Spurs Debate Over Proper Court for Terrorism Trials

On November 17, 2010, Ahmed Khalfan Ghailani was convicted of conspiracy for his participation in the 1998 bombings of two United States embassies in East Africa, and faces a sentence of 20 years to life in prison. The verdict triggered a renewed debate over the appropriate court- federal criminal courts or military commissions- for trying suspected terrorists.

In a [statement](#) released by TCP, Counsel Mason Clutter said, "Justice has been done. The Ghailani trial demonstrates that our traditional federal criminal courts can handle complicated terrorism cases, while upholding our Constitution and the rule of law." Ms.

Threat to Privacy Posed by Government Data Mining Focus of Report & Event

On December 7th, TCP will release *Principles for Government Data Mining: Preserving Civil Liberties in the Information Age*. The report examines the U.S. government's increasing reliance on data mining, the use of computing technology to sift through staggering quantities of information—including personal data—as a tool to identify possible wrongdoing. While data mining can provide a valuable tool for uncovering criminal activity, it is important to ensure that the government's collection, acquisition, and use of data do not infringe upon privacy rights. Included in the report will be a series of detailed recommendations that will provide the government with a much needed legal framework to effectively balance national security needs with civil liberties.

TCP will also host a panel discussion on this issue on December 7th at the National Press Club. There has been a high level of interest in this event, so [register](#) now. Panelists are: Christopher Caine, Mercator XXI, LLC; Mary Ellen Callahan, Chief Privacy Officer, U.S. Department of Homeland Security; Jim Harper, Director of Information Policy Studies, The Cato Institute; and Paul Pillar, Visiting Professor and Director of Studies, Security Studies Program, Georgetown University. TCP Senior Counsel Sharon Bradford Franklin will serve as moderator.

California Prison Overcrowding Case Focus of Amicus Brief

TCP and The Prison Law Office organized a group of 27 individuals, with decades of experience in the fields of corrections and law enforcement, to file an [amicus brief](#) in the United States Supreme Court in favor of plaintiffs-appellees in *Schwarzenegger v. Plata*. Last year, a three-judge federal panel in California declared that prisoner overcrowding in the state had led to inmate medical care so inadequate that it violated the U.S. Constitution's Eighth Amendment's prohibition against cruel and unusual punishment. They ordered the state to cap its prison population at 137.5% of the designed capacity, and therefore, to reduce its overall prison population by between 38,000-46,000 inmates within two years.

Governor Schwarzenegger appealed the decision, and the U.S. Supreme Court heard oral argument on November 30th. At issue is the federal government's power to force states to reform overcrowded corrections

Clutter was also quoted in stories in [*The New York Times*](#), [*Wall Street Journal*](#), [*Associated Press*](#), and [*MSNBC*](#). In November 2009, TCP published [*Beyond Guantanamo: A Bipartisan Declaration*](#), a statement by almost 150 experts endorsing the use of traditional civilian criminal courts to try terrorism cases.

systems across America. The *amicus* brief argues that the level of prison overcrowding in California is extreme and that at this level of overcrowding, prisons do not function properly and administrators cannot provide necessary services, including health care. Further, courts must have a role in relieving such circumstances, especially when the political process fails to provide a remedy as has occurred in California.

Florida Supreme Court May Order Pivotal DNA Test in Death Penalty Case

On Nov. 10th, the Florida Supreme Court issued an order remanding death row inmate Paul Hildwin's case to a lower court to hold a hearing on several factual issues related to DNA samples' eligibility for uploading into the national and state DNA databases. After the hearing, the Florida Supreme Court will determine whether the State must upload the sample, granting Paul Hildwin's "all writs" [petition](#) filed earlier this year by the Innocence Project. Hildwin was convicted in 1986 for the rape and murder of Vronzettie Cox. Hildwin's petition requests the Court to order that unidentified DNA samples found at the scene of the murder be uploaded into a national and state DNA database, so that the samples can be compared against the other profiles there.

TCP filed an [amicus brief](#), drafted by the national law firm of Holland & Knight, in the Florida Supreme Court in support of Hildwin's petition. TCP was joined in its brief by William S. Sessions, former director of the FBI and former federal district judge and member of TCP's Board of Directors; Harry L. Shorstein, former five-term State Attorney for the Fourth Judicial Circuit of Florida; and Sandy D'Alemberte, past president of the American Bar Association and former dean of Florida State University College of Law.

Department of Justice Agrees to Remove Deficient Regulations

On November 23rd, the Department of Justice (DOJ) [announced](#) that it was removing regulations related to a provision in the federal law, to which TCP, along with the Judicial Conference of the United States and a coalition of reform organizations, objected. The regulations lacked virtually any standards for the Attorney General to apply when evaluating state requests for certification under what is known as the Chapter 154 Opt-in Program.

The Opt-in Program originated in the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), and was amended in 2005 as part of the USA PATRIOT Improvement and Reauthorization Act. Under AEDPA, federal judges would certify that a state provides counsel to indigent capital defendants for state post-conviction review. In exchange, the states would enjoy procedural advantages to speed federal *habeas corpus* review of capital cases. The 2005 amendment moved the authority to certify the programs to the Attorney General. Earlier this year, TCP submitted [comments](#) urging the DOJ to remove the Bush-era regulations, because they would allow states to provide less than adequate counsel while enjoying the benefits of fast-tracked *habeas* review. This would increase the chances that a capital defendant could face the death penalty despite serious constitutional concerns.

TCP, with the help of its allies, will continue to work with the DOJ as it designs new regulations for the Opt-in Program to ensure that they provide adequate standards.

U.S. Supreme Court to Consider Reform of State Secrets Doctrine

On November 19, 2010, The Constitution Project

Report Reveals Importance of Legal Resources for Federal Capital Defendants

(TCP) filed an *amicus* brief in the U.S. Supreme Court in the consolidated cases *General Dynamics v. United States* and *Boeing v. United States*, in which defense contractors challenge the Government's assertion of the state secrets privilege to block their defense in a government contracting dispute.

This is the first state secrets case before the Supreme Court since the privilege was recognized in 1953. TCP's brief supports the contractors' challenge to the state secrets claim and urges the Court to take this opportunity to revisit and reform the state secrets doctrine. We urge the Court to make clear that the state secrets doctrine is an *evidentiary* privilege and should not permit the government to completely block litigation of entire cases or defenses.

On November 24th, the Administrative Office of the U.S. Courts released a report entitled "[Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases.](#)" The report updates a 1998 report from the Judicial Conference of the United States that offered recommendations aimed at containing costs while ensuring high-quality defense services in capital cases.

Among its many findings, the report provides further support for what TCP and other death penalty reform advocates have been saying for years – access to qualified counsel with sufficient resources vastly increases a capital defendant's chances for a fair trial. Specifically, the report found that federal capital defendants whose defense representations cost the least, were more than twice as likely than other capital defendants to receive the death penalty. The report also found that defendants in low cost cases were less likely to be represented by lawyers with "distinguished prior experience" in capital cases. Christopher Durocher, TCP Government Affairs Counsel noted, "These findings underscore the need for reform in indigent capital defense. There's something terribly wrong when a person is more than twice as likely to face execution because we are unwilling to provide sufficient resources for his or her defense."