

JANUARY 2011

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

As the new Congress takes office, the Constitution is front and center, especially in the House, where the new Republican leadership is requiring that the document itself be read in its entirety on the House floor, and where new rules regarding the introduction of legislation have been proposed or put in place.

One rule offered by Majority Leader Eric Cantor (R-VA) requires House Members, when introducing a new piece of legislation, to cite the specific “power or powers granted to Congress in the Constitution to enact the bill.” An amendment by Rep. Scott Garrett (R-NJ) would have gone further in prohibiting sole reliance on certain clauses of the Constitution, including the “necessary and proper,” “general welfare,” and “common defense” clauses. This amendment was defeated. The Constitution Project Board wrote a letter to the House Rules Committee objecting to this provision, and to a provision implying that the Ninth and Tenth Amendments were more authoritative than other provisions of the Constitution as a basis for the introduction of legislation.

Earlier this week, I wrote a [letter](#) that was published in the *Washington Post* in which I applauded the effort of Members to better educate themselves and the public about the Constitution. My letter focused on the *Post*'s confusion involving the source of authority for the recently enacted health care law, but my point transcends that one issue. As I wrote, “We can, and should, discuss the Constitution's terms and meanings. In doing so, however, we must be scrupulous about the accuracy of those terms and meanings. The people's understanding of the extent of congressional power, and the courts' interpretation of congressional action, depend on it.

### Bipartisan Task Force on Detainee Treatment Launched

Last month, The Constitution Project (TCP) [announced](#) the formation of the bipartisan Task Force on Detainee Treatment. On January 5th, the Task Force convened its first official meeting. The goal of the Task Force is to bring to the American people a comprehensive understanding of what is known and what may still be unknown about the past and current treatment of detainees by the U.S. government, as part of the counterterrorism policies of the Obama, Bush and Clinton administrations.

The Task Force will help policymakers and the public confront alleged past abuses—including torture and cruel treatment—by following the facts. The highly esteemed [members](#) of the Task Force bring diverse ideological views and a wide range of professional backgrounds to the new initiative. This wealth of experience and diversity of perspective makes the Task Force uniquely qualified to make sense of the vast quantity of information in the public domain. It will review this information, determine where the holes are and then pass the baton to the administration, Congress, and ultimately to the American people, who will determine what steps should be taken next.

The [Associated Press](#) wrote the lead story about the group and its mission, and the story was re-published by scores of media outlets around the nation.

### SAVE THE DATE

Please mark your calendars for The Constitution Project's 4th annual *Constitutional Champions Award* gala reception on April 14th.

We are privileged to honor Judge Patricia Wald, who served for two decades on the U.S. Court of Appeals for the District of Columbia—the first woman ever appointed to that bench. Judge Wald also served on the International Criminal Tribunal in The Hague where she heard cases on wartime atrocities in the former Yugoslavia. She is being recognized for her long

### Technology Encroachment on Privacy Rights Focus of New Report

On December 7th, TCP released a new report, [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. The report includes a series of detailed recommendations that will

and vital service to our country and to safeguarding the Constitution.

In addition to honoring Judge Wald, this year's gala reception will feature a veritable Farmer's Market including organic and sustainable fare from local and regional farms and markets. The event will be held on the rooftop of the Jones Day law offices, offering an exceptional view of the U.S. Capitol.

provide the government with a much needed legal framework to effectively balance national security needs with civil liberties.

TCP released the report during a [videotaped](#) event at the National Press Club. The audience included privacy officers from several federal agencies as well as congressional staff, privacy advocates, and corporate executives.

## Washington Post Editorial Touts TCP Report

On December 10th, a *Washington Post* [editorial](#) about Professor Laurence Tribe's departure from the Justice Department's Access to Justice Initiative cited our report, [Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel](#) as a guide for the types of reforms that the administration should continue pursuing.

## Administration and Congress Set Stage for Battle over Indefinite Detention Policy

A variety of news reports have suggested that the Obama Administration may be preparing an executive order that would establish a regular review process for Guantanamo detainees who will not be released or tried. In a [statement](#) released by TCP, Policy Counsel Mason C. Clutter noted, "Our concern is that we don't want this executive order to create an overarching system of indefinite detention that would encompass those already detained and those who would be captured in the future. A system of indefinite detention is not consistent with our constitutional values or the rule of law."

The reports about a possible executive order came less than a week after Congress voted to prohibit the use of defense funds to transfer detainees to the United States, even for prosecution. This would almost inevitably preclude trials in the federal courts. In statements released on [December 9th](#) and [December 14th](#), TCP expressed alarm at Congress' willingness to abandon one of the nation's most effective tools in the fight against terrorism.

## TCP Urges President and Senate to Finalize Privacy and Civil Liberties Oversight Board

In mid-December, President Obama announced his intention to nominate two members to the Privacy and Civil Liberties Oversight Board (PCLOB): James X. Dempsey and Elisebeth Collins Cook. TCP welcomed these nominations, but [urged](#) the President to promptly name the remaining three members of the Board, and called on the Senate to confirm all five members immediately.

In 2007, Congress reconstituted the PCLOB as an independent agency within the Executive Branch, charged with reviewing the civil liberties impact of national security programs. To date, no members have ever been confirmed to serve on the revamped Board, and it has not yet come into existence.

## Amicus Brief Urges Texas Court to Hold Hearing on Risk of Wrongful Executions

John E. Green, Jr. faces a possible death sentence if convicted of fatally shooting a Houston woman during a June 2008 robbery. In March 2010, State District Judge Kevin Fine, the presiding judge in the trial, agreed to hold a hearing on the constitutionality of the application of the death penalty in Texas, at the request of defense counsel. However, just as the hearing was about to begin in December, the Texas Court of Criminal Appeals intervened and granted a request by the Harris County District Attorney's Office to halt the hearing. The appeals court required the parties to file briefs addressing whether the hearing should continue.

An unusual alliance of individuals filed an *amicus* brief urging the Texas Court of Criminal Appeals to allow the hearing to proceed. The individuals who joined the brief—many of whom were recruited by TCP—included former governors (including former Texas Governor and co-chair of TCP's Death Penalty Committee Mark White), former judges, former prosecutors, victims advocates, exonerees and others. The group argued that the state of Texas runs a grave risk of executing innocent people, since it has failed to address the leading causes of wrongful convictions. Eleven people have been exonerated from Texas's death row, and at least two men have been executed by the state based on evidence that was later determined to be questionable. Several leading Texas papers reported on the filing of the *amicus* brief, including the [Houston Chronicle](#) and [Dallas Morning News](#).

## Smart on Crime Blueprint to Guide New Congress

Two years ago, as President Obama took office and a new Congress was sworn in, TCP and a national coalition of criminal justice reform organizations published [\*Smart on Crime: Recommendations for the Next Administration and Congress\*](#). In October, the group reconvened to discuss the development of an updated publication that will reflect the challenges and opportunities that have emerged in the intervening years. In early February, the coalition will release a blueprint for criminal justice reform, including specific recommendations to guide members of the 112th Congress. Please stay tuned for the release of the new publication and the launch of a website that will serve as a national resource for those interested in criminal justice reform in America.

## Indigent Defense Crisis Focus of New Faces of Reform Interview

Every month we spotlight a [videotaped](#) interview with a national leader of reform on criminal justice or rule of law issues. This month, Stephen Hanlon, a partner at Holland & Knight and Chair of TCP's Board of Directors, shares powerful insights on the crisis in the nation's indigent defense and prison systems, describing the litigation he has conducted as well as his hopes for substantive reform.

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