

FEBRUARY 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

We at The Constitution Project (TCP) are proud of the work we do here in Washington, DC, to promote the rule of law and criminal justice reform to our nation's leaders. But we also dedicate significant resources to work beyond Washington—educating the vast majority of policymakers and the public who do not work at the White House or on Capitol Hill about some of the most important constitutional issues of our time. This month's newsletter gives you a glimpse of some of those ongoing outreach efforts.

In February alone, we will travel to New York City for a discussion about the future of Guantanamo; co-host a public education event about material support laws and the Constitution; and co-sponsor a briefing for Hill staff on the importance of Congress' constitutional obligation to conduct meaningful oversight. Just last week, I participated in a Justice Department symposium examining international perspectives on indigent defense. The event was designed to identify whether any international practices are transferable to the United States and to develop a proposed research agenda on criminal indigent defense. I learned a great deal from the many experts that came together, including researchers, academics, advocates, and government officials.

We hope that TCP's many public education activities contribute to the development of solutions to our country's urgent problems. And we hope to see you at an upcoming event!

Constitutional Principles Focus of New Interview

Every month we showcase a videotaped [interview](#) on our website with a national leader of reform on criminal justice or rule of law issues. This month, Stanford law professor and TCP Board Member Mariano-Florentino Cuellar shares his insights on the importance of American constitutional principles, both at home and abroad. Mr. Cuellar served in the Clinton administration and most recently as a special assistant to President Obama on criminal justice and regulatory issues. View previous [interviews](#) with Stephen Hanlon, Judge William S. Sessions and Julie Stewart.

TCP is Hiring

TCP seeks a high-energy individual with strong communication skills and a proven record of identifying new donors to join our team as a [Development Coordinator](#). Please visit our website to view other [employment opportunities](#).

Panel to Discuss Threat to Constitutional Rights Posed by U.S. Material Support Laws

TCP and KARAMAH will host a panel lecture on February 24th entitled, "Constitutional Pitfalls of Material Support Laws." TCP has long expressed concerns that U.S. material support laws sweep too broadly and threaten First Amendment rights and allow the government to designate groups as "foreign terrorist organizations" without providing evidence or a chance for the group to respond. Panelists are: **David Cole**, Professor, Georgetown University Law Center; **Kay Guinane**, Program Manager, Charity and Security Network; **Dr. Azizah Y. al-Hibri**, the Chair of KARAMAH; and **Sharon Bradford Franklin** (moderator), Senior Counsel, TCP. General admission is free. The cost for those seeking CLE credit is \$75. For more information, please call (202) 234-7302 or LectureRSVP@karamah.org.

Guantanamo Without End?

On February 24th, TCP will host a panel discussion at the New York offices of Cravath, Swaine & Moore, LLP on the future of the Guantanamo detention policies. Two years after President Obama's Executive Order to close Guantanamo within a year, the facility remains open, and the possibility of a formal system of indefinite detention without charge remains a reality.

We wonder—is there is an end in sight? Panelists include: **Jonathan Hafetz**, Associate Professor of Law, Seton Hall University School of Law; **Hon. James Robertson**, U.S. District Judge for the District of Columbia (ret.); **Neena Chhabra**, former public defender representing the United Nations with

Constitutional Champions Award

April in Washington means warmer weather, the National Cherry Blossom Festival, and TCP's annual *Constitutional Champions Award* gala reception. Come join us on April 14th as we honor Judge Patricia Wald, who served for two decades on the U.S. Court of Appeals for the District of Columbia—the first woman appointed to that bench. We are recognizing her for her

Nancy Soderberg, former alternate representative to the United Nations with the rank of Ambassador; and **Mason C. Clutter** (moderator), Counsel, TCP. [RSVP here](#) for the lunch and panel discussion or by calling 202.580.6924.

We are grateful to our Board member Paul Saunders, a partner at Cravath, for making the space available.

We are also pleased to make you aware of the American University Washington College of Law's program, "The Guantanamo Detainees: What's Next?," on February 18th. Speakers include TCP Supreme Court Fellow and WCL Professor **Steve Vladeck**, TCP Liberty and Security Committee member and Princeton Professor **Deborah Pearlstein**; Harvard Law Professor **Jack Goldsmith**, and Washington College of Law Professor **Dan Marcus**. [Register here](#).

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

In addition to honoring Judge Wald, we will feature a veritable farmer's market including organic and sustainable fare from local and regional growers and sellers. The event will be held on the beautiful rooftop of the Jones Day law offices, with an exceptional view of the U.S. Capitol. To ensure that you receive our RSVP email, please contact Francine Wargo at (202) 580-6924.

Hill Staff Briefing on Congressional Oversight

On February 7th, TCP and the Project on Government Oversight (POGO) will sponsor a lunch briefing: "Congressional Oversight: What It Means and How to Make It Work." Presenters at the event, which is open to Hill staff only, will be: **Stanley Brand**, Brand Law Group and former General Counsel to the House of Representatives under Speaker Tip O'Neill, Jr.; **Mickey Edwards**, Vice President and Director, Aspen Institute; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee, and TCP Board member; and **Morton Rosenberg**, TCP Fellow and former Specialist in American Law at the Congressional Research Service (CRS). To register, [click here](#) or call Danni Downing at 202-347-1122.

State Secrets Challenges Reach Supreme Court

On January 18, 2011, the U.S. Supreme Court heard oral argument in a pair of cases (*General Dynamics Corp. v. United States* and *Boeing Co. v. United States*) challenging the government's use of the state secrets privilege. Last November, TCP filed an [amicus brief](#) in the cases, in which defense contractors challenge the Government's assertion of the state secrets privilege to block their defense in a government contracting dispute. TCP's brief urges the Court to take this opportunity to clarify and reform the privilege. The day before the argument, *USA Today* published a [story](#) previewing the case and quoted TCP Senior Counsel Sharon Bradford Franklin. A *Wall Street Journal* [story](#) about the state secrets challenges cited our *amicus* brief. TCP is grateful to David Gossett of Mayer Brown for his assistance in drafting our brief.

The *USA Today* article also mentioned another state secrets challenge that TCP is supporting. On January 12th, TCP filed an [amicus brief](#) in *Mohamed v. United States and Jeppesen Dataplan*. In that brief, TCP urged the Supreme Court to accept the case for review and clarify that the privilege does not authorize dismissal of cases at the pleadings stage and instead requires independent judicial review of the evidence asserted to be privileged.

Coalition Set to Unveil Criminal Justice Reform Blueprint

TCP and a bipartisan national coalition of more than 40 criminal justice reform organizations and experts are preparing to release a comprehensive set of criminal justice reform recommendations for the Obama administration and the members of the 112th Congress. This blueprint for reform will cover more than a dozen major issues ranging from overcriminalization to juvenile justice, and indigent defense to executive clemency. The new report and accompanying website will be unveiled next week. Visit our [website](#) for the latest news.

New Supreme Court Amicus Brief Challenging Preventive Detention

On January 28th, TCP filed an [amicus brief](#) in the U.S. Supreme Court in *Ashcroft v. al-Kidd*. The case is brought by Mr. al-Kidd, a U.S. citizen who was preventively detained under the material witness statute in 2003. The question before the Court is whether former Attorney General Ashcroft has either absolute or qualified immunity. TCP's brief does not take a position on the ultimate question of immunity, but supports Mr. al-Kidd by explaining the limited scope of the Executive's detention authority. TCP's Liberty and Security Committee released a [Report on Post-9/11 Detentions](#) condemning this use of the material witness statute in 2004, and in its 2008 report, [A Critique of National Security Court](#), the Committee explained that preventive detention is only constitutionally permissible in very narrow circumstances. TCP thanks Chris Handman at Hogan Lovells for his assistance on our *amicus* brief.

Senate Judiciary Chair Introduces Justice for All Act, Praises TCP

Senate Judiciary Chairman Patrick Leahy (D-Vt.) this week [reintroduced](#) the Justice for All Reauthorization Act, a bill to increase transparency in the way states spend federal criminal justice grant money, to provide the Department of Justice authority to work with states to improve their indigent defense systems, and to increase availability of post-conviction DNA testing. TCP worked extensively with the Senator and his staff in crafting and garnering support for the legislation. “In 2004, the original Justice for All Act passed with huge bipartisan support,” explained Christopher Durocher, TCP Government Affairs Counsel. “We believe this bill, which has been endorsed by law enforcement, prosecutors, and defenders, will garner similar bipartisan support. We are grateful to Senator Leahy for focusing on good policy and not politics.”

Our appreciation appears to be mutual. In [remarks](#) delivered January 11th at the Newseum in Washington, DC, announcing the Committee’s upcoming agenda, Senator Leahy singled out TCP and its president, Virginia Sloan, for its effective work in support of transparency and government accountability.

Right to Counsel Sought in Civil Proceeding

On January 11th, TCP filed an [amicus brief](#) in the United States Supreme Court in *Turner v. Rogers*. The South Carolina Supreme Court held that Turner, an indigent defendant in a civil contempt proceeding for nonpayment of child support, had no constitutional right to counsel—despite his being sent to jail for one year. However, TCP’s Right to Counsel Committee has issued a [new recommendation](#) that counsel should be provided to those unable to afford it, “in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature.” We are grateful to Kate McSweeney at the firm of Chadbourne & Park for her assistance in drafting TCP’s *amicus* brief.

Congress Imposes New Restrictions on Transfer of Detainees to U.S.

TCP Counsel Mason Clutter was interviewed for a story about the new restrictions Congress imposed on the transfer of Guantanamo detainees to the U.S., including for prosecution. In its January 7th [story](#), the *New York Times* reported that President Obama criticized the restrictions in a statement he delivered while signing the bill. TCP opposed the transfer restrictions both before and after they were passed, but praised President Obama for not asserting constitutional authority to ignore [them](#).

Also on January 7th, a *Huffington Post* [story](#) cited the statement TCP released from “legal lion Abner Mikva and former FBI director and jurist William S. Sessions, urging Congress to reverse” the transfer limitations. The bipartisan legal experts said the legislation “represents a clear intrusion on the authority of the executive branch to decide where prosecutions should be brought.”

Ghailani Sentence Demonstrates Civilian Courts Work

According to a January 30th *CBS News* [story](#), when Judge Lewis Kaplan handed down a life sentence to Ahmed Khalfan Ghailani for his role in the 1998 bombing of the U.S. embassy in Kenya, “the judge seemed to telegraph a message to the nation endorsing terrorist trials in federal court and announcing that in this case, again, our judicial system worked.” TCP shares this sentiment and has sought to promote the use of civilian trials for suspected terrorists. We released a [statement](#) from TCP Counsel Mason Clutter noting, “Mr. Ghailani joins a group of over 400 terrorism suspects who have been tried in our traditional federal courts, compared to only five detainees who have faced trial in the military commissions system.”