

August 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

A deal between the president and Congress has averted, at least for now, the first ever default by the United States. Although a vote on a balanced budget amendment to the Constitution was not required as part of the deal approved by the House and Senate this week, it does require both houses of Congress to vote on such an amendment before December 31st. This means that the debate over this issue will continue in the coming months and that The Constitution Project (TCP) will continue to serve a vital public education role by providing much-needed context for the national discussion. In 1999, TCP released a bipartisan report, [*Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change*](#), which urged extreme caution when considering proposals to amend our nation's founding charter. While TCP's Constitutional Amendment Committee does not take a position on the merits of any particular proposal (except for one amending the amendment process), the report addressed the *process* for considering all proposals, including one for balancing the budget.

No one doubts that, for a variety of reasons, our nation's fiscal health has reached a crisis stage, and a balanced budget amendment proposal is not new; one was first proposed in Congress in 1936. During the 1990s, a balanced budget amendment was approved by the House and failed twice in the Senate by a single vote.

Yet, however genuine the concerns about our nation's fiscal situation are, what TCP's bipartisan experts concluded in 1999 remains true today: "A constitutional amendment is a far cruder instrument than is congressional or presidential action to address the issue of federal spending, for it lacks the flexibility to permit tailoring fiscal policy to the nation's changing economic needs."

With this wise counsel in mind, Mickey Edwards, a former Member of Congress (R-OK) and Co-Chair of TCP's Constitutional Amendment Committee, and I called on lawmakers in a [statement](#) and in a *Washington Post* [letter-to-the editor](#) to carefully consider whether such a drastic measure is appropriate. According to former Congressman Edwards, "Constitutional amendments should not be used as a kind of default mechanism when legislative solutions to policy problems hit a wall, especially when there are other tools that could accomplish the same goals." TCP's *Great and Extraordinary Occasions* is as relevant today as when it was published in 1999.

Save the Date to Celebrate Constitution Day 2011

On Thursday, September 15th, join The Constitution Project and the Mid-Atlantic Innocence Project (MAIP) as we recognize three distinguished authors, former Republican Attorney General of Ohio Jim Petro and his wife, Nancy Petro, and Professor Brandon Garrett (University of Virginia School of Law) for their respective books, [*False Justice: Eight Myths that Convict the Innocent*](#) and [*Convicting the Innocent: Where Criminal Prosecutions Go Wrong*](#). TCP will present the three authors with its *Constitutional Commentary Award*, given annually on Constitution Day to the author or producer of an outstanding work that has improved the quality of public discourse through insightful, articulate analysis of a constitutional issue of the day. Following the award presentation, Jeffrey Rosen, the distinguished scholar at George Washington University's law school and legal reporter for the *New Republic*, will moderate a discussion with the three authors; a reception will follow. The event will take place from 3:30 to 6:30 p.m. at the Gewirz Student Center at Georgetown University School of Law. The event is free, but tickets will go fast, so [RSVP](#) today.

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New Bill Authorizes Indefinite Detention of Immigrants

On July 14th, the House Judiciary Committee approved legislation that would expand the use of mandatory detention and

permit indefinite detention for many immigrants, including asylum seekers. After the markup of the bill (H.R. 1932), TCP released a [statement](#) outlining our concerns. Specifically, we noted that the bill would: (1) authorize the indefinite detention of immigrants who have been ordered removed but cannot be deported because no country will accept them; and (2) authorize the detention of many noncitizens throughout their removal proceedings, regardless of how long those proceedings might take. TCP Counsel Mason Clutter also observed, “While we recognize that immigration detention under certain circumstances serves legitimate public purposes, too many non-citizens are being held unnecessarily in custodial detention. This bill would amplify this problem.”

TCP supporter Bruce Einhorn, who is a former federal prosecutor and federal immigration judge, raised doubts about the bill in an [Op-Ed](#) published in *The Hill's* Congress blog. Judge Einhorn also endorsed TCP's Liberty and Security Committee's 2009 report, [Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings](#).

TCP Outspoken in Support of Federal Courts as Proper Venue for Trying Terrorism Cases

TCP continues to contribute to the debate over the appropriate venue for holding terrorism trials—via military commission or federal court. Following the announcement by Senator Mitch McConnell (R-KY), that two terrorism suspects being held in Kentucky should be moved to Guantanamo Bay to face prosecution in a military commission, TCP Counsel Mason Clutter authored an [Op-Ed](#) in the *Louisville Courier-Journal* that refuted the senator's position. The Op-Ed referenced the more than 400 successful terrorism-related trials that have taken place on U.S. soil since 9/11, compared to only six completed cases in the military commissions.

Senate Committee Considers Consular Notification Compliance Act in Wake of Foreign National's Execution

On July 7th, the state of Texas executed Humberto Leal Garcia, a Mexican national who, before and during his capital trial, was denied access to the Mexican consulate in violation of the Vienna Convention on Consular Relations. In letters that TCP helped to organize, [former military officials, diplomats, judges and prosecutors](#) urged Texas Governor Rick Perry to delay the execution to provide the U.S. Congress time to consider the Consular Notification Compliance Act (S. 1194), introduced by Senate Judiciary Committee Chair Patrick Leahy (D-VT).

A number of the former diplomats—appointed by Republican and Democratic presidents—expressed dismay at the execution, [stating](#) “We are disappointed that Texas has chosen not to comply with the clear international legal obligations of the United States under the U.N. Charter and unanimously confirmed by the Supreme Court.” The tragedy of Mr. Leal's execution is not the end of the story. Scores more foreign nationals are currently on death row in the U.S., and at least three could have executions dates set at any time. TCP also released a [statement](#) in which Senior Counsel Mary Schmid Mergler asserted “Today's execution puts even more pressure on Congress to pass the Consular Notification Compliance Act so that today's miscarriage of justice is not repeated.”

On July 27th, Senator Leahy held a [hearing](#) on the Consular Notification Compliance Act. During the hearing, John B. Bellinger III, legal advisor to the State Department in the George W. Bush administration as well as with the National Security Council, and one of the signatories of the TCP organized letter from former diplomats, testified in favor of the legislation, explaining that honoring the Vienna Convention “is not a gracious favor that we give to foreigners... it is a matter of survival for many [Americans] who are imprisoned in far-off lands without anyone to help them but a U.S. consular officer.”

TCP Files SCOTUS Brief Supporting a Robust Right to Counsel Rights at Plea Bargaining Stage

On July 22nd, TCP filed an [amicus brief](#) in two Supreme Court cases being jointly considered, *Frye v. Missouri* and *Lafler v. Cooper*. In both cases, the criminal defendants did not receive effective assistance of counsel during their plea negotiations, and as a result of the lawyers' deficiencies in each case, the defendants received substantially longer sentences than if they had accepted prosecutors' initial plea offers. TCP's *amicus* brief argued that because the vast majority of criminal cases are now resolved through plea bargaining, it is imperative that defendants receive the quality assistance of counsel at this stage to ensure justice is done. We would like to extend our thanks to our friends at Venable LLP for their generous *pro bono* assistance in drafting the brief.

Reform, Says TCP Death Penalty Committee Member

One of the newest members of TCP's Death Penalty Committee, O.H. Eaton, Jr., authored [an Op-Ed](#) published in the *Birmingham News* calling on Alabama to reform its practice of judicial override. Judge Eaton served as a trial judge in the 18th Judicial Circuit of Florida for more than 20 years and is a nationally recognized expert on capital trials. Florida and Alabama are two of the only states in the country to allow a trial judge to override a jury's recommendation that a defendant be sentenced to life in prison, instead imposing a death sentence. Judge Eaton argued that, "judicial override creates a system in which (1) geography; (2) race; (3) timing of trial; and (4) the individual judge determine whether one will be sentenced to death, rather than the seriousness of the crime," citing a recent report by the Alabama-based Equal Justice Initiative, [The Death Penalty in Alabama: Judge Override](#).

The U.S. Supreme Court's decisions in a range of high profile cases including the [Wal-Mart](#) and [AT&T](#) class-actions, and the case involving the First Amendment rights of protesters at funerals, were examined during a Hill briefing for lawmakers and their staff by TCP Supreme Court Fellow Professor Steve Vladeck of Washington College of Law, with an introduction and brief remarks by Sharon Bradford Franklin, TCP Senior Policy Counsel. The briefing was part of an ongoing series that Bobby Scott, Chair of the House Crime Subcommittee, and Jerold Nadler, Chair of the House Constitution Subcommittee, have asked TCP to present. Professor Vladeck also provided the capacity audience, including staffers, representatives of advocacy groups, and members of the public, with a fascinating look at the upcoming term, in which the Court is expected to weigh in on such issues as GPS tracking and the Fourth Amendment.

More TCP Newsmakers

- TCP Board Member Mickey Edwards' recent [essay](#) in *The Atlantic* magazine on how to reduce partisan paralysis in Congress was lauded by Fareed Zakaria in a *Washington Post* [Op-Ed](#) on July 20th and again on his *CNN* television program, *GPS*.
- In a compelling *Washington Times* [Op-Ed](#), TCP Board Member David Keene described the case of Thomas Haynesworth, who spent 27 years in prison for crimes he was later found not to commit. Mr. Haynesworth and Virginia Attorney General Kenneth Cuccinelli, who pushed for post-conviction DNA testing and for Mr. Haynesworth's release, were honored during a luncheon held in Washington by the Mid-Atlantic Innocence Project, which represented Mr. Haynesworth in his legal proceedings. Our president, Ginny Sloan, is on MAIP's Board of Directors. Attorney General Cuccinelli's remarks about the obligation of prosecutors to do "justice," not just seek conviction, are worth reading.
- TCP Scholar in Residence Louis Fisher wrote an article, "Parsing the War Power," which was published in the July 5th *National Law Journal*. In addition, Mr. Fisher completed the ninth [edition](#) of *American Constitutional Law*. We were honored that he chose to dedicate the book as follows: "It is my pleasure to dedicate the book to The Constitution Project, which I have worked with over the past decade on a number of issues, including war powers and the state secrets privilege. Its expertise, analytical skills, and nonpartisan approach contribute to an informed and professional debate on key questions of constitutional law. Upon my retirement from government in late August 2010, I worked even more closely with The Constitution Project as scholar in residence and am proud to be among its supporters."
- TCP President Virginia Sloan wrote an [Op-Ed](#), which was published in *Roll Call* on July 27th, in which she urged Congress to be more precise when drafting criminal laws. Vague criminal statutes, she argued, do not provide adequate notice to the public about what activities are prohibited, thereby leaving individuals to learn the hard way—after being charged by sometimes overzealous prosecutors.

New Faces of Reform Interview Focuses on Privacy

Every month we showcase a videotaped [interview](#) on our Web site with a national leader on criminal justice or rule of law issues. This month, former Republican Congressman, Undersecretary of Homeland Security during the George W. Bush administration, and TCP Board member Asa Hutchinson discusses the challenge of protecting privacy in the digital age. View previous [interviews](#) with TCP Board chair Stephen Hanlon of Holland & Knight, and TCP Board Members former FBI Director and federal Judge William S. Sessions, former Congressman Mickey Edwards (R-OK), and Stanford Law Professor and former Special Assistant to President Obama for Justice and Regulatory Affairs Mariano-Florentino Cuellar, and others.



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