



In This Issue

[TCP Releases Statement on Federal Criminal Discovery](#)

[Supreme Court Bolsters Right to Counsel In Plea Bargains](#)

[20 Groups Urge Senate to Move Forward with Confirmation Process for Privacy Panel Nominees](#)

[Ninth Circuit Orders Rehearing in Border Search Case](#)

[TCP Joins Call for Transparency in Debating Next Defense Authorization Bill](#)

[Video: Expert Panel Looks at Privacy Protection in Digital Age](#)

[FAA Should Examine Privacy Impact of Aerial Surveillance Drones](#)

[TCP Seeks Transparency Regarding Drones Used for Targeted Killing](#)

[Amicus Brief Coordinated by TCP Draws Praise](#)

[TCP Newsmakers](#)

Greetings!

March was a bittersweet month around The Constitution Project. We were extremely busy on the policy front as you'll read in this newsletter. We launched a campaign to get Congress to address the problem of federal prosecutors' failure to turn over favorable evidence to defendants as the Constitution requires them to do. The courts handed down opinions adopting our position in several cases in which we intervened as a "friend of the court." We held two great panel discussions in New York City. And, we issued our [2011 Annual Report](#).



We were also focused on preparations for last Thursday night's hugely [successful gala reception](#), where we were joined by several hundred supporters to honor David A. Keene and the Digital Due Process Coalition as this year's Constitutional Champions. It was a terrific evening, and I enjoyed the chance to visit with so many old and new friends and advocates. Thanks to all who attended the event or showed their support in other ways.

But March also marked the retirement of Paul Saunders from TCP's Board of Directors. Paul is Of Counsel to Cravath, Swaine & Moore's litigation department, where his practice includes jury trials and international arbitration, primarily in the areas of antitrust, securities, intellectual property, and public and private international law. Among his many accolades, Paul was cited as one of the country's leading practitioners in the litigation arena by *Chambers USA: America's Leading Lawyers for Business* from 2007 through 2010.

Paul has been an ardent supporter of TCP since its inception - including serving as our first chair of the Board, and leading our effort to become an independent non-profit organization - and we will miss his wise counsel. In recognition of his strong commitment to the Constitution, and to his years of service to TCP, it gives me great personal pleasure to announce that we are launching The Paul Saunders Constitutional Debate and Lecture Series, which will offer several events each year focusing on some of the major constitutional challenges before us. Look for the first of these events coming up soon.



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Sincerely,



Virginia Sloan
President, The Constitution Project

TCP Releases Statement on Federal Criminal Discovery, Endorses Reform Bill

Criminal Discovery Reform

On March 15th, TCP [endorsed](#) the Fairness in Disclosure of Evidence Act, legislation introduced by Senator Lisa Murkowski (R-AK) requiring federal prosecutors to turn over to defendants all evidence favorable to their cases, and providing appropriate penalties when they do not. TCP believes the legislation is needed to address the persistent problems with discovery in the federal criminal justice system that arise when federal prosecutors fail in their constitutional duty to hand over evidence that might help lawyers for an accused person mount an effective defense. Senator Murkowski's bill was introduced in part because of the Justice Department's failure to turn over such evidence in the case of her colleague, former Senator Ted Stevens. The Senate Judiciary Committee has already held a hearing on the devastating report by special investigator Henry Schuelke, appointed by the judge in the *Stevens* case and the House is contemplating a similar hearing soon.

"The passage of this legislation will ensure that defendants have access to all favorable information, including information to which they are constitutionally entitled, and will create greater consistency by eliminating disparities in the way federal prosecutors determine what information they are required to disclose," TCP President Virginia Sloan said. Earlier in the month, TCP released a [statement](#) - now endorsed by nearly 150 former federal prosecutors and judges and other criminal justice experts - calling on Congress to adopt legislation to address the problem.

[Back to Top](#)

Supreme Court Bolsters Right to Counsel in Plea Bargains

Right to Counsel

On March 21st, the U.S. Supreme Court handed down two decisions (*Lafler v. Cooper* and *Missouri v. Frye*), in which the Court recognized the necessity of the right to effective assistance of counsel during plea negotiations preceding trial. TCP filed an [amicus curiae](#) brief with the generous *pro bono* support of attorneys at Venable LLP in the two closely-related cases in support of the constitutional right to counsel.

In a statement, TCP President Virginia Sloan hailed the two decisions, saying they "recognize that in order for the right to counsel to have meaning for the overwhelming majority of defendants, counsel must perform effectively during the plea bargaining stage and appropriate remedies must follow when counsel fails." In 2009, TCP issued [Justice Denied](#), a comprehensive report that documents systemic and widespread failures of the criminal justice system to protect the Sixth Amendment right to counsel at all stages of criminal proceedings, and offers recommendations for protecting this fundamental constitutional right.

The Supreme Court's decisions recognize the changing reality of our criminal justice system; most

notably, that roughly 19 out of every 20 criminal cases end in a plea agreement rather than going to trial. The [Los Angeles Times](#) quoted Ms. Sloan's statement that TCP is "pleased the Court recognized that the right to counsel during plea negotiations is just as important as at trial." TCP's Criminal Justice Program senior counsel, Mary Schmid Mergler, discussed the cases on [ACSblog](#). The cases were also the topic of a teleforum that TCP co-hosted with The Federalist Society on April 3rd.

[Back to Top](#)

20 Groups Urge Senate to Move Forward with Confirmation Process for Privacy Panel Nominees

Transparency and Accountability

According to a diverse coalition of twenty groups led by TCP, the Senate Judiciary Committee should promptly hold confirmation hearings on President Obama's nominees to the Privacy and Civil Liberties Oversight Board (PCLOB). "President Obama has finally offered a full bipartisan slate of candidates to serve on this essential oversight board. It is now time for the Senate to carry out its duties," the groups told Senators Patrick Leahy (D-VT) and Charles Grassley (R-IA), the committee's chair and ranking member, in a [letter released](#) on March 13. Created by Congress based on the recommendations of the bipartisan 9/11 Commission, the PCLOB is intended to play a vital, independent role in overseeing the privacy and civil liberties implications of national security programs and policies. However, no members have yet been confirmed to serve on the PCLOB so, at present, the Board exists in name only.

[Back to Top](#)

Ninth Circuit Orders Rehearing in Border Search Case

Privacy and Technology

On March 19th, the U.S. Court of Appeals for the Ninth Circuit ordered a rehearing *en banc* in *United States v. Cotterman*. This case involves the question of whether border officials may, without probable cause or even reasonable suspicion, search and seize an individual's laptop and hold it for two days while transporting it over 170 miles from the border. TCP filed an [amicus brief in this case](#), written by the firm of Hogan Lovells LLP, urging the Court of Appeals to rehear the case *en banc* because of the Fourth Amendment implications of the case.

At issue is the Department of Homeland Security's policy for searching and seizing laptops, smart phones, portable storage devices, and other electronic media near the U.S. border without "probable cause" or even "reasonable suspicion" of wrongdoing. The policy is an expansion of the "border exception" of the Fourth Amendment, which historically allowed agents to search and seize packages, baggage, merchandise, and even travelers near the border of the United States without the Fourth Amendment's traditional protections. TCP's brief argues that reasonable suspicion should be required for searches of electronic devices at the border to ensure that Fourth Amendment safeguards continue to apply in the Digital Age. The brief was based on TCP's report, [Suspicionless Border Searches of Electronic Devices: Legal and Privacy Concerns with the Department of Homeland Security's Policy](#).

[Back to Top](#)

TCP Joins Call for Transparency in Debating Next Defense

Authorization Bill

Transparency and Accountability

The Constitution Project has joined with 25 other civil and human rights, taxpayer, and good government organizations from across the ideological spectrum to call for more openness in the legislation that allocates funds to the national defense budget. The National Defense Authorization Act (NDAA) last year authorized more than \$662 billion of taxpayer dollars for FY 2012, but was drafted and debated behind closed doors in the Senate Armed Services Committee (SASC). The "Open NDAA" campaign urges Senators to shine a light on the defense budget by making the draft bill and amendments available in advance of the markup, as well as opening the markup-or committee votes-to the public. In stark contrast to the Senate, the NDAA markup in the House of Representatives is open to the public. For more information, visit the [coalition website](#).

[Back to Top](#)

VIDEO AVAILABLE: Expert Panel Looks at Privacy Protection in Digital Age

Privacy and Technology

On March 6th, TCP hosted an [informative discussion](#) on how to ensure that privacy can be protected in an age of rapidly advancing technology. The event, which took place in New York City, included: TCP Liberty and Security Committee member Bob Barr, CEO, Liberty Strategies, LLC, former Member of Congress, (R-GA), and former U.S. Attorney in Georgia; Peter Eckersley, Technology Projects Director, Electronic Frontier Foundation; Jeffrey Rosen, Professor of Law, The George Washington University, Legal Affairs Editor, *The New Republic*, co-author of *Constitution 3.0: Freedom and Technological Change*; and Jason Weinstein, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice. TCP Senior Counsel Sharon Bradford Franklin moderated the discussion. *The Wall Street Journal's* Law Blog also [covered the event](#).

[Back to Top](#)

FAA Should Examine Privacy Impact of Aerial Surveillance Drones, TCP Urges

Privacy and Technology

The increased use of aerial surveillance drones poses a significant threat to the privacy of United States residents. Experts estimate that as many as 30,000 new aerial drones could be launched in the United States over the next decade, and some of these drones have the ability to stealthily track multiple targets over a vast distance without being detected. In a recent [petition](#), TCP joined more than thirty other human rights, technology, and civil liberties organizations to ask the Federal Aviation Administration to conduct a notice and comment rulemaking on the privacy and civil liberties implications of such surveillance drones in the United States. The [petition](#) also emphasized the importance of reporting on the proposed use and retention of data acquired by drone operators.

[Back to Top](#)

TCP Seeks Transparency Regarding Drones Used for Targeted Killing

On March 22, 2012, The Constitution Project joined with eight other organizations in filing an *amicus* brief in *ACLU v. CIA*, a Freedom of Information Act (FOIA) lawsuit seeking documents regarding the CIA's program for using drones for targeted killings abroad. The brief argues that the CIA should process the FOIA request rather than simply refusing to confirm or deny that it has any such records because it cannot confirm the existence of the program. It describes how various administration officials have already confirmed existence of the program, and calls for transparency that will permit a full public debate on the legality and wisdom of the drone program.

[Back to Top](#)

Amicus Brief Coordinated by TCP Draws Praise

Death Penalty

On March 26th, [The Washington Times](#) reported on an *amicus* brief filed in the 4th Circuit Court of Appeals by 34 high-profile former judges, state attorneys general and law enforcement officials arguing against the State of Virginia's effort to reinstate the death sentence of Justin Wolfe, a northern Virginia man widely believed to have been wrongfully sentenced in a murder-for-hire scheme. TCP coordinated the recruitment of the signers of the *amicus* brief, which was drafted *pro bono* by attorneys at Vinson & Elkins LLP. An [AP story](#) summed up the effectiveness of TCP's work: "Attorney L. Steven Emmert of Virginia Beach, an appellate specialist who is not involved in the Wolfe case, said a friend-of-the-court brief like the one filed by the former judges and prosecutors is likely to grab the court's attention. 'People of that level will have instantaneous respect from members of the court,' Emmert said. 'That doesn't mean the court will automatically do what they want. But it has some special meaning.'

[Back to Top](#)

TCP Newsmakers in Brief

Current Events

- TCP Scholar-in-Residence **Louis Fisher**, a nationally recognized war powers expert, was quoted in a March 9th [MSNBC article](#) about Congress's role in potential military conflicts in Syria and Iran.
- On March 10th, TCP Senior Counsel **Sharon Bradford Franklin** was quoted in a [Congressional Quarterly story](#) about the privacy implications of cybersecurity legislation pending in Congress. Two weeks later, on March 27th, Ms. Franklin spoke about the civil liberties issues raised by potential cybersecurity legislation at a brownbag lunch program sponsored by Georgetown Law School's National Security Law Society.
- TCP Board President **Stephen Hanlon** and Senior Counsel **Mary Schmid Mergler** spoke at an event at the Benjamin N. Cardozo School of Law entitled "Reviving *Gideon*: Reforming the Right to Counsel." The March 27th event also featured public defense practitioners.

[Back to Top](#)

T: 202.580.6920 | F: 202.580.6929
www.constitutionproject.org

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