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### Greetings!

As too many lawyers know, failure to disclose *Brady* evidence is a constitutional violation that by its very nature often goes undiscovered - anything that the government chooses not to disclose to the defense generally remains unknown. (*Brady v. Maryland* and its progeny require that the prosecution disclose evidence to the defense when that evidence would help the defendant's case.) However, several particularly egregious violations have recently come to light. For example, the myriad *Brady* violations in the prosecution of the late Sen. Ted Stevens [are now well known](#). The scathing [independent report](#) ordered by the judge detailing the violations in that case clearly makes the case for legislative reform.



Moreover, in the last two weeks, we have learned from a series of *Washington Post* stories about more instances of nondisclosure by the Department of Justice - disclosures that TCP's Board, in a [special statement](#), could only describe as "appalling." The *Post* revealed the results of a Justice Department investigation into [flawed FBI forensic reports and testimony](#), generally relating to hair analysis-evidence that has been widely criticized for years. According to the *Post*, [DOJ failed to ensure](#) that defendants in federal, state, and local cases were informed of the potentially flawed evidence in each of their cases, resulting in wrongful convictions and even an apparent wrongful execution.

Just last week, in an unrelated criminal prosecution in the District, U.S. District Judge Gladys Kessler determined that there was "not the slightest doubt" that the government had violated its *Brady* obligations. She noted: "In this day and age with all of the publicity going on about *Brady* issues..., it is hard to fathom why the government would not be super, super attentive to the issue of what is and what isn't *Brady*."

I wholeheartedly agree. TCP will continue to [urge Congress](#) and the [Attorney General](#) to ensure that a law is passed to rectify this problem. And in the meantime, we will call attention to federal prosecutors who fail, as Judge Kessler said, to "be super, super attentive to the issue of what is and what isn't *Brady*."

Sincerely,



Virginia Sloan  
President, The Constitution Project

## TCP Urges Attorney General to Support *Brady* Reform

### Exculpatory Evidence

Based on a series of articles in *The Washington Post* about the failure of federal prosecutors to notify defendants of flawed forensic evidence in scores of cases, and in the wake of a recent string of other high-profile nondisclosures by prosecutors, TCP Board Chair Stephen F. Hanlon and President Virginia Sloan [wrote to Attorney General Eric Holder](#) urging him to support a new law that would clarify the obligations of all federal prosecutors to disclose favorable evidence and provide remedies when they fail to do so. TCP's Board of Directors also weighed in on the issue with [a statement](#) decrying the apparent breaches by federal prosecutors of their *Brady* obligations.

In addition, The Constitution Project has organized [a letter](#) from nearly 150 criminal justice experts, more than 100 of whom are former federal prosecutors, who believe that Congress should pass legislation to clarify the obligations of federal prosecutors to disclose favorable evidence to the defense and impose consequences when they fail to do so. The signers of [the letter](#) agree that self-regulation by the Justice Department has been tried and has failed and that it is time for Congress make certain that this problem is solved.

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## TCP Fights to Protect Privacy in Cybersecurity Legislation

### Privacy and Technology

On April 26th, the U.S. House passed cybersecurity legislation known as CISPA, the Cyber Intelligence Sharing and Protection Act ([H.R. 3523](#)) by a vote of 248 to 168. CISPA, whose lead sponsors are Reps. Mike Rogers (R-MI) and Dutch Ruppersberger (D-MD), the Chair and Ranking Member of the House Intelligence Committee (HPSCI), would allow private companies in the United States, like Facebook and Microsoft, to share information about their customers' online activities and the content of private communications with the government - including the National Security Agency - giving these agencies unprecedented access to sensitive personal information and private communications.

To educate Congress on the civil liberties threats posed by CISPA, TCP, the Center for Democracy & Technology and the American Civil Liberties Union hosted [an April 17th briefing](#) on Capitol Hill titled, "The False Choice: Cybersecurity vs. Civil Liberties." TCP and a host of privacy and civil liberties advocacy groups also joined together to [campaign](#) against the bill. In a letter to members of Congress on the day of the House vote, TCP and a coalition of alarmed privacy and civil liberties groups wrote, "We are gravely concerned that this bill will allow companies that hold very sensitive and personal information to liberally share it with the government, which could then use the information without meaningful oversight for purposes unrelated to cybersecurity."

While TCP believes that limited information sharing can be an effective approach to cybersecurity, an overly broad CISPA that lacks critical privacy safeguards could establish a system of government cyber-surveillance that violates Americans' constitutional rights and civil liberties. In the weeks

leading up to the vote, TCP was one of the groups that worked with Intelligence Committee staff on amendments to enhance the privacy safeguards contained in the bill, including narrowing the scope of "cyber threat information" that may be shared with the government and limiting how the government may use private information once it is received. These HPSCI-supported amendments did move the bill in the right direction, but TCP ultimately continued its opposition to CISPA, because the bill still fails to include critical safeguards for privacy rights and civil liberties. In particular, CISPA lacks provisions to limit the amount of personal information that may be shared with the government and it would allow private information to be shared directly with the NSA and other Defense Department components.

TCP's opposition to CISPA, rooted in its recent report, [Recommendations for the Implementation of a Comprehensive and Constitutional Cybersecurity Policy](#), was noted in stories in [The Washington Post](#), [National Journal](#), and [TalkingPointsMemo](#), among others. In addition, TCP Senior Counsel Sharon Bradford Franklin participated in [U.S. News & World Report's Debate Club](#) on whether or not Congress should pass CISPA.

TCP will continue seeking ways to improve privacy and civil rights protections in cybersecurity legislation as the debate moves to the U.S. Senate.

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## Task Force Members Meet with Former Detainees and Others

### Detention and Prosecution of Terrorism Suspects

Two members of TCP's Task Force on Detainee Treatment, former Congressman Asa Hutchinson and General David Irvine, flew to London for a series of meetings in connection with the group's ongoing investigation into the detention and treatment of suspected terrorists. They were accompanied by Task Force Executive Director Neil Lewis and Counsel Alka Pradhan.

On the afternoon of April 15th, Hutchinson and Irvine met with Conservative MP Andrew Tyrie, who led the All-Party Parliamentary Group on Extraordinary Rendition (APPG) for six years. The APPG held numerous hearings on the subject of UK involvement in the CIA rendition program, and issued a report on the subject last year entitled "Account Rendered." The APPG has since been encouraging the British government to hold a formal inquiry into its collaboration with the CIA. Tyrie described the evolution of the APPG for Hutchinson and Irvine, and the group discussed the possibility of cooperating on promotion of the Task Force's report and recommendations both in the US and the UK. Later that evening, Hutchinson and Irvine met with Clive Stafford Smith, a lawyer who founded Reprieve, a not-for-profit human rights organization, who shared many of his experiences representing Guantanamo Bay detainees.

The following day, Hutchinson and Irvine met with three former detainees: Moazzam Begg, Bisher al-Rawi, and Omar Deghayes. This meeting marked the first time that former U.S. government officials have met with released detainees, who are barred from entering the United States. During the meeting, the three described the circumstances of their detention, and of their treatment while in captivity in Pakistan, Afghanistan, and at Guantanamo Bay. The conversation was free-flowing, with Hutchinson and Irvine asking detailed questions and Begg, al-Rawi, and Deghayes responding with questions of their own regarding current and former U.S. government policies.

The meeting with former detainees will serve to help inform the Task Force report and will complement the many government and NGO sources also being included. The Task Force expects to issue its final report in early 2013.

## Groups Want Quick Action on Privacy Board Confirmations

Transparency and Accountability

On April 18th, the Senate Judiciary Committee held a confirmation hearing on President Obama's five nominees to the Privacy and Civil Liberties Oversight Board (PCLOB). Congress originally created the PCLOB in 2004 in response to the bipartisan 9/11 Commission's recommendation to create a body to oversee the privacy and civil liberties implications of national security programs and policies. However, since Congress passed legislation in 2007 to strengthen the Board, no members have been confirmed to serve on the PCLOB, and the Board has not yet come into existence.

TCP has been very active in pressing the Bush and Obama administrations to appoint members to the Board, and urging the Senate to act on the nominations. On the day before the Senate hearing, a diverse coalition of sixteen organizations led by TCP sent a [letter to Committee leaders](#) urging them to act quickly to move the nominees forward so that the PCLOB could begin its important work. Some of the groups joining TCP in signing the letter were the American Civil Liberties Union, American Library Association, Bill of Rights Defense Committee, Consumer Action, Defending Dissent Foundation, Liberty Coalition, Muslim Public Affairs Council, National Association of Criminal Defense Lawyers, OpenTheGovernment.org and Privacy Times.

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## TCP Heralds Release of Uighurs from Guantanamo Bay

Detention and Prosecution of Terrorism Suspects

Seven long years after the U.S. military first determined that none of a group of Chinese Muslims - known as Uighurs - held at Guantanamo were "enemy combatants," two additional Uighurs have finally been released from detention at Guantanamo Bay by the Department of Defense for settlement in El Salvador. "The news that the unlawful detention of these two individuals has finally ended is long overdue," TCP President Virginia Sloan said in [a statement](#) on April 19th. TCP has been a leader in the efforts to ensure the release of the Uighurs, including developing political support from across the political spectrum and filing *amicus curiae* briefs in several court cases. In her statement, Ms. Sloan pointed out that the release of these two prisoners fails to resolve the fate of the scores of other detainees held at Guantanamo Bay, including three additional Uighurs, who have also been determined not to pose a threat to national security.

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## TCP Recruits Former Federal Judges to *Amicus* Brief in Guantanamo *Habeas* Case

Detention and Prosecution of Terrorism Suspects

Continuing its involvement in a long line of important Guantanamo *habeas* cases, TCP helped recruit former federal judges to sign on to an *amicus curiae* brief in *Latif v. Obama*. The brief was expertly drafted by Gary Isaac and Jim Schroeder at Mayer Brown, who have been litigating detainee cases for many years and who have worked extensively with TCP in the past.

Latif is a Guantanamo detainee who petitioned for a writ of *habeas corpus*. The District Court granted

Latif's *habeas* petition after refusing to credit the reliability of a classified piece of government evidence (which has since been revealed to be a report that the government claims summarizes an actual interview with Latif himself). Over a strong dissent, a divided D.C. Circuit panel reversed and held that the District Court in Guantanamo *habeas* cases must afford the government's evidence a presumption of "regularity" or "accuracy."

The *amicus* brief argues that the D.C. Circuit got it wrong. The historical role of a *habeas* court is to independently analyze the prosecution's evidence, not presume it to be accurate. Moreover, the D.C. Circuit's decision disregards the experience of those D.C. District Court Judges who have assessed the government's evidence in Guantanamo *habeas* cases, found it problematic, and explained why it should not be presumed to be accurate. Finally, the *amicus* brief explains that the presuming the accuracy of the government's evidence upsets the balance-of-powers scheme guaranteed by the Constitution's Suspension Clause and undermines prior Supreme Court precedent by denying detainees a meaningful opportunity to challenge their executive detentions.

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## Experts Debate Supreme Court Decisions in Access to Effective Counsel Cases

Access to Counsel

On April 3rd, TCP and The Federalist Society hosted a [teleforum debate](#) about recent Supreme Court decisions implicating the constitutional right to counsel and the impact of these decisions on our criminal justice system. George Kendall, Of Counsel at Squire Sanders and a leading criminal defense lawyer, and Dean Mazzone, Chief of the Enterprise and Major Crimes Division of the Massachusetts Attorney General's Office, offered their views on the decisions in *Missouri v. Frye*, *Lafler v. Cooper*, *Maples v. Thomas* and *Martinez v. Ryan*. The panel was moderated by Dean Reuter of The Federalist Society. The debate podcast is available [online](#).

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## TCP Newsmakers in Brief

Current Events

- Virginia Sloan wrote [an op-ed](#) about the need for criminal discovery reform that was published in The Huffington Post.
- Ms. Sloan was quoted in an article in [The Washington Post](#) about the wrongful conviction of Santae Tribble. She called for a further review of cases involving flawed forensic evidence after suggestions that a review would be confined to D.C. cases: "Obviously, if there are problems in D.C., there are problems across the country. To think this kind of testimony or potentially flawed evidence is limited to a particular location makes no sense."
- In an opinion piece about President Obama's recent comments on the Supreme Court, *The Atlantic's* Contributing Editor Andrew Cohen cited TCP's [The Newsroom Guide to Judicial Independence](#).
- TCP Scholar-in-Residence Louis Fisher was recently awarded the 2012 Hubert H. Humphrey Award, bestowed annually by the American Political Science Association. The award is granted to a political scientist who has made significant contributions to public service. Dr. Fisher is a preeminent scholar in constitutional law, war powers, budget policy, executive-legislative relations, and judicial-congressional relations, and he has testified before Congress approximately 50 times and authored more than 400 articles.

- On April 20th, TCP Senior Counsel Sharon Bradford Franklin served as a panelist for the Fulbright Foreign Scholars Enrichment Seminar on "The Constitution and U.S. Elections" in Philadelphia, PA. Sharon spoke about constitutional issues arising in U.S. election debates to the group of over 150 foreign students participating in this State Department fellowship program.

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