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### Greetings!

In addition to finding bipartisan solutions to the most contentious constitutional debates of the day, The Constitution Project (TCP) invests significant time and energy on public education. We believe that an informed citizenry is ultimately the greatest safeguard of our constitutional liberties and the rule of law. Most of our public education events focus on the responsibilities of the different branches of government and the powers (and limits) of each branch.



But we the people have an immense responsibility as well - we choose our nation's leaders in free and open elections. These elections are our chance to hold our government leaders accountable for protecting our civil liberties and upholding the rule of law. It is an awesome power, and one not to take lightly. Regardless of your political viewpoint, I hope you will make the time on Tuesday to vote.

Sincerely,

Virginia Sloan  
President, The Constitution Project

## D.C. Circuit's Decision in *Hamdan* Reaffirms Need for Fair Trials, Use of Federal Courts

### Prosecution of Suspected Terrorists

On October 16, the U.S. Court of Appeals for the D.C. Circuit threw out the conviction of Osama bin Laden's driver, Salim Hamdan, a decision that struck a blow to the legitimacy of military commissions. Hamdan was found guilty of material support for terrorism by a military commission, but a three-judge panel of the D.C. Circuit Court overturned the conviction because it found that material support was not a war crime at the time of Hamdan's actions and, therefore, the

commission lacked jurisdiction to try him for the offense. Hamdan served his sentence, and has since been released in Yemen.

This decision demonstrating the unreliability of military commissions further confirms TCP's longstanding position that terrorism suspects should be afforded fair trials, whenever possible, in our civilian justice system, a position TCP President Virginia Sloan reaffirmed in her [statement](#) to the media. TCP's Liberty and Security Committee outlined the advantages of the federal court system for trying terrorism cases in its 2008 report, [A Critique of National Security Courts](#).

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## TCP to Privacy Board: Focus First on 'Secret' Programs, 'Targeted Killing' and Government Data Gathering

Transparency and Accountability

Testifying before the newly-constituted Privacy and Civil Liberties Oversight Board (PCLOB), TCP's Senior Counsel Sharon Bradford Franklin urged the board to use its access to classified information to scrutinize the privacy and civil liberties implications of secret national security programs that are completely unknown to the public, or whose existence has not been confirmed by the government. TCP also called on the board to review the Obama administration's guidelines and policies governing drone attacks against suspected terrorists, and to examine a range of government surveillance programs that involve intelligence collection on, and monitoring of, U.S. persons and their private information. This last category is a broad one, including surveillance conducted pursuant to both the FISA Amendments Act and the Patriot Act, cybersecurity programs, data mining programs, and the federal role in fusion centers. A copy of TCP's testimony is available [online](#).

TCP has long urged [Congress](#) and the [president](#) to establish and staff an independent privacy board. First created in 2004 based on the recommendations of the bipartisan 9/11 Commission, Congress expanded the authority of the PCLOB in 2007, including providing it with subpoena power. However, the president failed to nominate a full slate of members to serve on the board until last December, and the Senate finally confirmed four of the five nominees in August. The new board held its first meeting on October 31, and Ms. Franklin opened her testimony by welcoming its long-delayed convening.

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## Jurists and Legal Scholars Ask Judge to Remove Special Prosecutor in Death Penalty Case

Death Penalty

At TCP's urging, a group of 59 former judges, prosecutors, and other legal experts sent a [letter](#) to Prince William County (Virginia) Circuit Court Judge Mary Grace O'Brien urging her to replace the special prosecutor selected to oversee the capital murder case of Justin Wolfe. TCP, which earlier organized an [amicus brief](#) in the *Wolfe* case, coordinated writing and gathering signatories for the letter through its Clearinghouse of New Voices.

Two months ago, the U.S. Court of Appeals for the Fourth Circuit upheld a district court's decision to vacate Wolfe's conviction because prosecutors withheld exculpatory evidence in violation of the Constitution. The original prosecutor stepped aside and recommended a special prosecutor, who, just one day after being appointed, announced he would pursue the capital murder charges against Wolfe. As the judges and prosecutors noted in their letter to Judge O'Brien, "This suggests a hurried decision in which the special prosecutor did not carefully examine the evidence to reach an independent conclusion about the case, but instead relied on the earlier deliberation of the Prince

William County prosecutors - prosecutors who were responsible for the misconduct and errors in judgment that left Mr. Wolfe on death row for more than a decade." [The Associated Press](#), [The Washington Post](#) and [The Washington Times](#) all covered the TCP letter.

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## Surveillance of Boston Peace Activists Confirms Fears of Fusion Center Abuses

Federal Surveillance Programs

An October 17 [Boston Globe story](#) confirmed the concerns many privacy advocates, including TCP, have raised about the nation's fusion center program. According to the story, the Boston Police Department conducted surveillance on several antiwar groups between 2007 and 2010, even though none of the groups had any connection to crime or terrorism. In one report filed by the police department, an antiwar meeting that took place at a church was described as a "criminal act" involving "extremists."

The surveillance activities were revealed in a [report](#) released by the National Lawyers Guild and the Boston ACLU. Documents obtained by the groups revealed that a fusion center created after 9/11, the Boston Regional Intelligence Center, maintained surveillance reports that had nothing to do with crime or homeland security. The fusion center's privacy policy states that reports must be purged in 90 days if they are not connected with criminal or terrorist activity. According to the article, a lawyer for the police department "blamed an error in the department's software as the reason intelligence reports from years ago remained in the system, even though they should have been deleted."

TCP Senior Counsel Sharon Bradford Franklin was interviewed by the *Globe* and noted that the problems in Massachusetts are not isolated examples. Echoing the findings of TCP's recent report, [Recommendations for Fusion Centers: Protecting Privacy and Civil Liberties While Protecting Against Crime and Terrorism](#), Ms. Franklin said the problems associated with fusion centers nationwide are a product of the lack of oversight and accountability in these intelligence-gathering efforts.

Earlier in October, the Permanent Subcommittee on Investigations of the U.S. Senate's Homeland Security and Governmental Affairs Committee issued a scathing [bipartisan report](#) that found fusion centers "too often wasted money and stepped on Americans' civil liberties," according to Senator Tom Coburn (R-OK), the Subcommittee's ranking member who initiated the investigation. A [Huffington Post](#) story cited both the Senate and TCP fusion centers report.

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## TCP Asks Supreme Court to Consider Availability of Habeas Review in Confrontation Clause Case

Criminal Justice Reform

Michael Peaks was convicted of murder and received a life sentence in Kentucky, based largely on the audio-taped testimony of one of his co-defendants, Patrick Meeks, which prosecutors played for the jury. Prosecutors never called Mr. Meeks to the stand, thereby preventing Mr. Peak's attorney from cross examining the witness, in violation of the U.S. Constitution's Sixth Amendment Confrontation Clause. The Kentucky Supreme Court, failing to apply clearly established Supreme Court precedent, found no Confrontation Clause violation. A federal district court and the U.S. Court of Appeals for the Sixth Circuit denied Mr. Peak's *habeas* petition, while acknowledging that Mr. Peak's Confrontation Clause rights may well have been violated. The federal courts concluded that the standard for obtaining federal review under the Antiterrorism and Effective Death Penalty

Act (AEDPA) precluded relief.

In an [amicus brief](#) filed on October 24 with the generous *pro bono* assistance of Holland & Knight attorneys, TCP asked the U.S. Supreme Court to accept review of the case and to clarify that AEDPA does not prevent federal courts from considering cases in which state courts fail to apply clearly established federal law.

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