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## TCP Marks Torture Awareness Month with Community Events

Counter-Terrorism Policies & Practices

Nearly thirty years ago, on June 26, 1987, the nations of the world took a major step toward banning the practice of torture. On that day, the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, an international human rights document that aims to prevent torture around the world, took effect. To mark this historic event, organizations across the country designated June as "Torture Awareness Month."

This year, TCP joined the National Religious Campaign Against Torture, KARAMAH - Muslim Women Lawyers for Human Rights, and local organizations in sponsoring community-based events across the country to ensure that the truth about the U.S. government's now-discredited post-9/11 "enhanced interrogation" program is made public. The groups sponsored well-attended community events in [Seattle](#), Los Angeles, [North Carolina](#), northern Virginia and [Washington, D.C.](#) Each of these events featured presentations from one or more [members](#) of TCP's bipartisan blue-ribbon Task Force on Detainee Treatment, which released a [comprehensive report](#) last year on the treatment of suspected terrorists in U.S. custody, finding that the U.S. government at its highest levels countenanced torture.

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## War Powers Experts Say Military Action in Iraq Needs Congressional Backing

Checks & Balances

A bipartisan group of war powers experts assembled by The Constitution Project warned President Obama that he must seek Congressional approval before any use of offensive military force to address the conflict in Iraq.

On June 19, Obama [announced](#) his plans to send up to 300 advisers to that war-torn country. While he said the advisers would not be engaged in combat, he indicated he is "prepared to take targeted and precise military action" if necessary. In separate letters sent to Obama and [Congressional leaders](#) on June 20, TCP's experts cautioned that such a step, including targeted air strikes or drone attacks, would exceed his constitutional authority.

The group of experts signing the letter includes: former Congressman Mickey Edwards (R-Okla.), who served as chair of the House Republican Policy Committee; former Congressman David Skaggs (D-Colo.), who served on the House Permanent Select Committee on Intelligence; Dr. Louis Fisher, scholar-in-residence at The Constitution Project, who for four decades served the Library of Congress as a specialist in constitutional law and separation of powers; and Professor Peter Raven-Hansen, co-director of the National Security and U.S. Foreign Relations Law Program at George Washington University Law School. All four are members of TCP's War Powers Committee.

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## TCP Brings War Powers Discussion to Capitol Hill

Checks & Balances

Along with the [Wayne Morse Center for Law and Politics](#), TCP sponsored a June 11 panel discussion on Capitol Hill focused on war powers decision-making in the context of U.S. counterterrorism operations. Senator Ron Wyden (D-Ore.) introduced the panel, shared his reminiscences of Senator Morse and speculated as to how the only Senator to vote against the Gulf of Tonkin Resolution in 1964 might view separation of powers today. Panelists included: Representative Peter DeFazio (D-Ore.); Dr. Louis Fisher, TCP's scholar-in-residence; and Steve Vladeck, American University law professor and TCP's Supreme Court fellow. Garrett Epps, legal correspondent for The Atlantic and a constitutional law professor at the University of Baltimore, moderated.

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## Majority of U.S. House Backs Email Privacy Reform

Government Surveillance & Searches

On June 17, efforts to strengthen constitutional protections in the digital age reached a major milestone, with the sponsors of the Email Privacy Act (H.R. 1852) [announcing](#) that a majority of the members of the U.S. House of Representatives had signed on as cosponsors of the legislation. Introduced by Representatives Kevin Yoder (R-Kan.) and Jared Polis (D-Colo.), the bill enjoys broad bipartisan support and is now cosponsored by a majority of Republicans in the House as well as a majority of the House Judiciary Committee.

The legislation would update the Electronic Communications Privacy Act (ECPA), which currently allows law enforcement agencies to access without a warrant emails more than 180 days old and information stored "in the cloud." Under ECPA, emails and online documents do not receive the same Fourth Amendment protections as physical letters sent through the Post Office and stored in filing cabinets. ECPA was enacted in 1986 - and has not been modified since to keep pace with the evolving use of digital technologies.

Earlier in June, TCP president Virginia Sloan [asked a number](#) of House members to consider cosponsoring the bill. Yoder said that the bill sponsors had been talking with House leaders about moving the Email Privacy Act forward. TCP is part of the [Digital Due Process Coalition](#), a group of technology companies and privacy groups from across the political spectrum that strongly supports modernizing the law.

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## TCP Asks Supreme Court for Procedural Relief in Case of Attorney Abandonment

Right to Counsel

On June 26, TCP filed a "friend of the court" [brief](#) in the U.S. Supreme Court in support of a grant of certiorari in the case of Perez v. Stephens, involving a prisoner, Louis Castro Perez, under a death sentence in Texas. TCP is grateful to Gregory Garre and his team at Latham & Watkins for providing pro bono assistance with the researching, drafting and filing of TCP's brief.

This case stems from a multiple murder in Texas, which Perez has consistently maintained he did not commit. After the Texas state courts upheld his conviction and death sentence, he filed for relief in federal court. The federal district court denied his petition, but authorized Perez to file for relief in

the U.S. Court of Appeals for the Fifth Circuit. Perez's lawyer, however, failed to inform him that he had a right to appeal, and instead made the unilateral decision not to pursue any further recourse. Perez did not hear from his attorney again until after the deadlines to appeal and to request an extension to act had passed. His attorney later admitted that the failure to appeal was "[d]ue to no fault of Petitioner," and that if she had not abandoned Perez, she would have learned that he wanted to pursue an appeal.

TCP's brief argues that the Court should grant certiorari to determine whether attorney abandonment is an "extraordinary circumstance" that may excuse a procedural default in a federal proceeding. This case is a corollary to the Court's 2012 holding in *Maples v. Thomas*, in which it held that attorney abandonment may excuse procedural default during state habeas proceedings. TCP's brief asks the Court to extend *Maples*' protections to federal proceedings as well.

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## New Senate Cybersecurity Bill Lacks Necessary Privacy Safeguards

Government Surveillance & Searches

A broad coalition of privacy, civil liberties and open government groups joined TCP in sounding the alarm against new cybersecurity legislation proposed in the Senate, saying that it omits many of the civil liberties protections that [previous versions](#) of the bill incorporated. The Cybersecurity Information Sharing Act, authored by Senate Intelligence Committee Chair Dianne Feinstein (D-Calif.) and ranking member Saxby Chambliss (R-Ga.), would create a "gaping loophole in existing privacy law," the groups wrote in a June 26 [letter](#) to Senate leaders.

The authors of the legislation say that its purpose is to allow the government and the private sector to share more information about attacks on computer networks. But the groups expressed concern that the bill would allow the government to approach private companies, ask for "voluntary" cooperation in sharing sensitive information, including communications content, and then use that information in a wide variety of law enforcement investigations without ever seeking court approval. This danger of a potential end-run around the Fourth Amendment and other crucial privacy protections, such as the Foreign Intelligence Surveillance Act and the Electronic Communications Privacy Act, is compounded by the potentially broad immunity conferred on companies sharing data "in accordance" with the proposed law, and the additional absolute defense when sharing violates privacy protections but occurs in "good faith" reliance on the mistaken belief that the sharing is lawful, the groups wrote.

The new bill also allows broad sharing of the information received by the civilian Department of Homeland Security with the military and intelligence agencies, including with the National Security Agency. "This new flow of private communications information to NSA is deeply troubling given the past year's revelations of overbroad NSA surveillance," many of the same groups warned in a second [letter](#), also delivered to lawmakers on June 26. When it marked up the bill in early July, the Senate Select Intelligence Committee adopted modest changes to address some of the concerns, but much more needs to be done.

TCP's January 2012 report, [Recommendations for the Implementation of a Comprehensive and Constitutional Cybersecurity Policy](#), analyzes the civil liberties risks posed by cybersecurity information sharing programs, and describes a series of recommendations to protect against these threats to constitutional freedoms.

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# Privacy Advocates Say FBI Facial Recognition System Threatens Civil Liberties

Government Surveillance & Searches

TCP joined a broad coalition of advocacy organizations in urging the Department of Justice to formally assess the privacy and civil liberties implications of the FBI's massive biometric and facial recognition database called the Next Generation Identification System. In a [June 24 letter](#) to Attorney General Eric Holder, the groups noted that the capacity of the FBI to collect and retain information, even on innocent U.S. citizens, has grown exponentially in recent years, and requested that the Justice Department complete an updated privacy impact assessment of the controversial database.

The NGI system is a massive biometric database compiled by the FBI that includes iris scans, palm prints, and facial recognition records, which it shares with other federal agencies and state and local law enforcement. For example, the [FBI projects](#) that the NGI database program will have more than 52 million facial images by 2015. It builds on the FBI's legacy fingerprint database, which already contains well over 100 million individual records -- equal to nearly one third of the U.S. population.

The groups noted that an FBI study found the quality of the data in the facial recognition system to be inconsistent and often of low resolution, and pointed out that sharing information with local law enforcement based on poor quality data can alter the traditional presumption of innocence in criminal cases by placing more of a burden on suspects to show that they are not the people identified by the system.

Many of the privacy and civil liberties concerns raised in the letter to Holder mirror those of TCP's groundbreaking [Guidelines for Public Video Surveillance](#).

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## Florida Court Overturns Death Sentence Based on DNA Evidence

Death Penalty

Twenty-eight years after Paul Hildwin was convicted of rape and murder, the Florida Supreme Court has overturned his conviction and death sentence based on the discovery of DNA evidence that "completely discredits" the prosecution's case against him. In a 5-2 decision, the court ruled on June 26 that Hildwin should be given a new trial, but it remains unclear whether prosecutors will seek to retry him.

At his original trial, Hildwin was convicted using DNA found at the scene of the crime. Prosecutors told jurors that this DNA was "unusual" and consistent with Hildwin's. No evidence of an exact match was presented. In 2003, new testing proved that Hildwin was not a match for the DNA found at the scene, but the Florida Supreme Court refused to grant him a new trial on that basis.

In 2010, The Constitution Project organized an [amicus brief](#) that asked the Florida Supreme Court to grant Hildwin's petition to test the original DNA sample against the FBI and Florida state databases. The court granted this request, and the DNA sample was found to match that of the victim's boyfriend at the time of the crime.

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## House Moves to Close "Backdoor Searches" Under FISA

On June 19, the House approved bipartisan legislation to limit intelligence agencies' ability to search records in their possession for information on U.S. persons. By a 293-123 vote, the House adopted an amendment to the Department of Defense funding bill by Representatives James Sensenbrenner (R-Wisc.), Thomas Massie (R-Ky.), Zoe Lofgren (D-Calif.), and others that would close the warrantless "backdoor search" loophole in the FISA Amendments Act by requiring the National Security Agency to obtain permission from a court before examining legally obtained communications of U.S. persons.

The FISA Amendments Act authorizes surveillance of foreign online and telephone communications, but it explicitly prohibits the NSA from intentionally targeting U.S. residents. Ordinarily, the Fourth Amendment requires that the government obtain a warrant before engaging in surveillance on U.S. soil. However, the current law does not prohibit government personnel from querying databases for U.S. communications inadvertently gathered under a foreign surveillance program, and government officials have acknowledged in recent months that they do, in fact, conduct warrantless searches of U.S. records of such "incidental collections."

TCP's [Report on the FISA Amendments Act of 2008](#) argues that national security programs must not operate outside of the Fourth Amendment's safeguards against unreasonable searches.

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## Newsmakers in Brief

### Current Events

- In a June 11 [Washington Times op-ed](#), TCP president Virginia Sloan recommended a number of ways that the U.S. Senate can strengthen the USA Freedom Act - legislation intended to rein in some of the National Security Agency's surveillance programs in light of threats to civil liberties disclosed in documents Edward Snowden released to the media - before passing it.
- TCP's [groundbreaking new report](#) on the administration of capital punishment in the United States has already received a great deal of attention, and media outlets continue take notice: TCP's senior counsel Sarah Turberville discussed the need for greater transparency in lethal injection with [KWTU](#) in Oklahoma City; TCP senior counsel Christopher Durocher addressed the report findings on Al Jazeera America's TV program, "[The Week Ahead](#);" an op-ed in the [Columbus Dispatch](#) noted the similarities in reform proposals between TCP's report and an Ohio-based joint task force on the death penalty; and [CNN](#) mentioned the report in a story on executions resuming after a seven-week lull following the grotesque death of Clayton Lockett.
- TCP scholar-in-residence Louis Fisher participated in [panel discussion](#) at the New America Foundation that addressed presidential war powers. Dr. Fisher also authored a June 23 op-ed for the [National Law Journal](#) on the separation of powers issues raised by the government's exchange of five Taliban detainees for U.S. Army Sgt. Bowe Bergdahl.

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