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### Dear Friend of TCP,

Although Congress is currently in recess, with members mostly back home as the fall elections approach, TCP continues to be extraordinarily active on a host of issues. Congress will return to Washington for a "lame duck" session after the elections are over and the dust has settled. If you listen to some of the political pundits, you might think that partisan gridlock in Washington will prevent it from accomplishing anything of significance during the time period before the next Congress convenes in January. While they might be right, it doesn't have to be that way.



On issue after issue on which TCP has been engaged, bipartisan consensus is still well within reach. For example, the Smarter Sentencing Act, introduced by Sen. Richard Durbin (D-Ill.) and Sen. Mike Lee (R-Utah), which would make much needed reforms to federal mandatory minimum sentences, passed the Senate Judiciary Committee with strong bipartisan majorities, and would likely pass the Senate if brought to a vote. The Senate Judiciary Committee also passed legislation with support from both sides of the aisle to give email the same kinds of 4th Amendment protections enjoyed by written communications, and (as you will read below) similar legislation in the House has more than 270 cosponsors from across the political spectrum. The House has already overwhelmingly passed surveillance reform, and there is strong bipartisan support for it in the Senate.

TCP will keep pushing Congressional leaders to take up these issues in the weeks ahead. You can help. Take the opportunity to ask the Congressional candidates in your state or district where they stand on these vital constitutional safeguards. And, for those who are already members of Congress, urge them to act on them during the "lame duck" session. As TCP has demonstrated repeatedly over the years, it is possible to achieve bipartisan consensus on these tough issues - if only there is the political will to do so. We think there is, and with your continuing support, together we can make it happen.

Sincerely,



Virginia Sloan  
President, The Constitution Project



## TCP Celebrates Constitution Day

### Current Events

On September 17, The Constitution Project commemorated the adoption of our nation's Founding Charter with a panel discussion focusing on the unique circumstances facing incarcerated women. Our panelists were Piper Kerman, author of the riveting memoir, "Orange is the New Black: My Year in a Women's Prison;" Kathy Dennehy, former Superintendent of MCI Framingham, the oldest continuously operated women's prison in the U.S.; Vanessa Ruiz, Senior Judge, District of Columbia Court of Appeals; and Brenda Smith, professor at the Washington College of Law at American University. Renowned Washington Post columnist Ruth Marcus moderated. A [video of the event](#) is available on TCP's website.

At the same event, we also honored the creators of the Emmy-nominated Netflix TV series based on Ms. Kerman's memoir with our Constitutional Commentary Award. We give the award each year to an author or producer of an outstanding work that has improved the quality of public discourse through insightful and articulate analysis of a constitutional issue of the day. Ms. Kerman accepted the award on the show's behalf.

[Politico](#) carried a full-page interview with Ms. Kerman the day before our event, and [Epoch Times](#) ran a story on the panel discussion later in the week. The event was cosponsored by the Washington Times, the Washington office of Arent Fox LLP, and the Robert H. Smith Center for the Constitution at James Madison's Montpelier. In addition to a full house in the Arent Fox auditorium, the event was webcast to classrooms around the country.

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## Broad-based Coalition Urges Action on Surveillance Reform

### Government Surveillance & Searches

More than 40 advocacy organizations from across the political spectrum joined The Constitution Project in calling on Senate leaders to move forward with legislation to rein in the bulk collection of Americans' phone records by the National Security Agency.

In a September 4 [letter](#) to Senate Majority Leader Harry Reid and others, the groups urged the Senate to quickly pass a [compromise version](#) of the USA Freedom Act (S. 2685) that Sen. Patrick Leahy (D-Vt.) negotiated with the Obama administration and [key stakeholders](#) in the private sector, including TCP, without adding a controversial data retention requirement. The legislation is aimed at curbing dragnet collection of millions of telephone records by the NSA and providing greater transparency of policies underlying government surveillance programs, in part by allowing the secret Foreign Intelligence Surveillance Court to appoint a special advocate to represent privacy concerns whenever the court considers cases presenting "a novel or significant interpretation of the law." TCP [released a report](#) earlier in the year that recommended the creation of a special advocate as a necessary component of any surveillance reform. (See the story below for additional information on the special advocate provision.)

The letter also warned the Senate to steer clear of a "gravely concerning" cybersecurity sharing information bill adopted earlier by the Senate Intelligence committee. The groups said that that

legislation (S. 2588) would significantly expand information collected by the NSA and permit unlimited information sharing with other government agencies without sufficiently protecting personally identifiable information.

In addition to TCP, privacy and civil liberties advocates joining the letter include the ACLU, American Library Association, Center for Democracy and Technology, Competitive Enterprise Institute, Electronic Frontier Foundation, FreedomWorks, New America's Open Technology Institute, Republican Liberty Caucus and Rutherford Institute. [The Hill](#) reported on the letter the following day.

On September 18, [USA Today](#) carried an opinion piece by Mary McCarthy on the need for Congress to quickly pass surveillance reform. McCarthy is a former high-ranking intelligence and national security official who serves on TCP's Liberty and Security Committee.

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## TCP Seeks Relief for Death Row Inmates in Texas and Missouri

Death Penalty

On August 12, two prominent Texans, former Gov. Mark White and Judge William S. Sessions [sent a letter](#) asking the Texas Board of Pardons and Paroles to recommend that Gov. Rick Perry commute the death sentence of Max Soffar, a prisoner suffering from terminal cancer. "We believe that no purpose is served by continuing to incarcerate a terminally ill man with two rapidly advancing and painful cancers," the letter said, pointing out that Soffar is completely disabled by his diseases and, hence, unable to pose a danger to anyone. The letter noted that White is a Democrat and Sessions, who served three presidents as Director of the FBI, is a Republican. Both are members of TCP's Death Penalty Committee.

Soffar was convicted for the murder of three teenagers during a stick-up at a Houston bowling alley in 1980. At the time, Soffar was 24 years old, but had had the mental capacity of a child due to brain damage caused by fetal alcohol syndrome and years of substance abuse. Because there was no physical evidence linking him to the crime, prosecutors relied entirely on a confession the police obtained after a three-day interrogation without a lawyer present. Soffar almost immediately recanted - and has spent most of the last 34 years insisting that he falsely confessed.

White and Sessions note in their letter the long-standing questions about Soffar's guilt, and point to the evidence found by his appellate lawyer that another man most likely committed the crime. However, according to doctors, Soffar has mere months to live, not enough time for his appeals to be heard. The [Dallas Morning News](#) noted TCP's plea for compassionate relief in an August 13 editorial entitled "Is this the type of execution Texans are comfortable with?"

Governor White also joined with the former Republican Attorney General of Virginia, Mark Earley, to [ask](#) Missouri Governor Jay Nixon to stay the execution of Earl Ringo, Jr. who was sentenced to death for the murder of two restaurant employees in 1998. Their September 5 letter noted that Ringo's prosecution, conviction and appeals were fraught with procedural errors and possible racial bias in violation of his constitutional rights. White and Earley said they support use of the death penalty in certain circumstances, but urged Nixon to exercise restraint in this particular case. Nixon denied clemency hours before Ringo was executed on September 9.

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## Time to Move on Reforming Email Privacy, Groups Tell Congressional Leaders

## Government Surveillance & Searches

On September 10, a broad-based coalition of companies and advocacy organizations asked Congressional leaders to vote on legislation strengthening constitutional protections in the digital age. The legislation would update the Electronic Communications Privacy Act, which currently allows law enforcement agencies to access, without a warrant, emails that have been stored for more than 180 days and information stored "in the cloud." As a result, emails and online documents currently receive less Fourth Amendment protections than physical letters sent through the Post Office and stored in filing cabinets, which require a warrant to access.

The letter to House leaders notes that the Email Privacy Act (H.R. 1852) has more than a majority of the U.S. House as cosponsors of the legislation, including a majority of Republicans in the House as well as a majority of the House Judiciary Committee. A Senate committee [passed its version](#) of the legislation (S.607) last year, but Senate Majority Leader Harry Reid (D-Nev.) has not yet brought it up for a vote in the full Senate. Officials in the White House also [support updating](#) the law.

TCP is part of the [Digital Due Process Coalition](#), comprising technology companies and privacy groups from across the political spectrum, which strongly supports modernizing the law. ECPA was enacted in 1986 - and has not been modified since then to keep pace with people's use of evolving digital technologies. In June, TCP president Virginia Sloan [asked key members](#) of the House to consider cosponsoring the bill.

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## Military Actions in Iraq Exceed Constitutional Authority, TCP War Experts Say

Checks & Balances

Members of TCP's War Powers Committee say that the steady escalation of military intervention in Iraq has exceeded what President Obama may authorize on his own under the Constitution and urged him to recall Congress from recess to debate the issue.

A [letter](#) sent to the president on August 20 argues that the Constitution clearly makes Congress responsible for authorizing and funding offensive military actions such as those to contain Islamic State militants in Iraq, noting that it is "not a decision that the Executive may take unilaterally." While acknowledging that the president may use military force without prior congressional authorization in a limited set of circumstances, the group said the current U.S. military intervention already "exceeds that narrow exception and lacks a discernible limit." They added that continued military action "without congressional approval is unlawful and violates the rule of law and democratic values." An [earlier TCP report](#) prescribes how the U.S. government should constitutionally and prudently make the decision to use armed force abroad.

The group of war powers experts signing the letter to the president 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 worked for the Library of Congress for four decades as a specialist in constitutional law and separation of powers, and who authored the 2013 book, *Presidential War Power*; and Professor Peter Raven-Hansen, co-director of the National Security and U.S. Foreign Relations Law Program at George Washington University Law School.

The [Los Angeles Times](#) carried an op-ed from former Congressmen Edwards and Skaggs, co-chairs of TCP's War Powers Committee, urging Congressional action. A September 9 op-ed in the [Jacksonville \(Fla.\) Courier-Journal](#) cited their LA Times article. In addition, Dr. Fisher's comments on the issue have appeared widely in the media, including in [U.S. News & World Report](#), the [Washington Examiner](#) and [CNS](#). A story in [The Hill](#) on the "shaky legal ground" for military

intervention quoted both Dr. Fisher and Professor Raven-Hansen. And TCP senior policy counsel Scott Roehm pointed out in a letter-to-the-editor to the [Washington Post](#) that "the constitutional rule is that the president can lawfully use military force only if Congress first authorizes it, not that the president may do so until Congress stops it."

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## TCP Calls Concerns about Privacy Advocate at Surveillance Court 'Unfounded'

Government Surveillance & Searches

A group of national security law experts says the constitutional concerns raised by a federal judge about the proposal in a Senate surveillance reform bill to create a special privacy advocate before the secret Foreign Intelligence Surveillance Court are unfounded and should not derail the compromise legislation discussed above. In an August 27 [letter](#) delivered to Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.), 16 members of The Constitution Project's Liberty and Security Committee addressed [concerns raised](#) by Judge John Bates. The group said the special advocate and appellate review provisions in the bill do not present the constitutional difficulties that Bates claims they do.

Bates, a federal district-court judge who is the director of the Administrative Office of U.S. Courts and who once served on the secret national security court, said he was speaking "on behalf of the Judiciary," but the chief judge of the Ninth Circuit Court of Appeals [disputed](#) that claim.

As noted above, Sen. Leahy is the leading sponsor of a [compromise version](#) of the USA Freedom Act (S. 2685) that he negotiated with the Obama administration and [key stakeholders](#) in the private sector, including TCP. The legislation is aimed at curbing bulk collection of telephone records by the National Security Agency and providing greater transparency of policies underlying government surveillance programs, in part by allowing the surveillance court to appoint a special advocate to represent privacy concerns whenever it considers cases presenting "a novel or significant interpretation of the law."

The letter to Leahy noted that TCP had [released a report](#) earlier in the year that recommended the creation of a special advocate as a necessary component of any surveillance reform. While observing that the Senate legislation does not reflect all the policy recommendations contained in that report, the group said, "There is no basis in Judge Bates's letter, or the CRS reports he cites, to doubt the bill's constitutionality, and such concerns should not derail [the] hard-won compromise."

On September 17, [The Hill](#) carried an op-ed by Georgetown University law professor Don Wallace, Jr. making many of the same arguments. Wallace, an international law expert, is a member of TCP's Liberty and Security Committee.

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## Groups Call on President Obama to Reduce Redactions in CIA Torture Report

Counter-Terrorism Policies & Practices

A coalition of civil liberties, human rights and open government groups joined The Constitution Project in urging President Obama to intercede in the dispute over declassification of the Senate Select Intelligence Committee's report on the CIA's detention and treatment of suspected terrorists after 9/11. In an August 14 [letter](#) to the White House, the groups called on the president to reconsider redactions to the report proposed by his administration, urging him to limit redactions to

those required to protect current, legitimate intelligence sources and methods. "In this case, the clear impression is that they have been used strategically to obscure the truth," the letter said.

At issue are the administration's proposed deletions from the report's executive summary, which committee members agreed to release to the public on a bipartisan vote in April. Those who have read the summary say it documents abuse that was far more brutal and widespread than commonly understood, and that the CIA misled the Justice Department and Congress about the program's safety, efficacy and necessity - findings that mirror those contained in an April, 2013 [report](#) from TCP's bipartisan, blue-ribbon Task Force on Detainee Treatment. Intelligence Committee chair, Sen. Dianne Feinstein (D-Calif.), [said](#) that redacting the material the CIA wants to keep classified would "eliminate or obscure key facts that support the report's findings and conclusions."

Among those joining TCP in signing the letter are the ACLU, the Center for Victims of Torture, Human Rights First, Human Rights Watch and the National Religious Campaign Against Torture. Many of the same organizations [earlier called on](#) the president to ensure that the White House takes the lead in declassifying the report, expressing concern that the CIA would use the declassification process to continue hiding embarrassing information.

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## TCP Applauds Holder for Policy Changes to Improve Administration of Justice

Right to Counsel

Two recent actions by the Department of Justice provide clarifying guidance to U.S. Attorney's offices aimed at ensuring fairer enforcement of federal criminal law, including the fair trial and effective counsel rights of those accused of crimes. On September 24, the department [issued a memorandum](#) addressing a federal prosecutor's prerogative to seek a sentencing enhancement if a defendant decided to go to trial rather than plead guilty. Such commonly-employed sentencing enhancements - often called a "trial penalty" - could double the mandatory minimum sentence imposed in the case, or even increase the sentence to life imprisonment. Recognizing the coercive effect of this approach, the Attorney General advised that sentencing enhancement "should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty."

More recently, the department [directed](#) federal prosecutors not to seek a waiver of a defendant's claim of ineffective assistance of counsel when negotiating a plea agreement. TCP applauds Attorney General Holder for adopting these policy changes to improve the administration of justice for federal criminal defendants.

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## Newsmakers in Brief

Current Events

- On September 11, retired U.S. Army Brigadier General David Irvine participated in a [panel discussion](#) held in Salt Lake City examining America's response to the 2001 terrorist attacks on New York City and Washington, DC. Irvine served on TCP's bipartisan blue-ribbon Task Force on Detainee Treatment and is a member of its Board of Directors.
- On September 17, Georgetown University law professor David Cole published an article in [Just Security](#) about a letter to he sent to Senators on TCP's behalf urging opposition to legislation introduced by Sen. Ted Cruz (R-Texas) that he claimed would strip citizenship

from Americans who fight for terrorist organizations. A co-chair of TCP's Liberty and Security Committee, Cole based his comments in part on an [earlier TCP report](#). Sen. Mazie Hirono (D-Hawaii) cited the letter in blocking a motion for unanimous consent to the bill.

- The [Washington Times](#) carried an article on the importance of reforming forensic evidence by Judge William S. Sessions as part of its Constitution Day supplement. Sessions, a former FBI Director who served three presidents, is a member of TCP's Board of Directors.
- On September 12, TCP senior counsel Sarah Turberville moderated a panel at the National Hispanic Bar Association Annual Convention entitled "Immigrant Rights are Human Rights: Right to Consular Assistance and the Death Penalty." Panelists included the Rev. Dr. Gabriel Salguero, president of the National Latino Evangelical Coalition; Nicole Sprinzen, a counsel at Akin Gump who helped to write TCP's [recent report](#) on the death penalty; and Katharine Huffman of The Raben Group.
- TCP policy counsel Rita Siemion was featured on a [Bloomberg Law](#) broadcast on developments in federal terrorist watch listing.
- The editors at [Commonweal](#) took favorable notice of the report of TCPs' Task Force on Detainee Treatment in an editorial on the CIA's "obstructionism" of the Senate Intelligence Committee report on the detention and treatment of suspected terrorists post-9/11.
- A [MedPage Today](#) article on the "medicalization" of capital punishment comments on the recommendations adopted by TCP's Death Penalty Committee in the [comprehensive report](#) it released in May on the role of doctors and medical professionals in lethal injections.

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