

## TCP Newsletter

April 2017

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

Dear Friend of TCP,

I am thrilled to announce that this year, The Constitution Project's annual Gala will be held on September 18, in conjunction with Constitution Day, and that, in honor of our 20th anniversary, we will honor two of TCP's founders and two of the most prominent and respected men in Washington, and indeed, the country: Mort Halperin and Mickey Edwards. Both have had so many prestigious positions, it is impossible to list them all, but among them, Mort, a MacArthur Fellow, was the head of the national ACLU's Office in Washington, D.C. and of the Open Society Foundations DC office, where he is now a Senior Advisor. He served in the Johnson, Nixon and Clinton Administrations. He taught at Harvard and was affiliated with a number of think tanks including the Brookings Institution and CAP. Mickey, a



longtime Member of Congress from Oklahoma, chaired the House Republican Policy Committee, was a founding trustee of the Heritage Foundation and national chair of the American Conservative Union, taught at Harvard and Princeton, and is now a Vice President of the Aspen Institute.

I cannot think of two more appropriate Constitutional Champions. Friends for years and sometime political adversaries, they are exactly the kind of "unlikely allies" who have made TCP so successful. When it comes to defending our founding document, Mort and Mickey have always stood up, no matter what the costs and no matter who is on "the other side."

The event will be held on Monday, September 18, at the Jones Day reception room with its stunning views of the Capitol. The event will begin at 6:30 pm with our usual buffet, followed by the program honoring Mort and Mickey.

Look for your invitation by email and when you get it, be sure to RSVP quickly. Because both Mort and Mickey have so many fans in Washington and elsewhere, we know that the room will be jam-packed. I look forward to seeing you there.

Sincerely,



Virginia Sloan  
President

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## Supreme Court Strikes Down Texas Intellectual Disability Standards

### Death Penalty

On March 28, the Supreme Court decided 5-3 against Texas in a case regarding the state's standards for determining intellectual disability in death penalty proceedings. Justice Ginsburg's [majority opinion](#) in *Moore v. Texas* held that Texas's standards are unconstitutional because they are not informed by the views of medical experts. The Court stated, "not aligned with the medical community's information, and drawing no strength from our precedent, the Briseno factors [the Texas standard being challenged] 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" In so holding, the Court cited [The Constitution Project's amicus brief](#), which compared how other Texas administrative rules and laws define intellectual disability by reference to the medical community's consensus, while the state determines eligibility for execution through an outdated, judicially-crafted set of criteria. TCP had previously filed an [amicus brief](#) in January urging the Supreme Court to hear the case.

On the day of the decision, TCP President Virginia Sloan was [interviewed](#) by the Bloomberg Law Show on Bloomberg Radio.

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## Hawkins Discusses National Security and Immigration at Georgetown

Immigration Reform

On Tuesday, February 28, Senior Counsel Katherine Hawkins spoke on a panel at the Journal of National Security Law and Policy's annual symposium at Georgetown Law School, on the topic "Immigration, Homeland Security, and the Constitution." The panel discussion centered on constitutional problems with three executive orders on immigration signed by President Trump in his first week in office, which banned entry to the U.S. of nationals of 7 Muslim-majority countries; sought to increase immigration detention near the southern border; and designated virtually every undocumented person living in the United States as a priority for removal.

Earlier in February, 29 members of the Constitution Project's Liberty and Security Committee and Task Force on Detainee Treatment issued a [statement](#) regarding the Executive Orders (along with a 4th order on detainee treatment reportedly under consideration but never issued).

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## Laperruque Pushes TCP Message on Surveillance

Government Surveillance & Seizures

It's been a busy time for surveillance news and issues, and The Constitution Project has been highly active in the fight to protect Americans' privacy on a variety of fronts. On March 1, the House Judiciary Committee [held a hearing on FISA Section 702 and necessary reforms](#) long supported by TCP. Senior Counsel Jake Laperruque highlighted the importance of a key reform - law enforcement use limits - in a [post in the prominent blog Lawfare](#) and as a guest on the [TechFreedom](#)

[podcast](#). Jake also published a blog post in [The American Conservative](#) on why Section 702 is the critical surveillance issue Americans face, described the need for reform and its prospects in a piece by [The Hill](#), discussed in [an Intercept report](#) the importance of Section 702 reform to the "Privacy Shield" US-EU data protection agreement, and commented in a [Vice piece](#) on Representative Devin Nunes' accusations regarding FISA surveillance "incidental collection." We're also taking a stand against improper cross-border searches and password demands. TCP joined a [coalition letter](#) opposing a proposed DHS policy requiring individuals to provide their passwords to social media sites when entering the United States, and Jake discussed the new limit on electronic devices carried onto flights from some countries in [The Huffington Post](#).

The Constitution Project is also proactively working to take a leading role in addressing emerging surveillance issues. Facial recognition is a surveillance technology with frightening implications, and we're offering solutions as lawmakers begin to realize these risks. On March 22, the House Oversight Committee [held a hearing](#) on law enforcement use of facial recognition, and TCP submitted a detailed [statement for the record](#) signed by our Policing Reform Committee co-chairs. Jake was also quoted extensively in an [Intercept article](#) on facial recognition and body cameras. We're continuing to highlight the need for positive police body camera policies since the publication of our comprehensive report on the subject, which was recently cited in a [Fast Company piece](#) that Jake was quoted in on the power of emerging technologies. Finally, TCP is looking skyward, as Jake wrote a [post in Just Security](#) and an [article published in the University of Richmond Law Review](#) on the threats of aerial surveillance, and how we might respond.

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## **Turberville Presents on Right to Counsel**

Right to Counsel

TCP Director of Justice Programs Sarah Turberville was invited to make two

presentations at the Worldwide Pretrial Innovators Convention, hosted by the Pretrial Justice Institute. On Wednesday, March 8, she gave a mini "Ted-style talk," titled "[The Shadowy Plea Bargaining Bazaar](#)," relating to the many concerns about the fairness and integrity of plea bargaining in the criminal justice system and foreshadowing a report forthcoming from TCP's National Right to Counsel Committee. On Thursday, she presented at a program on the various constitutional questions raised in pretrial justice, including the right to counsel. Entitled "The Constitutional Question," her talk was based in large part on TCP's popular report on the subject, [Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Appearance](#).

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## **Former Corrections Officials Concerned about Arkansas Executions**

Death Penalty

On March 29th, a group of 25 former corrections officials sent a letter to Arkansas Governor Asa Hutchinson expressing their concerns with the state's plan to execute 8 death row inmates in a 10-day span this month. The officials, many of whom participated in or oversaw executions during their careers, noted the "severe toll on corrections officers' wellbeing" that executions can cause, and also raised concerns that the pressure of such a condensed schedule could increase the chances of a problem arising during an execution. Many of the letter's signers are also members of Public Safety Officials on the Death Penalty, to which TCP provides staff support. The letter and several signers were featured in multiple news reports, including from the [Associated Press](#), [NPR](#), and the [Guardian](#).

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# Alabama Poised to Eliminate Judicial Override

## Death Penalty

In an exciting development from Alabama, a bill that would ban judicial override-the practice by which a judge may impose a sentence other than what the jury recommended-in death penalty cases is on the cusp of becoming law. [SB 16](#) has passed the Alabama House of Representatives (having previously passed in the Senate) and is now with the Governor, who has promised to sign it. Eliminating judicial override has been a recommendation of every report of TCP's Death Penalty Committee since the Committee was established in 2000. See, for example, [Irreversible Error](#) Recommendation 27: "Judges should be prohibited from overriding a jury's recommendation of a sentence less than death." As the Committee wrote, "Indeed, in states such as Alabama, where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation." This is a huge victory for advocates in Alabama and elsewhere.

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