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Greetings!

On June 25, the Supreme Court decided *Arizona v. United States*, a much-anticipated case in which the federal government challenged Arizona's controversial immigration law, S.B. 1070. Specifically at issue in *Arizona* were four provisions of S.B. 1070: Section 3, which criminalizes willful failure to complete or carry immigration papers; Section 5, which makes it a crime for undocumented non-citizens to work; Section 6, which authorizes the warrantless arrest of any person police have probable cause to believe is removable from the United States; and Section 2B, which



requires law enforcement officials to verify the immigration status of any person lawfully stopped or detained when they have reason to suspect that the person is here unlawfully.

The *only* question before the Court in this case was whether these provisions were "preempted"; that is, whether Arizona overstepped its bounds by passing state legislation that undermines federal immigration law. The Court cautiously upheld Section 2B - at least for now - but struck down sections 3, 5, and 6.

The Court's ruling in *Arizona* leaves a number of questions unanswered. Can and will Section 2B be implemented without racial profiling? What aspects of copycat laws now subject to constitutional challenges in states like Alabama, South Carolina, Georgia, Utah and Indiana will survive post-*Arizona*? How will states that were debating immigration legislation pre-*Arizona* proceed? And what about states and local jurisdictions that have taken the opposite approach and resisted participating in certain federal enforcement programs? Can they be forced to do so?

These questions lie at the heart of a series of tugs of war between the federal government and states and localities that will play an important role in setting the permissible boundaries for immigration enforcement going forward. The health care case decided last Thursday, *National Federation of Independent Businesses v. Sebelius*, raises many of the same issues. In *Arizona*, Justice Kennedy urged that that process take the form of a "searching, thoughtful, rational civic discourse." I couldn't agree more, in both of these areas and so many others.

Although TCP has already made a few forays into immigration policy, it is clearly an area where TCP's approach to assembling a panel of issue experts from across the ideological spectrum, then asking them to develop bipartisan, consensus-based solutions to tough constitutional questions, can be more fruitfully brought to bear. To that end, as our first article explains, I am pleased to announce the launch of our new Immigration Committee. TCP looks forward to being a part of the national conversation on this important issue.

Sincerely,



Virginia Sloan
President, The Constitution Project

TCP Forms New Committee on Immigration Reform

Immigration

Comprising experts, practitioners, and former government officials from across the political spectrum, TCP's Immigration Committee will examine a myriad of constitutional questions and civil liberties concerns that arise out of immigration policies and practices at the federal and state levels. The Committee members are:

- **Eleanor Brown** - Associate Professor, George Washington University School of Law; Schwartz Fellow, New America Foundation; former Reginald F. Lewis Fellow, Harvard Law School; former Chairman, Jamaica Trade Board; Board of Directors of several publicly traded Caribbean companies
- **Bruce J. Einhorn** - Professor of Law and Director, Asylum and Refugee Law Clinic, Pepperdine University; Member, ABA National Commission on Immigration; Of Counsel, Wolfsdorf Immigration Law Group; U.S. Immigration Judge, Los Angeles, California, 1990-2007; Attorney and Deputy Director in charge of Litigation, Office of Special Investigations, U.S. Department of Justice, 1979-1990
- **Morton H. Halperin** - Senior Advisor, Open Society Institute and Open Society Policy Center; former Director of the Policy Planning Staff, Department of State, 1998-2001; Deputy Assistant Secretary of Defense, International Security Affairs, Department of Defense, 1966-1969
- **Asa Hutchinson** - Senior Partner, Asa Hutchinson Law Group; Undersecretary, Department of Homeland Security, 2003-2005; Administrator, Drug Enforcement Administration, 2001-2003; Member of Congress (R-AR), 1997-2001; United States Attorney, Western District of Arkansas, 1982-1985
- **Prakash Khatri** - President and CEO, KPK Global Solutions, LLC; Attorney at Law, Khatri Law Firm; First Ombudsman for Citizenship and Immigration Services, Department of Homeland Security, 2003-2008; Manager, Immigration Compliance Department for Walt Disney World Co., 1998-2003
- **Doris Meissner** - Senior Fellow and Director, U.S. Immigration Policy Program, Migration

Policy Institute; Commissioner, U.S. Immigration and Naturalization Service, 1993-2000; Senior Associate, Carnegie Endowment for International Peace, 1986-1992

- **Louis Michael Seidman** - Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center
- **Neal R. Sonnett** - Former Assistant United States Attorney and Chief, Criminal Division, Southern District of Florida; past President, National Association of Criminal Defense Lawyers; past Chair, American Bar Association Criminal Justice Section and American Bar Association Coordinating Committee on Immigration Law
- **William H. Taft, IV** - Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; Legal Adviser, U.S. Department of State, 2001-2005; U.S. Ambassador to NATO, 1989-1992; Deputy Secretary of Defense, 1984-1989
- **John W. Whitehead** - President and Founder, The Rutherford Institute
- **Julie Myers Wood** - President, ICS Consulting, LLC; Assistant Secretary, United States Immigration and Customs Enforcement, 2006-2008
- **James W. Ziglar, Sr.** - Senior Counsel, Van Ness Feldman; Senior Fellow and Advisor to the Board, Migration Policy Institute; Director, National Immigration Forum, 2004-2005; Director, Migration Policy Institute, 2003-2005; Commissioner, Immigration and Naturalization Service, U.S. Department of Justice, 2001-2002

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TCP Argues Before 9th Circuit in Border Search of Electronic Devices Case

Privacy and Technology

On June 19, Chris Handman of Hogan Lovells represented The Constitution Project before an *en banc* panel of the United States Court of Appeals for the Ninth Circuit in *United States v. Cotterman*. The case involves Howard Cotterman, whose laptop was seized by customs agents at the US-Mexico border and then transported 170 miles away for three days of forensic testing. TCP argued that when the longstanding "border exception" to the Fourth Amendment is applied in the digital age, its historically narrow scope must be maintained, and therefore the vast quantities of information stored on laptops or smart phones should not be subject to searches without reasonable suspicion of a crime.

Last year, TCP filed an [amicus brief](#) urging the Ninth Circuit to rehear the case *en banc*, and when the court agreed to the rehearing, TCP was also given the right to participate in oral argument. This was the first time that TCP, participating in the case as an *amicus*, has presented oral argument in court. The arguments were covered by [The Recorder](#) and [video](#) of the proceedings is available online.

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VIDEO: United States v. Cotterman

Senate Committee Backs Justice for All Act, But Without Key Provision

Right to Counsel

On June 22, the Senate Judiciary Committee approved the Justice for All Reauthorization Act (S. 250) without a key "cause of action" provision giving the federal government the authority to hold states accountable when they fail to provide constitutionally-required lawyers for poor people accused of crimes. In a [statement](#), TCP President Virginia Sloan explained that the provision, which would have allowed the Department of Justice to sue states if necessary, "would have offered an important incentive to the states to take their Sixth Amendment obligations more seriously." She likened the original legislation to a "carrot and stick approach," with the bill's training and technical assistance grants for the states, which were approved, as the carrots and the cause of action provision, which was removed, as the stick. According to Ms. Sloan, "A carrot and stick approach without the stick is not much of an approach." On the same day, Senator Leahy introduced a stand-alone version of the measure, The Effective Administration of Criminal Justice Act of 2012 (S. 3335).

TCP continues to support the Justice for All Reauthorization Act, which contains a number of other critical reforms, including a provision that requires states applying for federal criminal justice grant money to provide indigent defenders a seat at the table when developing plans to spend federal money. A recent Government Accountability Office report suggests that giving these defenders a seat at the table substantially increases the share of federal money they ultimately receive. The bill also increases funding opportunities for training attorneys who represent capital defendants. The legislation is now in the hands of the full Senate.

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Legislation to Plug "Leaks" Must Also Protect Government Transparency

Transparency

In a [letter](#) to leaders of the Senate and House Intelligence Committees, 30 advocacy organizations from across the ideological spectrum urged Congress to consider the consequences of hastily passing legislation aimed at plugging "leaks" of classified national security information. In a [TCP-released statement](#), Senior Counsel Sharon Bradford Franklin maintained that any legislation must be carefully crafted to avoid threats to an open and accountable government.

In their letter, the groups noted that as Congress considers legislation to address the issue of leaks, it should also take into account reform of the classification system, so that the system is not overburdened with information that does not require rigorous protection, and should ensure that the civil liberties and free speech rights of government employees are preserved. They urged the Senate to abandon a plan announced earlier in the month to attach language that the sponsors describe as addressing leaks of classified information to the Fiscal Year 2013 intelligence reauthorization bill.

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Issa Quotes TCP Report as Committee Votes to Hold AG Holder in Contempt

Transparency and Accountability

On June 20, the House Oversight and Government Reform Committee voted to hold Attorney General Eric Holder in contempt of Congress for not turning over documents subpoenaed by the committee.

The subpoena was issued after the committee learned of a Bureau of Alcohol, Tobacco and Firearms (BATF) program called Operation Fast and Furious, during which BATF officials allegedly permitted thousands of guns to be sold to the leaders of Mexican drug cartels through straw purchasers. According to "whistleblowers" within the BATF, the purported goal of the program was to allow the BATF to track the gun sales and break up the cartels. To date, no high-level cartel leaders have been arrested but the BATF lost track of many of the guns, which have been tied to various violent crimes on both sides of the U.S.-Mexico border, including the killing of U.S. Border Patrol Agent Brian Terry and hundreds of Mexicans.

The Justice Department turned over thousands of pages of documents in response to a subpoena issued by the Committee. The Department also withheld thousands of pages of documents, citing various reasons, including an ongoing internal investigation. After months of sparring between Rep. Darrell Issa (R-CA), the chair of the House Committee, and the Department of Justice over the withheld documents, Mr. Issa scheduled a vote for June 20 to hold Attorney General Holder in contempt for failing to comply with the subpoena. On June 19, President Obama asserted executive privilege over the remaining documents sought by the Committee, the first time in his presidency that he exercised that privilege. The committee nevertheless moved forward with its contempt vote, which was approved by the Committee, and then the full House. During the Committee's debate, Mr. Issa quoted from TCP's report, [When Congress Comes Calling](#), as an authoritative explanation about the permissible extent of executive privilege.

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Texas Reverses Course, Agrees to DNA Testing in Death Row Case

Death Penalty

In an unexpected about-face, the Texas Attorney General ended its decade-long opposition to post-conviction DNA testing in the case of Texas death row inmate Hank Skinner. Mr. Skinner was convicted of the 1993 murder of Twila Busby and her two sons, but has consistently maintained his innocence, arguing that he was too incapacitated by alcohol and drugs to commit the murders and that Busby's uncle was the more likely culprit. While he has sought to obtain DNA testing on several pieces of evidence at the crime scene for over a decade now, the Texas Attorney General has opposed his request in protracted litigation that has gone all the way to the U.S. Supreme Court and is now before the Texas Court of Criminal Appeals.

Last year, TCP helped to organize [a letter](#) from current and former lawmakers, judges and prosecutors calling for DNA testing in the case, and TCP Board member William S. Sessions and TCP Death Penalty Committee co-chair Mark White authored [an op-ed](#) that ran in the *Austin American-Statesman* calling on the state to test the evidence. Finally last month, the Attorney General filed a notice with the Texas Court of Criminal Appeals stating that they now believe that DNA testing would be in the "interest of justice." However, the State has also disclosed to the court that a key piece of evidence - a windbreaker that belonged to Busby's uncle - cannot be located for testing, cause for "grave concern," [according to Skinner's attorney](#), Rob Owen.

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Supreme Court Refuses to Hear Appeals of Guantanamo Detainees

Detention and Prosecution of Terrorism Suspects

On June 11, the eve of the fourth anniversary of its landmark ruling in *Boumediene v. Bush* that Guantanamo detainees have a constitutional right to meaningful judicial review of their detention, the

U.S. Supreme Court again refused the opportunity to consider whether *Boumediene's* promise has been fulfilled. Over the past several years, the United States Court of Appeals for the D.C. Circuit has fashioned a series of procedural, substantive and evidentiary rules that - taken together - make it nearly impossible for detainees to mount an effective challenge to their continued confinement. The Supreme Court has elected not to review any of them.

Perhaps the most troubling decision that the Court let stand is *Latif v. Obama*. The government's case against Latif is based on an intelligence report produced under difficult and stressful circumstances during the chaos of war. The district court found that the intelligence report was not sufficiently reliable to prove that Latif was more likely than not a part of al Qaeda or the Taliban. But the D.C. Circuit disagreed, holding that government intelligence reports *must* be afforded a "presumption of regularity" or accuracy. Given the central role that such reports play in detainee cases, the effect is to shift the burden of proof from the government to the detainees.

TCP President Virginia Sloan [expressed](#) her disappointment in the Court's decision, saying the shift "unfairly stacks the deck against Guantanamo detainees," and gives "undue deference to the executive branch, to the point of undermining the independent courts."

On Tuesday, July 17, 2012 from 12:00 PM to 1:30 PM (ET), TCP and Covington & Burling LLP will cosponsor a panel discussion on "*Boumediene's* Legacy and the Fate of the Guantanamo Detainees." For details, and to RSVP, please click [here](#).

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TCP Continues to Back Federal Criminal Discovery Reform

Federal Criminal Discovery Reform

In a [June 5 letter](#) to the Senate Judiciary Committee, TCP commended the senators for holding a hearing concerning the ongoing failure of some federal prosecutors to meet their constitutional obligations to provide criminal defendants with favorable evidence, as required by the U.S. Constitution in *Brady v. Maryland*. TCP President Virginia Sloan told the Committee members that the Department of Justice's efforts to address the problem internally have proven insufficient. "Internal Department policies, by design, cannot be relied upon by courts or defendants, and are, therefore, inadequate to ensure fairness in criminal proceedings," she wrote. She also noted TCP's [Call for Congress to Reform Federal Criminal Discovery](#) - signed by nearly 150 criminal justice experts, including more than 100 former federal prosecutors - urging Congress to act.

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TCP Newsmakers in Brief

Current Events

- **TCP**, with the generous *pro bono* assistance of attorneys at **Jones Day LLP**, organized [an amicus brief](#) filed earlier this month from nine former federal judges urging the Supreme Court to hear the Texas death penalty case of *Trevino v. Thaler*. The judges assert that the case involves *Brady* violations by the state prosecutors, as well as objectionable behavior by federal appellate court judges who conducted their own independent investigation in the case and based their decision on facts uncovered by their investigation that go beyond the record in the case.
- After lengthy consideration, the Washington State Supreme Court has adopted new caseload limits for lawyers who represent indigent defendants. Last year, **TCP** had [urged the Court](#) to

adopt these guidelines in an effort to improve the provision of public defense across the state.

- On June 19, TCP Policy Counsel **Scott Roehm** participated in a panel discussion on video surveillance and privacy issues at the National Institute of Justice Conference.
- **Ms. Franklin** was quoted in a CBS News SmartPlanet [story](#) about video surveillance systems in local communities, titled "Surveillance Cameras: An Eye for an Eye?"
- On June 7, *The Hill* newspaper published TCP National Right to Counsel Committee Co-Chair **Robert M.A. Johnson's** [op-ed](#), "Indigent defense given short shrift in federal justice grants."
- TCP Counsel **Christopher Durocher** was quoted in a June 16 [story](#), "Pennsylvania Public Defenders Rebel Against Crushing Caseloads," written by John Rudolf for Huffingtonpost.com.
- Keep an eye out for TCP Board Member and former Congressman **Mickey Edward's** new book "*The Parties Versus the People: How to Turn Republicans and Democrats into Americans*" - on shelves next month.

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