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 Safeguarding Liberty, Justice & the Rule of Law

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### Dear Friend of TCP,

I know it's not even summer yet, but at The Constitution Project, we're already planning our Constitution Day event. Every year on September 17, we present our Constitutional Commentary Award, which recognizes exceptional critical analysis of the constitutional implications of public policy. **I am delighted that this year we will honor the creators of "Orange is the New Black," followed by a panel on the show's compelling view of our criminal justice system.** Last year's recipient, Ken Burns, was recognized for his documentary "The Central Park Five", a powerful story of five teenagers who were wrongfully convicted of raping a woman in Central Park in 1989 based, in part, on their false confessions. Past awardees include Michelle Alexander, Linda Greenhouse, Dana Priest & William Arkin, among others. We will be back to you soon with details, so please save the date.



As you will see in this newsletter, May was a busy month at The Constitution Project. Early in the month, our bipartisan Death Penalty Committee released "[Irreversible Error](#)," a comprehensive new report on the administration of capital punishment in America. As the story below explains, the new report looks at the flaws in the death penalty system from the "moment of arrest to the moment of death." The report received extensive coverage in the news media, and it has already caught the attention of state and federal policymakers. You can read [the report](#) and a [sampling of the coverage](#) on our website.

Later in the month, Congress began action on the USA Freedom Act, legislation aimed at reining in the out-of-control surveillance programs involving the National Security Agency's collection of phone records from millions of Americans. TCP has been engaged in efforts to ensure that programs intended to protect national security do not infringe on basic constitutional rights. As part of that effort, our Liberty and Security Committee developed an [innovative way](#) to include a public representative on the secretive FISA court that authorizes these programs, and our team is actively promoting it in the Senate.

None of this is possible without a committed and hard-working staff, the hundreds of policy professionals and lawyers who serve on our

committees and task forces, as well as the generosity of the foundations, individual donors and corporate sponsors that support us. We are grateful for your continued support, which is critical for us to continue to produce this kind of insightful policy analysis and hard-hitting advocacy.

Sincerely,



Virginia Sloan  
President, The Constitution Project

## Report Proposes Changes in Capital Punishment from Arrest to Execution

### Death Penalty

On May 7, TCP's [Death Penalty Committee](#) - a unique group of criminal justice and other experts from across the ideological spectrum, including those with experience as judges, prosecutors, defenders, law enforcement officers, policymakers, victim advocates and scholars - released a comprehensive new report on the administration of capital punishment in America. Entitled "[Irreversible Error](#)," the report recommends a number of safeguards to prevent wrongful convictions and executions, such as precluding the execution of people with intellectual disability or severe mental illness, changes in "felony murder" laws so that only those who intentionally kill face the death penalty, and radically improving the executive clemency process for death row inmates. It also suggests substantial reforms to the use of forensic evidence and eyewitness testimony, two of the most common causes of errors in capital cases.

In conjunction with the release of the report, TCP hosted a standing-room only issue briefing at the law offices of Akin Gump Strauss Hauer & Feld LLP. The panelists were Mark White, the former Democratic Governor and Attorney General of Texas, who is a co-chair of the committee; committee member Mark Earley, the former Republican Attorney General of Virginia; Anthony Graves, who was imprisoned in Texas for 18 years (16 of them on death row, most of them in solitary) for murders he did not commit; and Megan McCracken, a lethal injection expert from U.C. Berkeley School of Law's Death Penalty Clinic. The panel was moderated by Nicole Sprinzen, an Akin Gump attorney who led a team that assisted in drafting of the report. The event was [webcast](#) around the country.

The report received extensive media coverage, beginning with a guest commentary from Governor White in [Politico](#) the day before release. The [New York Times](#), the [Los Angeles Times](#), [USA Today](#), the Wall Street Journal and the [Washington Post](#) all carried stories the morning of release, as did [CNN.com](#) and [MSNBC.com](#). Examples of stories in more than 170 papers from around the country are available in the [newsroom](#) on our website. In addition, The Los Angeles Times [editorialized](#) that "policymakers would be wise to read the report closely" and TCP is sharing copies of the report with legislators and government officials in key states and with federal policymakers. The [Dallas Morning News](#), the [Oklahoman](#), and the [Orlando Sentinel](#) all wrote editorials urging lawmakers in their respective states to consider our report.

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**Public Deserves Strong Public Representative at Secret Terror**

# Court

## Counter-Terrorism Policies & Practices

TCP's bipartisan [Liberty and Security Committee](#) issued a report on May 29 calling on Congress to create "meaningful adversarial participation" before the Foreign Intelligence Surveillance Court, or FISC, whenever the government seeks broad surveillance authority under the USA Patriot Act or the FISA Amendments Act, including authorizing a security-cleared special advocate with a specific mandate to represent the public's privacy and civil liberties interests.

The [new report](#) suggests that any effort by Congress to provide for a strong public representative before the FISC should give the special advocate an unconditional right to participate in any case in which the court is asked to approve non-individual surveillance authorizations. The special advocate should also be empowered to represent all U.S. persons who are subject to the broad surveillance orders, and should have the authority to litigate on their behalf. In addition, the report says there needs to be a meaningful appellate process to review FISC decisions that adversely affect constitutional rights. The Hill [noted](#) the report's release.

Among those endorsing the new report are the Liberty and Security Committee's co-chairs, Georgetown University law professor David Cole, and David Keene, former chair of the American Conservative Union. Also backing the report are: John Dean, former counsel to President Richard Nixon; Mickey Edwards, a former GOP member of Congress; Mary McCarthy, who served as a special national security assistant to Presidents George W. Bush and Bill Clinton; Alberto Mora, a former general counsel for the U.S. Navy; retired federal judge James Robertson, who served on the FISC; Col. Lawrence Wilkerson, a chief-of-staff for Secretary of State Colin Powell; and two former CIA counterintelligence officers, Philip Giraldi and Paul R. Pillar.

Earlier in the month, the House of Representatives adopted a watered-down version of the USA Freedom Act, legislation originally introduced by Senator Patrick Leahy (D-Vt.) and Representative James Sensenbrenner (R-Wisc.) to curtail the National Security Agency's bulk collection of phone data. Unfortunately, the version of the bill (H.R. 3361) that passed the House creates only a pool of private lawyers to appear as "friends of the court" when appointed by the FISC, and provides an unreviewable means for FISC judges to sidestep that requirement simply by asserting that such an appointment is unnecessary. TCP [urged](#) surveillance reformers in the Senate to push for stronger provisions.

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## Supreme Court Rejects 'Bright Line' Test for Intellectual Disability in Death Penalty Cases

### Death Penalty

On May 27, the U.S. Supreme Court ruled in *Hall v Florida* that a state's use of a rigid IQ test score cutoff to determine eligibility for the death penalty violates the Eighth Amendment. On a five-to-four vote, the Court reversed a Florida Supreme Court decision that death row inmate Freddie Lee Hall would have to show an IQ of 70 or below before being allowed to present any additional evidence about his intellectual disability. TCP had filed an [amicus brief](#) from former judges and law enforcement officials arguing against Florida's strict cutoff and expressing concern that Florida's procedure for determining intellectual disability subverts the Court's 2002 decision in *Atkins v. Virginia* that executing individuals with intellectual disabilities violated the Eighth Amendment ban on cruel and unusual punishment.

"By rejecting Florida's rigid formulation for determining intellectual disability, the Supreme Court has made clear that decency, dignity and our Constitution require a system that places fairness above all else," TCP president Virginia Sloan said in a [press release](#). "The Court's mandate is clear: Florida, and those few states with statutes that treat intellectual disability similarly, must use IQ

tests in the manner consistent with the view of those who design, administer and interpret these tests," she added, noting that TCP's comprehensive report on the administration of capital punishment includes a [number of reforms](#) to the way states determine intellectual disability in death penalty cases.

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## House Defeats Efforts to Ease Closure of Guantanamo Bay Prison

Counter-Terrorism Policies & Practices

On May 22, the House of Representatives rejected a proposal to take concrete steps towards closing the Guantanamo prison. Adam Smith, the senior Democrat on the House Armed Service Committee, sought to amend the FY2015 National Defense Authorization Act (NDAA) to remove the ban on transferring detainees to the U.S., speed up long-delayed administrative reviews to determine whether detainees should be released, and - through a series of reporting requirements - force a timely and serious conversation between the Obama administration and Congress about plans for closure. The House rejected Smith's amendment on a vote of 177-247.

In a [letter](#) to all House members, TCP senior counsel Scott Roehm noted the importance of lifting U.S. transfer restrictions to allow for both prosecutions in federal courts and for transferring detainees in need of medical care that cannot be provided at Guantanamo - a problem increasing in scope and scale as detainees age and their health deteriorates. TCP has long argued that detainees who can be tried in conventional federal (Article III) courts should be, noting that our federal system has successfully handled hundreds of cases against suspected terrorists. Military commissions, by contrast, have yet to prove that they are up to the task of providing fair and timely justice.

In a [report released](#) last year, TCP's Task Force on Detainee Treatment backed improved access to medical care for those held at Guantanamo Bay and called for closure of the prison.

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## The Exoneration of Sabein Burgess

Sentencing

On May 28, TCP cosponsored (along with American University's Washington College of Law, the Mid-Atlantic Innocence Project and Steptoe and Johnson) a panel on the recent exoneration of [Sabein Burgess](#). Burgess spent nearly twenty years in prison for a crime he did not commit.

At age 24, Sabein Burgess was convicted of murdering his girlfriend at their Baltimore home and sentenced to life in prison. The conviction rested almost entirely on questionable gunshot residue evidence - the validity of which was [formally rejected by the FBI](#) because it has such a high risk of contamination. In addition, his defense attorney called no witnesses during the two-day trial. Burgess remained incarcerated until earlier this year.

The panel featured attorneys from both Steptoe and Johnson and the [Mid-Atlantic Innocence Project](#), which worked together on behalf of Burgess. The panelists explained how the justice system failed Burgess by providing an ineffective defense attorney, by relying on suspect forensics and by repeatedly disregarding evidence of his innocence that emerged after his conviction.

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# COMING UP IN JUNE: TCP Marks Torture Awareness Month with Community Events

## Current Events

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 instrument that aims to prevent torture around the world, came into effect. It requires signers to take effective measures to prevent torture within their borders, and forbids them from returning people to their home countries if there is reason to believe they will be tortured. To date, 142 nations are parties to it.

To mark this historic event, the United Nations has declared June 26th the "International Day in Support of Victims of Torture," and organizations across the country have designated June as "Torture Awareness Month." This year, TCP is joining 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 "enhanced interrogation" program after 9/11 is made public. Each of these events features 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.

Well-attended events have already been held in [Seattle](#) and Sterling, Va. Upcoming events include:

- Los Angeles - June 21, 2:00pm at Immanuel Presbyterian Church
- Raleigh, North Carolina - June 24, 7:00pm at Pullen Memorial Baptist Church
- Washington, D.C. - June 26, 6:00 pm at 1420 16th St NW.

More information on the [Los Angeles](#) and [Washington](#) events is available on TCP's website. In addition, these two events will be live-streamed around the country. Look for more information on the webcasts soon.

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