

TCP Newsletter

November 2016

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

Dear Friend of TCP,

Mark your calendars to attend a couple of lunch-time panel discussions hosted by The Constitution Project this November. On November 17, we will focus on demilitarizing America's police. In the aftermath of the public outcry over local police using tank-like vehicles and assault rifles to quell protests in Ferguson, Missouri following the fatal shooting of an unarmed black teenager by a white police officer in 2014, the Obama administration placed a modest ban on the transfer of some military-grade equipment from the Pentagon to law enforcement.

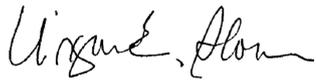


Earlier this year, [The Constitution Project Committee on Policing Reforms](#), a bipartisan group of former military and law enforcement officers and criminal justice system experts, [released a comprehensive report](#) calling on the Obama administration to further tighten restrictions on the transfer of military equipment to state and local police departments and to require greater transparency and accountability of such programs. A panel of experts will discuss what immediate and long-term steps the next administration, states, and Congress can take to curb the militarization of law enforcement and to improve the relationship between police and communities. The event is free and open to the public, but space is limited, so [register today](#).

The following day, November 18, we will be discussing judicial nominations. It has been nearly nine months since President Obama nominated Judge Merrick Garland to the United States Supreme Court. However, the Senate has yet to hold a hearing, let alone a vote, on his confirmation. Now, some Republican candidates are saying they will work to block any nominations to the Supreme Court that President Clinton might put forward if she is elected. Some conservative commentators are urging the Senate to go even further by preventing votes on any judicial nomination, from the federal district courts on up.

Two distinguished constitutional scholars will debate what the Constitution's "advice and consent" clause really means. Does the Senate have a constitutional responsibility to at least consider all nominees put forward by the president? If senators, in fact, carry out their threats to block votes on judicial nominees, what is the impact on the Supreme Court and the judiciary in general? Does the president have any recourse? Make sure you have a seat at what promises to be a rousing discussion by [registering today](#).

Sincerely,



Virginia Sloan
President

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A Right to "Know" or a Right to "No"? Examining Congressional Oversight of the Executive Branch

Transparency & Accountability

There is a constant tension between Congress' constitutional responsibility to oversee the workings of the executive branch on the one hand, and the president's claims of executive privilege and deliberative process on the other.

On October 25, two panels of distinguished scholars and legal practitioners discussed these pressing issues. The [first panel](#) (video) looked at recent developments in the law on Congress' access to information from the executive branch. A [second panel](#) (video) examined the question of whether the current system needs to be reformed and, if so, in what way. The event was cosponsored by The Constitution Project and the Levin Center at Wayne State University Law School in Detroit and was covered by C-SPAN. [READ MORE](#)

In the next several weeks, TCP plans to release an updated and expanded version of its comprehensive handbook on congressional oversight of the executive branch, written by TCP Fellow Morton Rosenberg, an expert who formerly addressed these issues at the Library of Congress. You can [pre-order a copy](#) by clicking on the link.

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Florida Supreme Court Declares Death Penalty Law Unconstitutional

Death Penalty

On October 14, the Florida Supreme Court issued two decisions finding the state's capital punishment law unconstitutional. In one case, [Hurst v. Florida](#), the court ruled that that the U.S. Constitution, the state constitution and Florida state law all require unanimous jury verdicts in capital cases, including unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in any final jury recommendation for death.

In a separate case, [Perry v. Florida](#), the court found that a new state law adopted earlier this year, which permits imposition of a death sentence when at least 10 of 12 jurors agree, was therefore also unconstitutional, and barred its use in pending criminal cases. TCP filed a [friend-of-the-court brief](#) in support of Perry's case. The brief argued that a "unanimity requirement promotes careful and thorough evidence-based deliberations, prevents the exclusion or silencing of minority and opposing views in the deliberation process, and increases public confidence in the jury's sentencing decision." Our thanks to Greenberg Traurig for help in writing the brief. [READ MORE](#)

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Hawkins Talks Interrogation at the United Nations

Counter-Terrorism Policies & Practices

On October 19, Senior Counsel on National Security Katherine Hawkins spoke at

an expert panel at the United Nations, organized by outgoing Special Rapporteur on Torture Juan Mendez. Professor Mendez, of the Washington College of Law at American University, recently presented a report to the U.N. General Assembly recommending that states collaborate on a protocol of best practices for interviewing detained persons and witnesses, focusing on techniques directed at gathering evidence rather than seeking a confession from a detainee who is presumed to be guilty.

Hawkins discussed the importance of adopting this model in a national security as well as a criminal context. She also discussed what changes the United States would need to make to comply with such a protocol -- for example, reforming the Army Field Manual on interrogation, as recommended by TCP's [Task Force on Detainee Treatment](#). A video of the panel is [here](#).

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Briefs Urge Supreme Court to Consider Law Enforcement Access to Cell Location Data

Government Surveillance & Searches

Several privacy groups joined The Constitution Project in asking the U.S. Supreme Court to consider a case to determine whether the Constitution requires police to obtain a warrant before requesting cell phone location history records from a telephone company.

In two friend-of-the-court briefs filed on October 28, the groups point out that the private information available from a cell phone is not limited only to the data stored on the device, but also includes the information about the location of the cell tower to which the device connected at any given date and time -- so-called cell site location information, or CSLI. "The dramatic increase in the number of cell phones and cell sites and the amount of detailed, sensitive location data they generate, combined with the quantity and extent of law enforcement demands for this data, show that it is time for this Court to address the Fourth Amendment privacy implications of CSLI," the [groups wrote](#).

TCP was joined by the Electronic Frontier Foundation, the Brennan Center for Justice, the Center for Democracy and Technology, and the National Coalition to Protect Civil Freedoms in filing the two briefs. [READ MORE](#)

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Facial Recognition Technology Threatens Civil Rights and Fourth Amendment Protections

Data Collection & Privacy

More than 50 civil liberties, human rights, immigrant rights, faith, digital rights and transparency organizations joined The Constitution Project in asking the Department of Justice to investigate whether the use of surveillance technologies, especially facial recognition technology, by state and local law

enforcement has had a disparate impact on communities of color. A [recent report](#) from the Center on Privacy & Technology at Georgetown Law found that more than 117 million American adults are included in facial recognition networks across the country, and at least one in four state or local police departments can run such searches. A prominent 2012 study, co-authored by an FBI expert, found that several leading facial recognition algorithms were 5 to 10 percent less accurate on African Americans than on Caucasians

"Face recognition technology is rapidly being interconnected with everyday police activities, impacting virtually every jurisdiction in America. Yet, the safeguards to ensure this technology is being used fairly and responsibly appear to be virtually nonexistent," the groups wrote in an [October 18 letter](#) to Vanita Gupta, head of DoJ's Civil Rights Division.

On October 28, TCP Privacy Fellow Jake Laperruque [explained the dangers](#) to the Fourth Amendment that law enforcement's use of tagging technologies such as facial recognition can pose, especially when combined with drone-based aerial surveillance, at a University of Richmond Law School symposium on National Security in the Information Age.

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Mandatory Sentences for Opioid Crimes "Wrong Direction," Groups Tell Congress

Sentencing Reform

Imposing mandatory sentences of life without parole or death on individuals caught selling fentanyl or a substance containing fentanyl is the wrong way to address the opioid crisis in America, a coalition of nearly 100 criminal justice reform groups, including The Constitution Project, told congressional leaders in opposing H.R. 6158, the HELP Act of 2016.

In an [October 18 letter](#) to Rep. Tom Reed (R-N.Y.), the chief sponsor of the legislation, the groups said it would be a "dramatic step in the wrong direction" at a time when there is a bipartisan consensus aimed at reducing the harsh mandatory drug sentencing laws adopted in 1986. While acknowledging the growing challenges caused by fentanyl and heroin in many communities, the groups wrote that the imposition of mandatory minimum sentences is "out of step with the times, science, data, and public opinion and doubles down on 30 years of ineffective drug policy."

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Experts Discuss Section 702 Post-Collection Reforms

Government Surveillance & Searches

Intelligence surveillance - often by necessity - bypasses many due process protections associated with traditional law enforcement surveillance. Yet there

are few restrictions on how government can query and use intelligence surveillance for law enforcement purposes once it is collected. That is especially true for information about U.S. persons collected "incidentally" to a foreign surveillance operation conducted under Section 702 of the Foreign Intelligence Surveillance Amendments Act of 2008.

On Oct. 14, Google cohosted an event with TCP, with a panel of experts exploring what sensible reforms we could adopt to create effective due process restrictions on law enforcement use of intelligence surveillance without rebuilding the "Wall" that was removed in response to the 9/11 attacks. The event was [broadcast live by C-SPAN](#).

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Groups Demand ODNI Reveal Legal Authority for Yahoo Email Scanning

Government Surveillance & Searches

Privacy and government transparency advocates, including TCP, have asked the federal government to reveal the legal authority it relied on in compelling Yahoo to search all of its customers' incoming emails for specific information sought by the National Security Agency and the FBI. According to [media reports](#), the company complied with a secret government order requiring them to build special software to scan hundreds of millions of Yahoo Mail accounts for "signature" information provided by U.S. intelligence officials.

"We believe such a massive scan of the emails of millions of people, particularly if it involves the scanning of email content, could violate FISA, the Fourth Amendment, and international human rights law, and has grave implications for privacy," the groups wrote in an [October 25 letter](#) to Director of National Intelligence James Clapper. The groups asked Clapper to honor an earlier [transparency commitment](#) made by his office by "disclosing publicly the interpretation of law and of the Fourth Amendment that was relied upon to justify this surveillance."

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DICRA Implementation Guidelines Inadequate, Reformers Say

Transparency & Accountability

The proposed guidelines for implementing the Deaths In Custody Reporting Act (DICRA) take too much of the responsibility for data collection and reporting away from states, and lack meaningful penalties for noncompliance, a coalition of criminal justice system reformers told Attorney General Loretta Lynch and other Justice Department officials in an [October 5 letter](#). DICRA [mandates](#) that states receiving federal criminal justice assistance grants report, by gender and race, all deaths that occur in law enforcement custody, including any while a person is

being detained or arrested.

Nearly 100 organizations, including TCP, expressed concern that the proposed guidelines shift the data collection and reporting requirements from the states to the Bureau of Justice Statistics. States and law enforcement agencies, the entities closest to the data being sought, should be responsible for collecting and reporting deaths in custody to the federal government as mandated by law, the letter said. In addition, the proposal does not discuss penalties for noncompliance. A financial penalty is critical to successful implementation of DICRA because voluntary reporting programs on police-community encounters have failed, the groups wrote.

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