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### Greetings!

One of The Constitution Project's (TCP) top priorities is enhancing government transparency and accountability. As a result, seeing our experts and reports quoted in stories about the debates of the day is very gratifying, especially when they concern major threats to our civil liberties, such as the recent revelations about extensive National Security Agency (NSA) surveillance programs (discussed in detail below).



In addition to the NSA story, the news media also sought out TCP staff and fellows to comment on several other issues involving government surveillance, privacy and security. For example, TCP senior counsel Sharon Bradford Franklin was quoted in an article in the [Wall Street Journal](#) dealing with cybersecurity and privacy. A story in the [Tri-Parish Times](#) that relied heavily on TCP's [report on fusion centers](#) also quoted her about public video surveillance and GPS tracking by law enforcement. And, TCP Scholar-in-Residence Lou Fisher discussed some of the challenges to effective congressional oversight of intelligence programs in [TalkingPointsMemo](#).

The fact that reporters and bloggers from across the country, and from media outlets of varying ideological stripes, are interviewing our experts tells me that people believe TCP has something valuable to add to the discussion, and it enables us to better communicate our bipartisan policy recommendations to a larger audience.

Sincerely,

Virginia Sloan  
President, The Constitution Project



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# Supreme Court Says Juries Must Decide Facts in Mandatory Minimum Cases

Sentencing Reform

On June 17, the U.S. Supreme Court decided that the Sixth Amendment requires a jury, rather than a judge, to determine facts that increase a defendant's mandatory minimum sentence. In its [decision](#) in *Alleyne v. United States*, the Court ruled that any fact increasing a mandatory minimum sentence is an element of the crime that must be submitted to the jury and proved beyond a reasonable doubt.

Alleyne was convicted of robbery affecting commerce and use of a firearm during a crime of violence in violation of federal law. Under the federal mandatory minimum sentencing scheme, where a firearm is used during a crime, there is a mandatory sentence enhancement when the firearm is "brandished." At sentencing, the district court judge held Alleyne responsible for brandishing a firearm during the robbery, even though the jury did not indicate in its verdict that the firearm had indeed been brandished. In a narrow 5-4 decision, the Court overruled an earlier decision in *Harris v. United States*, thereby preventing judges from increasing mandatory minimum sentences using facts expressly rejected by the jury.

[The Christian Science Monitor](#) quoted TCP president Virginia Sloan on the importance of the decision: "By limiting a judge's ability to use elements of a crime specifically rejected by a jury in determining whether or not to impose a mandatory minimum, the Court fittingly strengthened due process protections during the sentencing process, and we applaud them for it. In cases such as this one that have gone to a jury, we believe it is generally preferable to let the jury be the fact-finder in mandatory minimum sentencing determinations, rather than relying solely on the judge's discretion."

In 2006, TCP issued its [Recommendations for Federal Criminal Sentencing in a Post-Booker World](#), describing *Harris v. United States* as "contrary to the rationale of [prior Court cases requiring that the jury, rather than a judge, establish the facts that may increase punishment]" and noted that it "may not survive a direct challenge," a prediction borne out in *Alleyne*.

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# Revelations of Extensive Domestic Surveillance by NSA Raises Privacy Concerns

Government Surveillance & Searches

Over the past month, TCP expressed strong concerns about the scope of the NSA's collection of telephone call metadata on tens of millions of Americans, and the PRISM program, under which the government reportedly gained access to the servers of nine leading U.S. Internet companies.

A flurry of activity was touched off by a June 5 report in *The Guardian* that it had obtained a leaked secret order issued by the Foreign Intelligence Surveillance Court (FISC) authorizing the NSA to collect telephone call metadata from tens of millions of Americans, including all domestic calls, as well as calls that originate or terminate abroad. The order, limited to a single carrier, Verizon, was based on Section 215 of the PATRIOT Act and is reported to be a 3-month renewal of a standing order. Subsequent reporting suggests the order disclosed by the paper is a routine renewal of a massive data collection that has been ongoing for at least several years and that other major carriers are subject to similar orders. The following day, *The Washington Post* reported on the collection of internet data through the PRISM program conducted under the FISA Amendments Act. Subsequent reports have revealed additional collection programs under this statute.

These programs demonstrate how aggressively the Obama administration is interpreting its surveillance authority, and dramatically illustrate the need for amendments to these laws to provide robust privacy safeguards. TCP senior policy counsel Sharon Bradford Franklin was quoted in a number of news stories, including [The Washington Post](#), [TechWorld](#), and [IDG News Service](#), highlighting TCP's comprehensive recommendations on reforms to government surveillance. In addition, *The Washington Post* published her [letter to the editor](#), explaining an additional problematic aspect of these programs: when the government's interpretation of surveillance laws is kept secret, this undermines governmental accountability.

Ms. Franklin's comments and recommendations are based on a variety of TCP reports and statements in these areas, including TCP's [Statement on Reforming the Patriot Act](#), [Report on the FISA Act Amendments Act of 2008](#), and [Principles for Government Data Mining](#).

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## Surveillance Disclosures Put Focus on Privacy Board

Government Surveillance and Searches

In response to the public uproar over the NSA's surveillance programs, President Obama has tapped the Privacy and Civil Liberties Oversight Board (PCLOB) to scrutinize the programs involving the collection and use of so-called "metadata," and to lead a national dialogue on the appropriate balance between national security and civil liberties. However, the PCLOB, which was established by Congress as an independent agency in 2007, only recently became fully operational when the U.S. Senate finally confirmed its chair, David Medine, on May 7. TCP has [long been active](#) in promoting the creation and staffing of PCLOB.

As Ms. Franklin [told the Associated Press](#), "They've been in startup mode a long time. With all the concerns about the need for a debate on the issue of surveillance, this is a great opportunity for them to get involved." She had the opportunity to more fully explain the important role the board can play in an interview for NPR's [On the Media](#). Ms. Franklin was also quoted about the role of PCLOB by [The Washington Post](#), [The Washington Times](#), [National Review](#) and [The Hill](#).

PCLOB has [since announced](#) an initial public hearing on these issues for July 9, and has asked Ms. Franklin to participate on one of the panels.

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## Bipartisan Legislation Would Rein in Surveillance Programs and End "Secret" Law

Government Surveillance & Searches

On June 25, 2013, The Constitution Project sent a [letter](#) to Rep. John Conyers, Jr. (D-Mich.) and Rep. Justin Amash (R-Mich.) in support of the [Limiting Internet and Blanket Electronic Review of Telecommunications and Email Act](#) (LIBERT-E Act). The bipartisan legislation has two primary components. First, to ensure better protections for Americans' constitutional rights and civil liberties, the bill would tighten the standard for the government to obtain orders under Section 215 of the PATRIOT Act. TCP's Liberty and Security Committee called for similar reforms in its 2009 [Statement on Reforming the Patriot Act](#). Second, the bill would require more transparency surrounding the FISC's interpretation of the law, changes consistent with the recommendations TCP's Liberty and Security Committee made in its 2012 [Report on the FISA Amendments Act of 2008](#). The legislation has 34 cosponsors.

Open government groups, including TCP, also [endorsed bipartisan legislation](#) introduced June 11 by Senator Jeff Merkley (D-OR) and Senator Mike Lee (R-UT) that would rein in the problem of "secret

law" governing controversial surveillance programs. The bill would require the Attorney General to declassify significant FISC opinions, and where declassification is not possible, to provide summaries. Other groups backing the bill include the American Association of Law Libraries, the American Civil Liberties Union, the Project on Government Oversight (POGO), CREDO Mobile and OpenTheGovernment.org.

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## Secretary Kerry Should Exempt Peacebuilding Activities from Material Support Restrictions

Counter-Terrorism Policies & Practices

A [petition](#) with broad-based support, including TCP's, was delivered to Secretary of State John F. Kerry on June 20, asking that he exempt peacebuilding activities from criminalization under the "material support" laws. Petition signers include President Jimmy Carter, as well as Ambassadors Nancy Soderberg and Thomas Pickering, both members of TCP's Liberty and Security Committee. Other signatories include peacebuilders, other former ambassadors, academics, foreign policy experts, religious leaders and civil liberties groups.

The petition was delivered to the State Department in anticipation of the June 21 anniversary of the 2010 Supreme Court decision in *Holder v. Humanitarian Law Project*. In that case, the Court ruled that peacebuilding organizations seeking to teach designated terrorist groups how to pursue their aims through non-violent political channels could be criminally prosecuted on the grounds they are providing the groups with "material support." A statutory provision gives the Secretary of State the authority to suspend the prohibition to allow certain engagement with designated terrorist groups, so long as it does not further any terrorist activity. The petition asks Secretary Kerry to act on that authority.

CNN's Global Public Square with Fareed Zakaria [carried an op-ed](#) from Ambassadors Soderberg and Pickering on the issue.

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## Open Government Advocates Urge Transparency around CIA's Post-9/11 Detention and Interrogation Program

Transparency & Accountability

On June 26, TCP sent to President Obama a [letter](#) from 18 open government advocates urging him to declassify the CIA's post-9/11 detention and interrogation program and to support a vote in the Senate Intelligence Committee to release its 6,000 page report based on a nearly four year investigation into that program (SSCI report). Senators such as Ron Wyden (D-OR) and Mark Udall (D-CO) who are familiar with the SSCI report insist that its fact-based analysis and conclusions will make clear to the public that the CIA program was brutal, ineffective in gaining actionable intelligence, and a terrible mistake.

Although the president acknowledged, during his May 23, 2013 counterterrorism speech, that the United States engaged in torture, and in doing so compromised our basic values, the groups made clear that more transparency around that issue was necessary: "The public deserves to know the full scope and scale of what was done in its name and to decide for itself whether claims about torture's efficacy stand up in light of the actual facts." Only when armed with those facts can the public engage in informed and meaningful discussion and effectively evaluate the actions of its government.

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## TCP Organizes *Amicus* Brief on *Brady* Violation

Clearinghouse

On June 3, a group of former judges and prosecutors filed a TCP-organized [amicus brief](#) in the District of Columbia Court of Appeals in the case of *Turner v. United States*. The brief argues that prosecutors in a high-profile, Washington, D.C. murder case from the mid-1980s violated their disclosure obligations, as established in *Brady v. Maryland*, by failing to provide to defense counsel eyewitness statements of an alternative perpetrator. The lower court, which upheld the convictions of the seven petitioners, found that this suppressed evidence was not material under *Brady*.

The seven petitioners, plus an eighth defendant who died in prison, were tried and convicted of the 1984 murder of Catherine Fuller. After their conviction, defense counsel discovered previously unavailable grand jury testimony that identified three people who were either at the crime scene at the time of the murder or had allegedly confessed to the attack. The *amicus* brief argues that these statements are material under *Brady*, particularly in light of the fact that the prosecution relied primarily on eyewitness testimony and offered no forensic evidence in obtaining the convictions.

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## "Defending Gideon" Available for Public Showing

Criminal Justice

This year marks the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, a landmark ruling declaring that the Constitution requires the government to appoint a lawyer for defendants in criminal cases who cannot otherwise afford one. To commemorate the occasion, TCP produced a short documentary, "[Defending Gideon](#)," which takes viewers on a fascinating journey from the heady days of the *Gideon* decision 50 years ago through the present day, and examines the crisis now facing indigent defense systems across the country.

Narrated by the noted actor Martin Sheen, the film features interviews with many who were involved in the case at the time, including Abe Krash, Bruce Jacob, Walter Mondale and Anthony Lewis. Interwoven in this historical context are the present day stories of the country's failure to fulfill *Gideon's* promise, such as burdening public defenders with overwhelming caseloads and failing to provide them with sufficient resources, and the heart-rending stories of people the system continues to leave behind.

We encourage people to use the film as a public education tool. Anyone is welcome to screen or stream the film for public showings. To make a screening easier, TCP has also developed an [event toolkit](#) and a [lesson plan](#). For more information or to order a DVD, contact Brian Yourish at [byourish@constitutionproject.org](mailto:byourish@constitutionproject.org).

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## SAVE THE DATE: Join TCP on September 17 for Constitution Day

Current Events

Mark your calendar to join TCP on September 17 for a panel discussion on wrongful convictions and a viewing of excerpts from "The Central Park Five," a new film from award-winning filmmaker Ken Burns that tells the story of the five teenagers from Harlem who were wrongly convicted of raping a woman in New York City's Central Park in 1989. More details of the event will be forthcoming in

future newsletters.

The growing pace of exonerations across the country in recent years has revealed disturbing flaws in our criminal justice system. Despite too many high-profile miscarriages of justice, our system continues to convict innocent people of crimes they did not commit. As a nation, we cannot continue to tolerate a status quo that robs innocent men and women of their liberty, while also allowing guilty persons to remain free. In addition to the panel discussion on preventing wrongful convictions, TCP will present its annual Constitutional Commentary Award to the filmmakers of "The Central Park Five." Ken Burns will accept the award on behalf of his colleagues.

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## Newsmakers in Brief

### Current Events

- On June 27, TCP president Virginia Sloan participated in a panel discussion hosted by the Florida Bar Association commemorating *Gideon's* 50<sup>th</sup> anniversary. The panel discussion featured excerpts from TCP's "Defending Gideon."
- On June 25, TCP, in partnership with Jenner & Block, LLP and the Washington Council of Lawyers, hosted a screening of "Defending Gideon" in Washington, D.C., followed by a panel discussion on the national indigent defense crisis. The panel was moderated by Dave DeBruin, Jenner & Block's Managing Partner.
- TCP senior policy counsel Sharon Bradford Franklin made several cybersecurity-related presentations in the month of June. On June 3, she addressed the National Attorneys General Training and Research Institute on the topic of the "Intersection of Cybersecurity and Digital Privacy." On June 6, she spoke on a panel on cybersecurity at the Personal Democracy Forum conference at New York University Law School. And on June 27, she participated as a panelist in [The Hill's](#) policy briefing on cybersecurity.
- *The Telegraph* (Macon, Ga.) quoted Ms. Franklin in a June 19 [article](#) about the continuing trend toward classifying more government documents, despite President Obama's promise of greater transparency.
- On June 17, Ms. Sloan delivered the keynote address at Karamah's Law & Leadership Summer program at the George Washington University Law School. The program attracts select Muslim women leaders from around the world as well as the United States.
- On June 10, the *Baltimore Sun* published [an op-ed](#) by TCP Board member Judge William S. Sessions, who served as director of the FBI, a federal district court judge, and a United States attorney. Judge Sessions discussed the need to let individuals convicted with flawed forensic evidence have an opportunity to establish their innocence.
- A June 6 [article](#) in Tech Dirt cited TCP's Liberty and Security Committee's 2011 report, [Suspicionless Border Searches of Electronic Devices](#).

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