



In This Issue

[MARK YOUR CALENDAR: Join TCP and Ken Burns on Constitution Day, 9/17](#)

[Surveillance Transparency Act of 2013 Earns TCP Support](#)

[TCP Applauds DOJ Leadership on Indigent Defense](#)

[Initial Victory in No Fly List Case with TCP Amicus Participation](#)

[SAVE THE DATE: Task Force on Detainee Treatment at National Constitution Center in Philadelphia, 9/24](#)

[First of TCP's Paul Saunders Web Forums Focuses on Recess Appointments](#)

[New Committee to Develop Guidelines for DNA Use by Law Enforcement](#)

[Stern Joins TCP as Rule of Law Policy Counsel, Franklin Moves to PCLOB](#)

[Columnist Cites TCP Report on Surveillance Cameras](#)

[Newsmakers in Brief](#)



[Donate Now](#)

Greetings!

August is usually a quiet time in Washington, but Attorney General Eric Holder changed that pattern last month. In an August 12 speech, he announced a [package of criminal justice reforms](#) that many, including The Constitution Project, have been championing for years. Among the issues Holder raised were the unjust and costly impact of drug-related federal mandatory minimum sentences and the crisis in indigent defense, particularly in the federal public defender program.



With respect to sentencing, it was striking to see the nation's top prosecutor admit that some

mandatory minimums result in unfairly long sentences that fail to increase public safety and are "ultimately counterproductive."

Holder said that the Justice Department would take the lead in fixing this problem by no longer charging low-level, non-violent drug offenders with offenses that carry mandatory minimums, reserving those charges "for serious, high-level, or violent drug traffickers."

This is clearly a step in the right direction, but Congress also needs to act.

TCP recently organized a [letter](#) from more than 50 former federal prosecutors and judges to Senate Judiciary Committee Chair Patrick Leahy (D-VT) and Senator Rand Paul (R-KY) in support of their bill, [the Justice Safety Valve Act of 2013](#), which would give judges greater discretion to sentence defendants below the mandatory minimum. TCP has also expressed [support](#) for a second sentencing reform bill, [the Smarter Sentence Act](#), introduced by Senator Dick Durbin (D-IL) and Senator Mike Lee (R-UT). Holder called these bills "promising legislation" that "will ultimately save our country billions of dollars while keeping us safe." We look forward to working with Congress to build the support necessary to enact bold sentencing reform and congratulate the Attorney General for supporting the first steps toward a more just criminal justice system that will also keep us safe.

Sincerely,

MARK YOUR CALENDAR: Join TCP and Ken Burns on Constitution Day, 9/17

Current Events

On September 17, The Constitution Project will present its annual Constitutional Commentary Award to the award-winning filmmaker Ken Burns and his colleagues for their documentary, "The Central Park Five," followed by a panel discussion on false confessions. "The Central Park Five" tells the harrowing story of five teenagers from Harlem who were wrongly convicted of an infamous rape in New York City's Central Park in 1989, in large part based on false confessions. Conservative columnist George Will calls the film "a meticulous narrative of a gross miscarriage of justice."

Unfortunately, the case is not an anomaly - false confessions are one of the leading causes of wrongful convictions in this country. The panel discussion will explore the reasons why innocent people confess to crimes they did not commit and examine best practices being adopted by law enforcement agencies across the country to help prevent wrongful confessions. Mr. Burns will be present to accept the award and will participate in the discussion.

The event will be held at Arent Fox LLP (1717 K Street, NW) in Washington, DC on Constitution Day, September 17. The reception begins at 11:30 am and the program will last from noon until 2:00 pm. Excerpts of the film will be shown as part of the program. A live webcast will also be available, which can enable federal agencies and educational institutions receiving federal funds to meet the requirement of a federal law that they teach about the Constitution on the day the document was adopted in 1787. [Click here](#) to RSVP or get more details about the event.

[Back to Top](#)

Surveillance Transparency Act of 2013 Earns TCP Support

Government Surveillance & Searches

On August 1, Senator Al Franken (D-MN) introduced the Surveillance Transparency Act of 2013, legislation designed to increase the transparency of government surveillance programs. If enacted, the bill would expand reporting on the scope of surveillance programs, helping Americans to become part of an informed debate about domestic surveillance.

Specifically, the bill would require the government to report annually on the number of Foreign Intelligence Surveillance Court (FISC) orders issued under various surveillance laws, the general categories of information collected, the number of U.S. persons whose information was collected under those categories and the number of U.S. persons whose information was actually reviewed by federal agents. The bill also includes less detailed reporting requirements and disclosure provisions for three surveillance authorities under the Foreign Intelligence Surveillance Act (FISA) that do not involve the bulk collection of Americans' records.

TCP strongly supports measures to enhance transparency in government surveillance programs without jeopardizing public safety. We have previously called for the reform of Section 215 of the Patriot Act and for greater transparency in orders issued by the FISC. Most recently, we joined a coalition of over 60 Internet companies and advocacy groups in [urging](#) the president and congressional leaders to require greater transparency by the government when national security-related requests are made to Internet, telephone, and web-based service providers for information about their users and subscribers. The coalition wrote that companies should be allowed to voluntarily disclose aggregate statistics about the information they are being compelled to produce

to the government. Passage of the Franken bill would be an important step toward achieving these goals.

[Back to Top](#)

TCP Applauds DOJ Leadership on Indigent Defense

Criminal Justice

In his August 12 speech announcing DOJ's support for criminal justice reform, Attorney General Holder "talked the talk," calling on the government to fulfill its obligation under the Sixth Amendment to provide counsel for poor criminal defendants. As Holder stated, "Congress must not only end the forced budget cuts that have decimated public defenders nationwide - they must expand existing indigent defense programs, provide access to counsel for more juvenile defendants, and increase funding for federal public defender offices."

Two days later, the DOJ "walked the walk." The Department filed a Statement of Interest in *Wilbur v. City of Mt. Vernon*, a federal case in Washington State involving potential violations of the defendants' Sixth Amendment right to counsel. Citing TCP's report, [Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel](#), the DOJ told the court, "The United States has an interest in ensuring that all jurisdictions - federal, state, and local - are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*." The DOJ's filing also called on the court to measure compliance by considering a myriad of factors that affect the quality of indigent defense.

In both the Attorney General's speech and the Statement of Interest, there was an appreciation that staggering caseloads and a chronic lack of resources have left indigent defense programs in states and localities across the country in a state of crisis. TCP is gratified that the DOJ has demonstrated strong leadership in this important area.

[Back to Top](#)

Initial Victory in No Fly List Case with TCP Amicus Participation

Government Surveillance & Searches

On August 28, Judge Anna Brown of the District Court for the District of Oregon issued an opinion in favor of the plaintiffs in *Latif v. Holder*, a case challenging the no fly list. Represented by Rita Siemion (formerly of Kator, Parks and Weiser), TCP filed an [amicus brief](#) in support of the plaintiffs' motion for summary judgment, arguing that the government should provide information to travelers who have already been informally advised of their watch list status about the reasons for placement on the list and give them a meaningful opportunity to challenge their inclusion. The brief, which is based on TCP's Liberty and Security Committee's report [Promoting Accuracy and Fairness in the Use of Government Watch Lists](#), also notes that the current procedure to seek removal from the list, the DHS Traveler Redress Inquiry Program, is inadequate to provide due process. Judge Brown's opinion is a preliminary one, finding that the plaintiffs have due process rights in this context, and ordering the government to provide more information on its current redress procedures. Ms. Siemion had participated in the June oral argument on the cross motions for summary judgment, and the opinion cites TCP's arguments. TCP is grateful to Ms. Siemion for her representation in this case.

[Back to Top](#)

SAVE THE DATE: Task Force on Detainee Treatment at National Constitution Center in Philadelphia, 9/24

Counter-Terrorism Policies & Practices

On September 24, three members of The Constitution Project's bipartisan, blue-ribbon [Task Force on Detainee Treatment](#) will join [National Constitution Center](#) President and CEO Jeffrey Rosen for an in-depth look at America's pre- and post-9/11 actions related to the capture, detention, and interrogation of suspected terrorists. In the wake of President Obama's renewed pledge to close the Guantánamo Bay prison - and amidst ongoing scrutiny of detainee treatment there - this timely conversation will encourage dialogue about our policies toward prisoners in Guantánamo Bay, Afghanistan, Iraq, and elsewhere. Joining Mr. Rosen in the conversation will be Task Force members Ambassador James R. Jones, Professor Azizah al-Hibri and General David R. Irvine. The noon event is open to the public free of charge. The National Constitution Center is located at 525 Arch Street on Independence Mall in Philadelphia. [Please RSVP](#) if you plan to attend.

[Back to Top](#)

First of TCP's Paul Saunders Web Forums Focuses on Recess Appointments

Current Events

TCP recently launched an [open web forum](#) centered on *NLRB v. Noel Canning*, an upcoming Supreme Court case that will tackle the issue of the Recess Appointments Clause, and more broadly the relative merits of political compromise and judicial resolution. We will be posting essays by contributors and will [accept submissions](#) on a rolling basis through September 15th. This is the first in an anticipated series of web forums named to honor Paul Saunders, who served on TCP's Board of Directors from 1999 to 2011, and as its chair from 1999 to 2006. Paul is of counsel in Cravath, Swaine & Moore's Litigation Department, having retired from the firm in August, 2010.

[Noel Canning](#), which the Supreme Court will take up next term, is a challenge to the constitutionality of three recess appointments made by President Obama to the National Labor Relations Board in 2012. At the time, the White House said these appointments were being made in accordance with the president's "Power to fill up all Vacancies that may happen during the Recess of the Senate."

Shortly after these appointments, an NLRB panel that included two of the new members affirmed a decision in a labor dispute involving Noel Canning, a soft drink bottling facility in Yakima, WA. Noel Canning challenged that decision on the ground that the recess appointments were invalid and thus, the Board lacked the quorum necessary to render a valid decision. In a sweeping decision that surprised some, the DC Circuit agreed, holding that the Recess Appointments Clause applies only to inter-session recesses and that it can be used to fill only those vacancies that arise during the recess itself. The NLRB appealed the decision to the U.S. Supreme Court.

Not long after the Court granted *certiorari* earlier this year, the political branches took their own actions that may have altered the legal landscape considerably. As part of a broader compromise within the Senate, President Obama withdrew the nominations of the two board members remaining from the January 2012 appointments and nominated two different board members, whom the Senate quickly confirmed through the normal process. As the Supreme Court prepares to consider this case, TCP seeks to foster a dialogue on both the underlying constitutional issues as well as the broader implications of *Noel Canning* as a case study in modern separation-of-powers disputes. To this end, we welcome submissions offering a variety of perspectives and we will post contributions on a rolling basis. We also plan to host an in-person roundtable on the issue sometime this fall.

[Back to Top](#)

New Committee to Develop Guidelines for DNA Use by Law Enforcement

Criminal Justice

TCP has formed a [new committee](#) to explore best practices for DNA collection by law enforcement agencies at the federal, state, and local levels. In June, the Supreme Court handed down its decision in [Maryland v. King](#), which held that a Maryland statute authorizing the collection of DNA samples from those arrested for certain felonies did not violate Fourth Amendment protections. While this case establishes a constitutional baseline for the practice, it also leaves a host of questions unanswered.

The Maryland law that the Court upheld includes significant procedural protections: a DNA sample is collected only upon formal charging, and only for certain violent or property felonies. It may only be used for identification purposes, and the record is expunged if no conviction is reached. Many jurisdictions across the country that collect DNA samples lack similar safeguards. We are pleased that an eminent and diverse group of experts, the Committee on DNA Collection, will survey the collection and storage policies and practices that jurisdictions currently have in place or are contemplating, identify the privacy and civil liberties concerns they raise, and fashion policy recommendations to better ensure the transparency and security of collection programs whenever government agencies choose to deploy this powerful law enforcement tool. We are grateful to the law firm of Jones Day, and to our board member Lawrence Rosenberg, a partner at the firm, for providing legal guidance and support for the Committee's work.

[Back to Top](#)

Stern Joins TCP as Rule of Law Counsel, Franklin Moves to PCLOB

Current Events

We are delighted that Katherine Stern is joining TCP's staff as a policy counsel in our Rule of Law program. Katherine, who holds a law degree from Yale and a doctorate in comparative literature from Princeton, is coming to TCP from the National Association of Criminal Defense Lawyers, where she has been working on post-conviction review of criminal cases with flawed forensic evidence. She previously worked at Jones Day on a variety of national security issues and privacy-related issues.

At the same time we are welcoming Katherine to the TCP team, we bid "au revoir" to our long-time senior policy counsel, Sharon Bradford Franklin, who is leaving us to become the executive director of the [Privacy and Civil Liberties Oversight Board](#). "Although we hate to lose her talent and leadership, we are thrilled that the members of the newly constituted privacy board have recognized her expertise and commitment to protecting Americans' civil liberties and delighted she will have this opportunity," [said](#) TCP President Virginia Sloan on hearing the news. Sharon will start in her new position on September 9. Anyone seeking to reach her at the PCLOB can email her at Sharon.Bradford.Franklin@pclub.gov.

[Back to Top](#)

Columnist Cites TCP Report on Surveillance Cameras

Government Surveillance & Searches

In his August 12 column, the *Washington Post's* Walter Pincus [wrote](#) about the proliferation of video surveillance cameras used by local law enforcement agencies as a more pervasive example of government surveillance than the National Security Agency programs recently in the news. Pincus quoted TCP's 2007 report, [Guidelines for Public Video Surveillance](#), which describes the

pervasiveness of this surveillance. TCP President Ginny Sloan responded to Pincus's article in a [letter-to-the-editor](#) in the *Post* published August 15. Saying that the public should not resign itself to more surveillance, she wrote, "There are legislative and regulatory solutions for government agencies using video surveillance programs. It is vital that policymakers ensure the laws and regulations safeguarding our privacy and civil liberties keep pace with advancing technology. With reasoned dialogue and informed debate, restoring balance to video surveillance is possible."

[Back to Top](#)

Newsmakers in Brief

Current Events

- The White House announced in August that Judge Patricia Wald, who served on both TCP's Liberty & Security Committee and its War Powers Committee, would receive the Presidential Medal of Freedom. The award is the nation's highest civilian honor. In 2011, TCP gave Judge Wald its Constitutional Champion award.
- On August 20, the Miami Herald published [an op-ed](#) by Dr. Azizah al-Hibri, a member of TCP's independent blue-ribbon Task Force on Detainee Treatment, entitled, "On torture, no time like the present to own up to our past." In addition, our friends at the National Religious Campaign Against Torture are using the Task Force report as a cornerstone in their own campaign, placing [three more op-eds](#) around the country, with a goal of placing at least one in each of the 50 states.
- As reported in last month's newsletter, members of TCP's War Powers Committee sent letters to President Obama and Congressional leaders arguing that the Constitution required Congressional authorization prior to any offensive military action on Syria. Their letter and/or the authors have been quoted in [various op-eds](#), [news stories](#) and [blog posts](#). The President announced that he will seek congressional authorization for any actions he contemplates taking in Syria and action is expected shortly.

[Back to Top](#)

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