

THE CONSTITUTION PROJECT

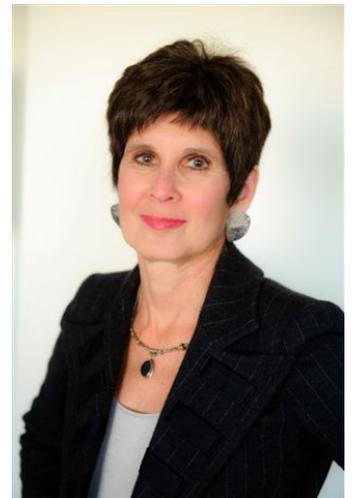


Safeguarding Liberty, Justice & the Rule of Law

Dear Friend of TCP,

I hope you enjoyed a restful Labor Day holiday. As you settle into your fall routine, please take a minute to read this message, which is of vital importance to The Constitution Project.

I want to first thank those of you who have regularly or even occasionally contributed to us to fund our important work. You may even have lent your expertise to our bipartisan, blue-ribbon committees, reports, and consensus recommendations that have had so much impact on federal, state, and local policymakers. Your steady support is the reason that we are able to remain on the forefront of efforts to bring bipartisan support to controversial constitutional issues. We appreciate your loyalty enormously.



Today, we ask you to renew your commitment to our work. We also ask those of you who have not yet contributed to TCP to do so now.

Times have changed in the funding of nonprofits like TCP. More and more, we find ourselves competing with larger organizations for declining dollars among those who support advocacy work. At the same time, requests for our unique brand of work have actually increased. For example, over the past year, we have organized a number of amicus briefs -- on behalf of prosecutors, judges, national security experts, and other unlikely allies -- at the request of lawyers across the country. We know, from the thanks we have received from the lawyers in those cases, that our efforts are making a difference. However, this work is extremely time-consuming, and we need financial support to keep doing it.

We appreciate that many of you have suggested that we take on other issues, knowing that TCP brings an influential point of view to the constitutional challenges we face. We badly want to respond to these requests, especially because we know that individuals' freedom and lives count on our efforts.

But we cannot do it without you. **Whether or not you have contributed to TCP before, I am asking you to give generously today, and then to give more if you possibly can.** If you would like to discuss this matter with me, please feel free to call me at 202-580-6923 or vsloan@constitutionproject.org. All of us at TCP welcome your generous donations.

Sincerely,



Virginia Sloan
President

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TCP Asks Court to Back Army Officer's Claim

that War against ISIL is Illegal

Checks & Balances

A federal judge should rule in favor of the Army officer who says the war against ISIL is illegal because President Obama has not received specific congressional authorization for it, TCP argued in a [friend-of-the-court brief](#) submitted to the U.S. District Court for the District of Columbia on August 19. The court accepted the brief, which was prepared with pro bono assistance from Lewis Baach PLLC, three days later.

Captain Nathan Michael Smith, who is deployed to Kuwait as an intelligence officer, argues in his lawsuit that the president lacks the authority to use force against the Islamic State, also known as ISIL or ISIS, because he failed to get congressional authorization under the War Powers Resolution of 1973. TCP has [consistently maintained](#) that Obama needs congressional permission to continue the war against ISIL. The Obama administration has asked the court to dismiss Smith's lawsuit. [READ MORE](#)

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Effective Representation of Indigent Defendants Requires Adequate Funding, Access to Independent Experts

Right to Counsel

As explained in the groundbreaking report from TCP's National Right to Counsel Committee, [Justice Denied](#), the constitutionally-guaranteed right to effective representation for indigent criminal defendants requires not only fair compensation for public defenders and court-appointed attorneys, but also access to independent experts, investigators and other vital elements of an effective defense. TCP filed two friend-of-the-court briefs last month asking the courts to enforce this right.

In the case of *McWilliams v. Dunn*, the [TCP brief](#) argues that the U.S. Supreme Court should clarify its earlier decision that the Constitution requires the government to provide the assistance of an independent mental health professional in cases where it is necessary to assure that an indigent defendant receives meaningful access to justice. *McWilliams* was sentenced to death for the 1984 robbery, rape and murder of a convenience store clerk in Alabama based largely on the testimony of a doctor working for the state, who provided his diagnosis to the defense counsel, the prosecution and the court less than two days before the sentencing hearing. The brief was prepared by Jenner & Block LLP.

TCP also helped to organize a [friend-of-the-court brief](#) from a group of former judges who are urging the U.S. Eighth Circuit Court of Appeals in St.

Louis to overturn the denial of the right to counsel to a Missouri death row prisoner, Mark Christeson. Christeson's lawyers asked the court for \$161,000 to enable them to develop and present crucial medical and mental health expert evidence to show that their client was unable to assert his own rights when his prior lawyers abandoned him, but the court granted them only \$10,000. The brief was prepared with pro bono assistance from Goldstein & Russell, P.C. [READ MORE](#)

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Border Patrol Should Not Collect Social Media Identifiers, Groups Warn

Government Surveillance and Searches

Nearly 30 human rights, civil liberties and immigration organizations joined TCP in raising concerns about a proposal giving U.S. Customs and Border Protection officials the power to require visa-waiver applicants to disclose information about their social media presence. The proposal appears to require applicants to disclose their account names on certain popular social media platforms, and to surrender any additional account names and platforms they may use, as part of their visa-waiver arrival/departure records and their online application for an Electronic System for Travel Authorization.

The proposal would "irresponsibly shift government resources to a costly and ineffective program while invading the privacy of not just visa-waiver applicants, but also their contacts in the U.S. The price of a business trip or family vacation to the United States should not include a fishing expedition into one's reading lists, tastes, beliefs, and idiosyncrasies by CBP officers," the [groups wrote](#) in an August 22 letter to the Border Patrol.

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Former Prosecutors Seek New Hearing for Texas Man Sentenced to Die Because He is Black

Death Penalty

The U.S. Supreme Court should grant a Texas inmate another sentencing hearing because his initial death sentence was based on racially-biased testimony, a group of former federal and state prosecutors (including one who helped prosecute the case) argue in a [friend-of-the-court brief](#) organized by TCP and filed with the court on August 4.

The case involves Duane Buck, who was convicted in 1997 of murdering two

people and sentenced to die. At the sentencing hearing, Buck's attorney called an expert witness, Dr. Walter Quijano, who testified under questioning from the prosecutor that Buck was likely to be more dangerous in the future specifically because he was black. During her closing argument, the prosecutor stressed Quijano's testimony about Buck's future dangerousness based solely on his race, and the jury imposed the death penalty.

"Prosecutors must seek justice, not just convictions, and that duty sometimes requires foregoing or overturning a conviction in order to protect a defendant's constitutional rights. Among the most important of those rights is the constitutional assurance that no defendant's sentence will be determined based upon race," the prosecutors' brief asserts. The brief was written with pro bono assistance from Boies, Schiller & Flexner LLP. [READ MORE](#)

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Third Circuit Throws Out Pennsylvania Murder Conviction Due to Brady Violations

Criminal Discovery Reform

On August 23, the U.S. Court of Appeals for the Third Circuit [overturned the murder conviction](#) of James Dennis because prosecutors in Philadelphia withheld crucial evidence from the defense in violation of the Supreme Court's landmark ruling in *Brady v. Maryland*, which requires prosecutors to disclose information favorable to the defense. The majority of the Third Circuit held that prosecutors in the case intentionally withheld from defense counsel a receipt corroborating Dennis' alibi, an inconsistent statement by the prosecution's key eyewitness, and documents indicating that another individual committed the murder, all of which "effectively gutted the Commonwealth's case against Dennis."

In 2015, TCP recruited a distinguished group of former prosecutors and judges from Third Circuit states to sign on to a [friend-of-the-court brief](#), which was written with volunteer help from WilmerHale lawyers, in support of Dennis' case.

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Just Declassified Surveillance Court Opinion Presents Problems and Promise, Laperruque Opines

Government Surveillance & Searches

A recently declassified opinion from the Foreign Intelligence Surveillance

Court of Review has important implications for privacy and warrantless surveillance, both positive and negative, opines TCP Privacy Fellow Jake Laperruque in an [August 26 column](#) in the widely-read Just Security blog. On the one hand, the opinion seems to create a whole new ill-defined pseudo-category of "content information" that the government can collect without the protections of a probable cause warrant, which ought to be worrisome for privacy advocates, especially so because the court's basis for allowing collection was simply because the government lacked the technological capacity to exclude it. On the other hand, the opinion places strict investigatory and evidentiary limits on what the government can do with this "content information" after it is collected, which, if applied more broadly, could provide some additional privacy protections to data over-collected pursuant to other surveillance authorities, such as Section 702 or Executive Order 12333.

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Determination of Intellectual Disability in Capital Cases Must Rely on Current Medical Standards, TCP Tells Supreme Court

Death Penalty

The Supreme Court must find that states cannot apply outdated standards for determining intellectual disability when imposing a death sentence, TCP said in a [friend-of-the-court brief](#) filed the case of Bobby James Moore v. Texas. Moore was convicted in the shooting death of a man during a grocery store robbery and sentenced to death in 1980. In 2014, a Texas state court applied current medical standards in determining Moore was intellectually disabled, and hence ineligible for execution under the Eighth Amendment. However, the Texas Court of Criminal Appeals reversed the state court's grant of relief, saying the law required the judge to use an older, outdated standard.

"Texas chose to deliberately set its death penalty system apart-both from other death penalty States, and from the way intellectual disability is ordinarily treated under Texas law," TCP argued in its brief. The result is that "Texas permits the execution of offenders who would be deemed ineligible in these other States, therefore greatly increasing the risk that a person with intellectual disability will be executed." The brief was written by Jones Day.

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