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### Greetings!

We hope you will join us on September 20 for TCP's annual Constitution Day event. This year, our focus will be on national security "leaks."

Recent disclosures of information that the government maintains is classified have generated harsh criticism - of both the "leakers" and of the media outlets that made the information public - from some policymakers and commentators. Congressional and Department of Justice inquiries are underway, and it is possible that legislative changes and criminal charges could follow.

With the number of "leak"-related cases on the rise, such investigations and prosecutions highlight important questions about the relationship between investigative journalism, national security disclosures, and the First Amendment.

Join TCP, Georgetown's Center on National Security and Law, and the Center for the Constitution at James Madison's Montpelier on September 20, 2012 from 9:00am-12:00pm for what promises to be a riveting panel discussion.

TCP will also be honoring the authors of *Top Secret America*, Dana Priest and William Arkin, with our annual Constitutional Commentary Award. [RSVP](#) today.

Sincerely,

Virginia Sloan  
President, The Constitution Project



## Cybersecurity Act Suffers Setback in Senate, But Fight Might Return

Privacy & Technology

On August 3, the Senate voted against ending debate and bringing the Cybersecurity Act of 2012 (S. 3414) to a vote. TCP had previously [welcomed](#) the inclusion of new privacy protective measures in the information-sharing provisions of this bill, noting that from "a privacy and civil liberties perspective, the Senate bill is now far superior to the cybersecurity bill passed by the House this spring, the Cyber Intelligence Sharing and Protection Act (CISPA)." Despite the failure to bring the Senate bill to a vote, cybersecurity is an issue that is not likely to go away - the Obama administration and many members of Congress continue to regard passing such legislation as a high priority. The sponsors of the Cybersecurity Act - Senators Joe Lieberman (I-CT), Susan Collins (R-ME), Dianne Feinstein (D-CA), Tom Carper (D-DE), and Jay Rockefeller (D-WV) - along with a coalition led by Senators Al Franken (D-MN) and Dick Durbin (D-IL), made great strides in developing legislation designed to protect America's computer networks without compromising Americans' constitutionally guaranteed civil liberties. TCP hopes that the next time Congress takes up the issue, it will treat the privacy protections in this bill as a floor, not a ceiling.

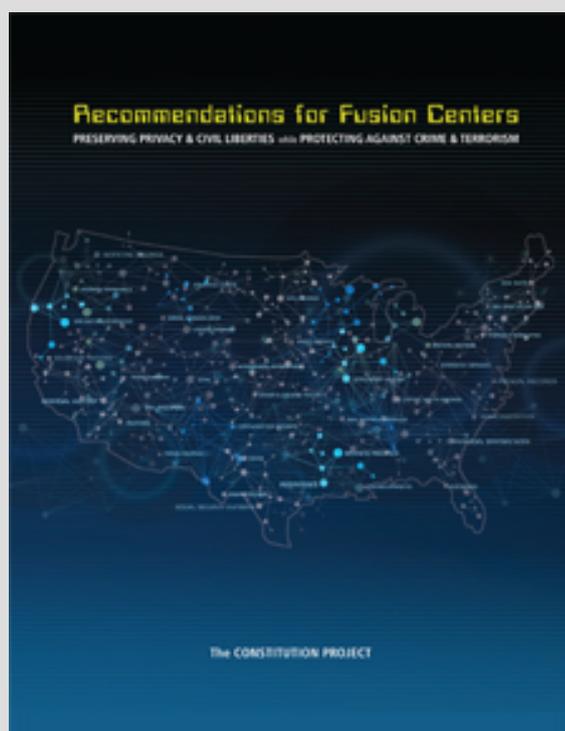
In addition, the Obama administration is considering issuing an executive order on cybersecurity, and several members of Congress - most recently, [Senator Feinstein](#), who chairs the Senate Intelligence Committee - are urging President Obama to do so. Although the type of measures that could be included in an executive order are less likely to threaten privacy rights than would legislation, we will continue to work with administration officials as well as members in both houses of Congress, and on both sides of the aisle, to ensure that any cybersecurity proposal that moves forward will incorporate robust safeguards for privacy and civil liberties.

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## TCP Finalizes New Report on Fusion Centers

Privacy and Technology

On September 11, TCP will release a new report on a largely unexamined issue. *Recommendations for Fusion Centers: Preserving Privacy and Civil Liberties While Protecting Against Crime and Terrorism* will be released and discussed at a public forum. There are now 77 fusion centers across the country, working to collect a wide array of information about individuals and pool the knowledge of state, local and federal law enforcement, government agencies, and even some private entities. TCP's new report highlights how the collection, use and storage of such massive amounts of personal and potentially sensitive information can threaten constitutional rights to privacy, equal protection and freedom of expression. Panelists will discuss these issues and the report's recommendations for policies to protect Americans' civil liberties. For more information or to RSVP click [here](#).



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## Eight Years Later, Privacy Oversight Board Might Finally Begin Work

Privacy and Technology

Eight years ago, Congress established a Privacy and Civil Liberties Oversight Board (PCLOB) based

on a recommendation of the 9/11 Commission. Five years ago, Congress enacted legislation to make the board independent and provide it with actual authority. On August 3 of this year, the Senate finally confirmed the first members for the reconstituted PCLOB - for four of the five positions on the board. Unfortunately, the Senate failed to consider the nomination of David Medine as the Board's chair, but the PCLOB can now come into existence with enough members to form a quorum and can finally begin its critical mission of assessing the privacy and civil liberties implications of national security programs. TCP has long urged [Congress](#) and the [president](#) to create and staff an independent privacy board, and issued a [statement](#) applauding the confirmations. TCP especially welcomes the confirmation of Judge Patricia Wald, who has long been active with TCP, serving on TCP's Liberty and Security Committee, our War Powers Committee, and our Task Force on Detainee Treatment.

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## TCP Urges Supreme Court to Clarify Award of Attorneys' Fees for Prosecutorial Misconduct

Federal Criminal Discovery Reform

In 2008, Miami doctor Ali Shaygan was the victim of gross prosecutorial misconduct during his criminal trial on prescription drug-related charges. Among other things, federal prosecutors intentionally withheld exculpatory evidence from Shaygan, who was eventually acquitted of every charge in the 141-count indictment. Under a federal law called the Hyde Amendment, federal judges have the power to order the government to pay reasonable attorneys' fees to acquitted defendants if the actions of the government lawyers were "vexatious, frivolous or in bad faith." A federal district court found that Shaygan's case met these criteria. However, the Eleventh Circuit Court of Appeals threw out the lower court's decision, ruling that there could be no Hyde Amendment award for *Brady* violations (i.e., failures to turn over exculpatory evidence to a defendant) no matter how egregious the prosecutors' conduct, so long as there were reasonable grounds to file the initial indictment.

In an *amicus* [brief](#) filed on August 9 with the generous *pro bono* assistance of Bryan Cave attorneys, TCP urged the U.S. Supreme Court to accept review of the case and clarify that the Hyde Amendment empowers a judge to require the Department of Justice to pay attorneys' fees when prosecutors intentionally withhold favorable evidence from prevailing defendants. TCP also recruited signatories for a brief authored by Tom Goldstein and filed on behalf of more than 50 former federal judges and prosecutors, also urging the Court to grant *certiorari* and reverse the Eleventh Circuit. The latter brief was highlighted by [CNN](#), [The Wall Street Journal](#), and the [Legal Times](#).

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## TCP Clearinghouse Cited for Work in Overturning Flawed Conviction

Federal Criminal Discovery Reform

On August 16, the U.S. Court of Appeals for the Fourth Circuit upheld a district court's decision to vacate the conviction of Justin Wolfe, who was sentenced a decade ago in Virginia for his role in a drug-related murder. The appeals court ruled that Wolfe's trial was tainted because prosecutors withheld exculpatory evidence in violation of the Constitution.

TCP organized an [amicus brief](#) from 34 former judges, prosecutors, and senior law enforcement officers in support of the district court's ruling. When the brief was submitted, Wolfe's attorney Michele Brace wrote TCP, "I don't think I've ever read an *amicus* brief with such a large collection of signatories! Aside from the merits of the brief, which are terrific, the size and diversity of the *amici* should send a strong message of confidence to the Fourth Circuit that the district court made the

right decision."

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## Reality TV - or Not?

Upcoming Event

On September 18, TCP will co-host "Law & Disorder: Criminal Justice on TV and in Real Life," a live webinar featuring a short video and expert panel examining myths about the U.S. criminal justice system perpetuated by popular culture. TCP President Virginia Sloan will be a panelist, along with Vanita Gupta, Deputy Legal Director at the American Civil Liberties Union, and Norman Reimer, Executive Director at the National Association of Criminal Defense Lawyers. For more information or to RSVP, click [here](#).

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## TCP Newsmakers in Brief

Current Events

- TCP Board member David Keene and former congressman Alan Mollohan (D-WV) co-authored an op-ed titled "[Left and right agree on criminal justice reforms](#)." *The Washington Times* published the piece on August 15.
- On August 18, TCP Government Affairs Counsel Christopher Durocher participated in a panel at the Office of Defender Services' Seventeenth Annual National Federal *Habeas Corpus* Seminar. Mr. Durocher spoke about the upcoming presidential and congressional elections and the effects they could have on federal *habeas corpus* laws in coming years.

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The Constitution Project | 1200 18th Street, N.W. | Suite 1000 | Washington | D.C. | 20036

T: 202.580.6920 | F: 202.580.6929

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