



In This Issue

[MARK YOUR CALENDAR: Join TCP and Filmmaker Ken Burns for Constitution Day](#)

[Former Federal Judges and Prosecutors Back Changes to Mandatory Minimum Sentences](#)

[Debate About Government Surveillance Programs Grows](#)

[TCP Working with Federal Public Defenders to Prevent Devastating Effects of Sequester](#)

[Offensive Military Action in Syria Requires Prior Congressional Approval, TCP War Powers Experts Say](#)

[Flawed Forensic Evidence Results in Tainted Death Penalty Convictions](#)

[TCP Urges Supreme Court to Hear Ineffective Assistance of Counsel Case](#)

[Upcoming Event: Commemoration of 50th Anniversary of the Criminal Justice Act of 1964](#)

[SAVE THE DATE: Join TCP on September 17 for Constitution Day](#)

[TCP Newsmakers](#)



[Donate Now](#)

Greetings!

I am delighted to welcome two distinguished individuals to The Constitution Project's (TCP) Board of Directors. The first is General David Irvine, a Salt Lake City attorney in private practice, a retired Army brigadier general and a former Republican state legislator. He is also a member of TCP's Task Force on Detainee Treatment. General Irvine enlisted in the U.S. Army Reserve in 1962 and received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, teaching prisoner-of-war interrogation and military law. He was the Deputy Commander for the 96th Regional Readiness Command. He served four terms in the Utah House of Representatives.



Our second new addition is David W. Beier, JD. Mr. Beier has been Managing Director at Bay City Capital LLC since March, 2013. He previously served as Senior Vice President of Global Government Affairs at Amgen, where he was also responsible for corporate communications and philanthropy. Mr. Beier joined Amgen from the law firm of Hogan Lovells LLP, where he was a Partner representing clients in the health care and technology fields, including pharmaceutical and biotechnology firms. Previously, Mr. Beier served as Chief Domestic Policy Adviser to Vice President Al Gore, as Vice President for Government Affairs and Policy at Genentech, and as Counsel to the House Judiciary Committee (where I first met him).

I am so pleased that TCP continues to attract such accomplished public servants and professionals to our roster. Like all the talented men and women who serve on TCP's boards and bipartisan policy committees, Dave Irvine and David Beier will provide unique and vital insights to our work. We are grateful to have them on our team.

Also, don't forget to mark your calendar and join us on September 17 in celebrating Constitution Day. See the first story for more details about what promises to be a riveting program.

Sincerely,



Virginia Sloan
President, The Constitution Project

MARK YOUR CALENDAR: Join TCP and Filmmaker Ken Burns for Constitution Day

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*, and will host a panel discussion on false confessions. Mr. Burns will be present to accept the award and participate in the discussion.

THE CENTRAL PARK FIVE tells the harrowing story of five teenagers from Harlem who were wrongly convicted of raping a woman in New York City's Central Park in 1989, in part based on false confessions. Conservative columnist George Will calls it "a meticulous narrative of a gross miscarriage of justice." Excerpts of the film will be shown as part of the program.

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.

The event will be held at Arent Fox LLP (1717 K Street, NW) in Washington, DC on September 17. The reception begins at 11:30am and the program will last from noon until 2:00pm. A live webcast will be available, and schools around the country are using it to satisfy their Constitution Day requirements under the Byrd Amendment. [Click here](#) to RSVP or to get more details about the event.

[Back to Top](#)

Former Federal Judges and Prosecutors Back Changes to Mandatory Minimum Sentences

Clearinghouse

In a letter organized by TCP, a group of more than 50 former federal judges and prosecutors urged Congress to adopt bipartisan legislation designed to relieve the nation's overcrowded prisons by granting courts greater flexibility to consider sentences below the federal mandatory minimum. According to a recent report from the nonpartisan Congressional Research Service, federal prisons are operating at 38 percent over capacity, endangering prison guards and inmates alike.

"Mandatory minimum sentencing laws are chiefly responsible for this wasteful use of prison space because they fail to distinguish between violent, serious criminals and low-level, nonviolent offenders," wrote the former federal prosecutors and judges in a [letter delivered](#) July 17 to Senators Rand Paul (R-KY) and Patrick Leahy (D-VT, and Chair of the Senate Judiciary Committee), the cosponsors of the [Justice Safety Valve Act of 2013](#), and to Congressmen Robert Scott (D-VA) and Thomas Massie (R-KY), the cosponsors of the House companion bill. Among those who signed the letter are Judge William S. Sessions, former director of the FBI; Michael Bromwich, former Inspector General of the Department of Justice; and Frank O. Bowman III, former special counsel for the

United States Sentencing Commission. Bowman was also a reporter for TCP's Sentencing Committee, which urges greater [sentencing discretion](#) for federal judges.

The Paul-Leahy bill (S. 619) would authorize federal judges to impose a prison sentence below the statutory mandatory minimum in cases in which a lower sentence will not jeopardize public safety. The bill would apply in cases where the judge determines the defendant is unlikely to become a repeat offender, and in other circumstances in which the minimum sentence is unwarranted, such as an offender's limited role in a crime or other mitigating factors. On July 22, the Charleston (W.Va.) *Daily Mail* published [an op-ed](#) from former US Attorney for the Southern District of West Virginia, Rebecca Betts, also a signatory to the statement, endorsing the Paul-Leahy bill. And on July 29, Senator Leahy cited the letter in the Congressional Record when he announced a hearing on the bill.

[Back to Top](#)

Debate About Government Surveillance Programs Grows

Government Surveillance and Searches

The national debate resulting from former National Security Agency (NSA) contractor Edward Snowden's disclosures to the media about federal surveillance programs continues. A good deal of attention is being focused on the role of the Foreign Intelligence Surveillance Court (FISC) in approving government requests for information about the American public and whether the public's privacy is being adequately protected.

Many in the media have turned to TCP experts to explore these questions. A July 7 [story](#) in *The Hill* examining "five unanswered questions" about the NSA surveillance quoted TCP senior counsel Sharon Bradford Franklin, who pointed out that, "[g]enerally we don't know the legal rationale being offered by the administration and being accepted by the FISA court to justify these particular types of surveillance programs. We should not have secret law in a democracy."

On July 9, Ms. Franklin participated as a panelist in a day-long "workshop" conducted by the recently constituted Privacy and Civil Liberties Oversight Board (PCLOB). She testified before the Board on the [Policy Perspectives panel](#), advocating for reforms to the statutory authorities used to collect Americans' communications and telephony metadata, and urging the PCLOB to promote transparency surrounding government surveillance programs. Ms. Franklin emphasized the concerns raised by secret interpretation of the law. "It shouldn't take a leak of classified information for us to learn what the law means," she [told](#) the Board.

A July 11 [report](#) in *Time* magazine about the PCLOB event quoted Ms. Franklin's remarks regarding the standards for when information can be collected in the first place: "It's very important that we have strict rules to require a sufficient connection to [terrorism](#) before this information is collected. The sheer fact that it is useful to the government for counterterrorism cannot possibly comply with Fourth Amendment standards, and it's not the kind of society that we live in." She was also extensively quoted in stories about government surveillance and personal privacy, including stories in [TechNewsWorld](#), [The Los Angeles Times](#), [CBN News](#), [Agence France-Presse](#), and the [International Business Times](#).

TCP also weighed in to support an amendment to the Defense Appropriations Act co-sponsored by Representative Justin Amash (R-MI) and Representative John Conyers, Jr. (D-MI) that would have reined in one of the NSA's data collection programs. The amendment would have prevented the NSA from using funds to conduct bulk collection of phone records, or other bulk data, under Section 215 of the Patriot Act. [TCP urged](#) Members of the House to support the amendment, noting that long before the recent leaks regarding NSA surveillance programs, The Constitution Project's Liberty and Security Committee had urged in its 2009 [Statement on Reforming the Patriot Act](#) that Congress *tighten* the standards for collection of information under the Patriot Act. Although the amendment failed, losing by a vote of 217 - 205, it received substantial bipartisan support and demonstrates that policymaker and public views on these privacy concerns are changing substantially.

In addition, TCP has joined a [coalition](#) of more than 50 Internet companies and organizations advocating for free speech and privacy rights. The coalition recently delivered a [letter](#) to the president and key members of the House and Senate demanding greater transparency around national security-related surveillance of Internet and telephone communications. In addition to that coalition letter, TCP joined with more than 50 organizations and individuals in a [letter](#) to the Senate Judiciary Committee welcoming its review of the NSA programs. During the July 31 Senate Judiciary Committee hearing on oversight of FISA programs, Senator Leahy acknowledged and entered into the record both coalition letters, as well as a [letter](#) authored by TCP in support of the FISA Accountability and Privacy Protection Act of 2013."

[Back to Top](#)

TCP Working with Federal Defenders to Prevent Devastating Effects of Sequester

Criminal Justice

On July 23, TCP submitted a [statement](#) from over 40 former federal prosecutors and judges to the Senate Judiciary Committee's Subcommittee on Bankruptcy and the Courts, in advance of a hearing on the effects of sequestration on the federal judiciary, and specifically the federal public defender program, which is funded through the judiciary's budget. Due to sequestration, the federal public defenders could face a 23 percent cut from their 2012 funding level, requiring a 30 to 50 percent reduction in staff and the closure of some offices. As the statement makes clear, such a cut would decimate the system, which has served as a model for the nation, and wreak havoc on the entire federal criminal justice system through delays and increased costs. TCP also submitted a [coalition letter](#) with other indigent defense advocates, in support of the federal public defenders. Senators, including Chair Chris Coons (D-DE) and Ranking Member Jeff Sessions (R-AL), and witnesses who attended the hearing agreed that the federal public defenders provide high-quality, cost-effective representation and serve a critical role in the federal criminal justice system.

The statement and coalition letter were also sent to members of the Senate Appropriations Committee. On July 25, the Committee approved a 2014 spending bill that would provide adequate funding for federal public defenders and avoid the worst effects of the potential budget cuts.

The [Washington Post](#) and the [Huffington Post](#) reported on the hearing and the statement from former federal prosecutors and judges. The Hill's Congress blog published a [piece](#) by Federal Public Defender Michael Nachmanoff, who testified at the hearing. Other outlets reporting on the hearing included the [New York Times](#), which also published an excellent [editorial](#) decrying the funding shortage, the [Wall Street Journal](#) and [CNN](#).

There is much more to be done to secure funding for the federal defender system, and TCP is working hard to try to save the system.

[Back to Top](#)

Offensive Military Action in Syria Requires Prior Congressional Approval, TCP War Powers Experts Say

War Powers

President Obama cannot conduct offensive military action in Syria without prior congressional approval, a group of legal scholars and former members of Congress says. Without specific congressional authorization, "any such use of force in Syria would be unlawful, contrary to the Constitution, and against the Framers' commitment to self-government," wrote members of The

Constitution Project's War Powers Committee in a letter delivered to the [president](#) and [key members of Congress](#) on July 23.

Last month, the Obama administration said Syria had crossed a "red line" with its use of chemical weapons, including the nerve agent sarin gas, against rebels seeking to overthrow President Bashar al-Assad in an ongoing civil war. Some members of Congress have repeatedly called on the administration to step up its support of the rebels, including destruction of Syrian air fields and enforcing a "no-fly" zone.

However, unless Congress gives its prior approval, such actions would "violate both the rule of law and democratic values," the signers of the letter said. The group cited an [earlier report](#) by TCP's War Powers Committee that recommended improvements needed to restore the proper roles of all three branches of government in decisions about the use of force abroad. They noted the Constitution clearly gives "the representatives of the people in Congress the power to declare or authorize war and the President, after obtaining that express legislative decision, the power as Commander in Chief to direct our armed forces."

[Back to Top](#)

Flawed Forensic Evidence Results in Tainted Death Penalty Convictions

Criminal Justice

According to a July 17 [story](#) in *The Washington Post*, an internal Justice Department task force investigation of old criminal cases has found as many as 27 death penalty convictions that were tainted because FBI forensic experts may have mistakenly linked defendants to crimes with exaggerated scientific testimony. The unprecedented review of cases led to an 11th-hour stay of execution in Mississippi in May. According to the Post, "It is not known how many of the cases involve errors, how many led to wrongful convictions or how many mistakes may now jeopardize valid convictions. Those questions will be explored as the review continues."

In April 2012, TCP's Board of Directors [first responded](#) to news of the Justice Department inquiry by sharply criticizing the Department for not sharing the results with those whose convictions were affected by the results or with their lawyers. And in [a letter](#) sent to Attorney General Eric Holder, TCP urged the Department to examine all cases in which prosecutors relied on potentially faulty evidence or flawed testimony that were not part of the task force's original review. Additionally, TCP wrote, "This investigation cannot be done by DOJ alone. Independent experts, along with the defense bar, the ABA, ethics authorities, and others, must work side by side with DOJ as it conducts this work." The Department agreed with TCP's requests and announced recently that it has expanded its review to include the Innocence Project and the National Association of Criminal Defense Lawyers.

[Back to Top](#)

TCP Urges Supreme Court to Hear Ineffective Assistance of Counsel Case

Criminal Justice

On July 15, The Constitution Project filed an [amicus brief](#) urging the U.S. Supreme Court to hear the case of *Long v. United States*. In the underlying case, Colie Long filed an ineffective assistance of counsel claim, arguing that he did not receive proper representation because his lawyer failed to present a witness in his second trial who provided key testimony rebutting the prosecution's star witness in his first trial. The DC Court of Appeals ruled against Long, holding that even though his lawyer failed to act because he was ignorant of the law, the lawyer's rationalization of his actions

after the fact required a heightened standard of review reserved for "strategic" decisions. TCP's brief supports Long's request to the Court to hear his case in the next term.

TCP argues in its brief that not only does the decision of the Court of Appeals fly in the face of established precedent, it significantly impairs defendants' constitutionally guaranteed right to counsel. TCP argues that, when a defendant's attorney makes a decision based on ignorance of the law, in violation of professional ethics and norms, a court should not use the same highly deferential standard as in cases where counsel made a strategic choice.

As TCP pointed out in [Justice Denied](#), a comprehensive report that documents failures of the criminal justice system to protect the Sixth Amendment right to counsel, the current test for ineffective assistance of counsel is nearly impossible to meet. Increasing the standard, as the DC Court of Appeals did, would eliminate any meaningful review of decisions made out of ignorance of the law. TCP is grateful to lawyers at King & Spalding LLP for representing us in this case.

[Back to Top](#)

Upcoming Event: Commemoration of 50th Anniversary of the Criminal Justice Act of 1964

Current Events

Later this month, TCP, the American Bar Association (ABA), Brennan Center for Justice, National Association of Criminal Defense Lawyers, and National Legal Aid & Defender Association will participate in an event marking the beginning of a year-long commemoration of the 50th anniversary of the passage of the Criminal Justice Act of 1964. This landmark legislation secured the 6th Amendment right to counsel in federal court. Distinguished speakers at the event will include James R. Silkenat, who will be President of the ABA, and the Honorable Gustavo Gelpi, Jr., President-Elect of the Federal Bar Association. The event will take place on August 20 from 3:00 to 5:00pm in the Montpelier Room at the Library of Congress, James Madison Memorial Building. Please RSVP to lawguest@loc.gov if you would like to attend.

[Back to Top](#)

Newsmakers in Brief

Current Events

- Sharon Bradford Franklin was quoted in a July 16 [story](#) in *The Hill* titled "Secret court agrees to unseal Yahoo's case against surveillance."
- TCP Task Force on Detainee Treatment counsels Alka Pradhan and Kent Eiler and investigator Katherine Hawkins wrote [an op-ed](#) titled "Force feeding - Guantanamo's shame," which was published in the *Los Angeles Times* on July 6.
- TCP Scholar-in-Residence Louis Fisher wrote [an essay](#) titled "Closing Guantanamo," which was published July 1 in the *National Law Journal*.

[Back to Top](#)

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