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THE CONSTITUTION PROJECT

 Safeguarding Liberty, Justice & the Rule of Law

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Dear Friend of TCP -

For those of us working to defend the values embodied in the Constitution, progress sometimes seems to come slowly, and victories happen less frequently than we might hope. Last week, however, we got a significant win.



On May 23, the U.S. Supreme Court [set aside](#) the conviction of Georgia death row inmate Timothy Foster, an intellectually-limited black man who was 18 years old at the time he was accused of murder in 1987. He was found guilty and sentenced to death by an all-white jury. Years later, Foster's lawyers finally received the prosecution's jury selection notes, which [revealed](#) overwhelming evidence that black citizens were identified by race and systematically excluded from the jury. By a 7 to 1 majority, the Supreme Court found that the prosecution in Foster's case had violated the Constitution, and returned the case to the state for further review.

Last August, eight renowned former trial prosecutors submitted a [friend-of-the-court brief](#) organized by TCP in support of Foster's claims. The brief from the former prosecutors was highlighted prominently in stories about the case in the [Washington Post](#) and the [Wall Street Journal](#), [on NPR](#) and [CNN](#), and in an opinion piece that appeared in the [New York Times](#). Thanks to Paul Smith at Jenner & Block for writing the superb brief. You can read more about the case, [Foster v. Chatman](#), [here](#) and [here](#).

We count on your support when we face the daily challenges of striving to preserve our fundamental liberties, and we hope you will join in the celebration of the victories, whenever they come.

Sincerely,

Virginia Sloan
 President, The Constitution Project



National Security Experts Seek Public Debate of Proposed Changes to Military Commissions

Counter-Terrorism Policies & Practices

Twenty-five national security experts from across the political spectrum want Congress to hold public hearings before making changes to the law for prosecuting suspected terrorists in military commissions. The experts are all members of the bipartisan Constitution Project [Liberty and Security Committee](#) or its [Task Force on Detainee Treatment](#).

Military commission proceedings have been underway at Guantanamo Bay since 2011 for six detainees accused of planning the 9/11 attacks, and one accused of plotting the bombing of the U.S.S. Cole. In mid-April, the Department of Defense asked Congress to consider several amendments to the Military Commissions Act that it said would improve the efficiency of the process.

"There are real problems with the military commissions, but the proposed amendments to the MCA do not address them-and in some cases raise serious constitutional concerns," the TCP experts wrote in a [May 10 statement](#) to members of the Senate Armed Services Committee. The committee did not include the MCA amendments in the version of the legislation the full Senate will consider. [READ MORE](#)

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Don't Exempt Biometric Database from Privacy Protections, Groups Tell FBI

Government Surveillance & Searches

A coalition of 45 civil rights, human rights, immigrant rights, privacy, and transparency organizations and companies joined The Constitution Project in expressing concerns about the FBI's proposal to exempt its massive national database of fingerprints and facial photos, which is called the Next Generation Identification (or NGI) system, from the Privacy Act of 1974.

"The NGI system uses some of the most advanced surveillance technologies known to humankind, including facial recognition, iris scans, and fingerprint recognition. It runs on a database holding records on millions of Americans, including millions who have never been accused of a crime," the coalition wrote in a [May 27 letter](#) to DoJ's Privacy and Civil Liberties Office. The groups asked the Department of Justice for more time to review the proposed rules for the database, and the agency extended its comment deadline to July 6. [READ MORE](#)

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TCP Urges Congress to Provide Assistance for Localities on Right-to-Counsel Issues

Right to Counsel

On May 12, the Senate Judiciary Committee adopted the [Justice for All Reauthorization Act](#) (S. 2577), introduced by Sen. John Cronyn (R-Texas). Among its important provisions, the legislation includes a section giving the Department of Justice the ability to offer technical assistance to state

and local governments in assuring the constitutionally-guaranteed right-to-counsel for all criminal defendants, marking the first time Congress has granted such authority, and approves an appropriation of \$5 million to carry it out. The Constitution Project provided advice and support to committee members in crafting the section. Earlier in the year, more than 100 criminal justice and victim advocacy groups joined TCP in [urging the Senate](#) to adopt the legislation.

In addition, TCP urged the leaders of two House Appropriations subcommittees to bolster funding for [federal](#) and [local public defender](#) programs. [READ MORE](#)

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Privacy Advocates and Tech Companies Want Senate to Pass Email Privacy Act without Amendments

Government Surveillance & Searches

In a [May 24 letter](#) to members of the Senate Judiciary Committee, 70 technology companies, trade associations and privacy groups joined The Constitution Project in urging the Senate to pass warrant-for-content legislation that would provide stronger protection to sensitive personal and proprietary online communications without further weakening amendment. The bill, the [Email Privacy Act \(H.R. 699\)](#) sponsored by Reps. Kevin Yoder (R-Ks.) and Jared Polis (D-Colo.), updates the Electronic Communications Privacy Act of 1986, which currently allows law enforcement agencies to access without a warrant emails that have been stored for more than 180 days and information stored "in the cloud."

The groups said the legislation "represents a carefully negotiated compromise which preserves existing exceptions to the warrant requirement, provides a new ability for civil agencies to obtain access to previously public commercial content, and maintains the government's ability to preserve records and obtain emails from employees of corporations." However, some senators have indicated they will attempt to further weaken the bill by offering several amendments.

In an [op-ed published](#) in The Hill on May 27, retired homicide detective James Trainum explains why one of the proposed amendments, a so-called "emergency exception" for law enforcement, is "unwise and unsafe." Trainum served 27 years with the Metropolitan Police Department of Washington, D.C., and currently co-chairs The Constitution Project [Committee on Policing Reform](#).

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Lack of Unanimous Jury Makes Florida Death Penalty Unconstitutional, TCP Argues

Death Penalty

Florida law is unconstitutional because it does not require a unanimous jury verdict to impose a death sentence, [TCP told](#) the Florida Supreme Court, arguing that the lack of unanimity violates the Eighth Amendment of the U.S. Constitution. Under Florida law, all 12 members of a jury must find an accused person guilty, but then only 10 of them have to agree that the defendant should die for the crime. Earlier this year, the Florida legislature increased the majority of the jurors required to impose a death sentence from seven to 10. However, Florida remains one of only three states to permit capital punishment with a less-than-unanimous jury.

"A unanimity requirement promotes careful and thorough evidence-based deliberations, prevents the exclusion or silencing of minority and opposing views in the deliberation process, and increases public confidence in the jury's sentencing decision. Unanimity is also essential to ensuring the jury's penalty determination accurately reflects the conscience of the community," The Constitution

Project wrote in a [friend-of-the-court brief](#) filed on May 23. The case before the Florida Supreme Court is Larry Darnell Perry v. State (Docket SC16-547), which the court is scheduled to hear on June 7. [READ MORE](#)

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How a Chain Link Fence Can Protect Privacy in the Age of "Collect It All"

Government Surveillance & Searches

In today's digital age, it seems like most everything we do or say is somehow collected and catalogued. As the use of technology like smartphones continues to grow, video cameras in public places become more prevalent, and technologies like GPS and facial recognition become more refined, it seems likely that [more information](#) will be collected, not less.

As a result, "it is critical that we also place appropriate limits on what the government can do with the data it inevitably amasses," Jake Laperruque and Joe Onek argue in a [recent post](#) to Lawfare, a widely read and well-respected national security blog. Their thought-provoking post suggests three critical post-collection reforms that would help restore the balance between overly broad data-gathering by government agencies and the constitutionally-guaranteed protection against unreasonable searches. Laperruque is the TCP Privacy Fellow, and Onek advises TCP on national security issues.

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An Algorithm Cannot Protect Constitutional Rights

Right to Counsel

A new, [in-depth series of articles](#) by a team of reporters at ProPublica shows that "risk assessment tools" may perpetuate racial bias in our justice system and, perhaps even more disconcertingly, cloak such discrimination in a veil of scientific certainty. Touted as an effective way to predict whether a defendant will pose a risk to public safety or fail to appear before trial, many courts have turned to these proprietary (and therefore, secret) algorithms to determine whether and under what conditions an accused should be granted pre-trial freedom.

As TCP's Virginia Sloan, Sarah Turberville and Madhu Grewal point out in a May 25 [column in Huffington Post](#), The Constitution Project [National Right to Counsel Committee](#) raised many of these same concerns in its 2015 report, [Don't I Need a Lawyer?](#) The committee emphasized that without defense counsel to provide the context missing from a raw risk assessment score, that number alone is not meaningful. The committee also warned that relying simply on a risk assessment tool could lead to disparate outcomes.

In [an article](#) in the spring issue of Criminal Justice, Alexander Bunin also favorably mentions the committee's report. Bunin is the Chief Public Defender in Harris County, Texas.

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