

June 14, 2011

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We are writing to urge your support for quick passage of the Consular Notification Compliance Act, legislation that would allow foreign nationals who were denied consular access while in law enforcement custody and face the death penalty to receive appropriate review of that failure. As former prosecutors and judges, we are strong supporters of a robust and accurate criminal justice system. We are well aware that international consular notification and access, as required under the Vienna Convention on Consular Relations (Vienna Convention), is essential to such a system, and to ensuring non-discriminatory treatment for both non-citizens in U.S. custody and U.S. citizens in the custody of foreign governments. It is also critical to the efficient, effective, and fair operations of criminal justice systems throughout the United States.

It is appropriate to ensure that our country complies with the laws to which it has obligated itself, and to ensure that those laws apply to our own citizens as well. At all stages of the proceedings, foreign nationals—whether our own citizens in other countries or those from other countries in the United States—face unique disadvantages and challenges when confronted with prosecution and imprisonment under the legal system of another nation. Prompt consular access ensures that they have the means necessary to be advised of their rights and to prepare an adequate defense.

Ensuring prompt consular access to foreigners arrested in the United States also enhances the truth-seeking function that lies at the heart of American justice. Much in the same way as the right to counsel under the Sixth Amendment, consular notification is essential to enabling fair access for those who are unfamiliar with our legal system. As Chief Judge Juan Torruella of the United States Court of Appeals for the First Circuit observed, “Without [consular access], I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.” *U.S. v. Li*, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

Consular assistance provides a unique and indispensable protection for foreign nationals who are unfamiliar with the U.S. criminal justice system. This is true with regard to our own citizens abroad as well. As many domestic courts have recognized, consulates can provide essential resources that are simply not available through other means, particularly in identifying and explaining the ways in which the U.S. criminal justice system differs from their native systems.

Early consular access can prevent misunderstandings and missteps by a foreign national that might otherwise prejudice their ability to obtain a fair trial. Consulates can assist defense counsel in locating crucial documents, witnesses, and exonerating evidence available only in their native country and can assist in translations that in too many cases have been demonstrated to be erroneous, thus jeopardizing the accuracy of the proceedings. This can mean the difference between conviction and acquittal, or between life and death.

We want to emphasize that demonstrating our nation's commitment to complying with Vienna Convention obligations is also critical to ensuring the safety of *Americans* traveling, living and working abroad. The United States expects countries to grant consular notification and access to Americans in law enforcement custody. In return we pledge to accord the same right to foreign nationals within our borders. In addition, particularly in states bordering Mexico and Canada, cooperation between law enforcement agencies is critical to ensuring the safety of citizens on all sides of the border. These accords are threatened when the United States erects procedural hurdles that prevent foreign nationals from obtaining meaningful judicial review when denied consular notification and access and may well mean that our own citizens' rights will be jeopardized in countries whose citizens' rights have not been respected by the United States.

The Consular Notification Compliance Act will allow U.S. federal courts to review claims of individuals facing death sentences, ensuring that violations of the Vienna Convention have not resulted, or will not result, in actual prejudice to the criminal conviction or sentence. While appropriately limited in scope to Vienna Convention claims, passage of this legislation will demonstrate to foreign governments the United States' good faith in upholding its consular access obligations, increasing the likelihood that foreign governments will grant access to Americans in their custody.

Providing meaningful enforcement of the Vienna Convention's consular notification and access requirements will increase the efficient, effective and fair operations of our criminal justice system and protect U.S. citizens abroad. For these reasons, we urge you to support the Consular Notification Compliance Act and to ensure its prompt progress and passage in Congress.

Respectfully,

Hon. Charles F. Baird, Former Judge, Texas Court of Criminal Appeals; Former Judge, 299th District Court of Travis County, Texas

Hon. William G. Bassler, Former Judge, United States District Court for the District of New Jersey (1991-2006); Former Judge, Superior Court of New Jersey (1988-1991)

A. Bates Butler III, United States Attorney, District of Arizona (1980-81); First Assistant United States Attorney, District of Arizona (1977-80)

Robert J. Del Tufo, Attorney General, State of New Jersey (1990-1993); United States Attorney, District of New Jersey (1977-1980); Former First Assistant State Attorney General and Director of New Jersey's Division of Criminal Justice

W. Thomas Dillard, United States Attorney, Northern District of Florida (1983-1986); United States Attorney, Eastern District of Tennessee (1981)

Hon. Bruce J. Einhorn, Former United States Immigration Judge (1990-2007); Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

Hon. Shirley M. Hufstедler, United States Secretary of Education (1979-1981); Former Judge, United States Court of Appeals for the Ninth Circuit (1968-1979); Former Associate Justice, California Court of Appeal (1966-1968); Former Judge, Los Angeles County Superior Court (1961-1966)

Hon. John J. Gibbons, Former Judge, United States Court of Appeals for the Third Circuit (1970-1990) (Chief Judge (1987-1990))

Hon. Nathaniel R. Jones, Former Judge, United States Court of Appeals for the Sixth Circuit, (1979-2002); Assistant United States Attorney, Northern District of Ohio (1962-1967)

Hon. Gerald Kogan, Former Chief Justice, Supreme Court of the State of Florida; Former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

Kenneth J. Mighell, United States Attorney, Northern District of Texas (1977-1981); Assistant United States Attorney, Northern District of Texas (1961-1977)

Hon. Stephen M. Orlofsky, Former Judge, United States District Court for the District of New Jersey (1995-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980)

Professor Mark Osler, Professor of Law, University of St. Thomas, Minnesota; Former Professor of Law, Baylor University, Texas; Former Assistant United States Attorney, Eastern District of Michigan

H. James Pickerstein, United States Attorney, District of Connecticut (1974); Chief Assistant United States Attorney, District of Connecticut (1974-1986)

Richard J. Pocker, United States Attorney, District of Nevada (1989-1990)

James H. Reynolds, United States Attorney, Northern District of Iowa (1976-1982)

Hon. William S. Sessions, Director of the FBI (1987-1993); Former Judge, United States District Court for the Western District of Texas (1974-1987) (Chief Judge (1980-1987)); United States Attorney, Western District of Texas (1971-1974)

John Van de Kamp, Attorney General of California (1983-1991); District Attorney of Los Angeles County (1975-1983)

Mark White, Governor of Texas (1983-1987); Attorney General, State of Texas (1979-1983); Secretary of State of Texas (1973-1977); Assistant Attorney General, State of Texas (1965-1969)

Hon. Michael Zimmerman, Former Justice, Supreme Court of Utah (1984-2000) (Chief Justice (1994-1998))