

July 2011

On My Mind: Monthly Message from TCP President Virginia Sloan

TCP was extremely gratified when, on June 14th, Senator Patrick Leahy introduced the [Consular Notification Compliance Act](#). The legislation, among other things, gives federal judges the jurisdiction to review cases where foreign nationals on death row claim that they did not receive fair trials or sentences because of violations of their right to contact their consulate, as the Vienna Convention on Consular Relations requires.

Over the past few years, we have worked closely with members of Congress and administration officials to support U.S. compliance with the Vienna Convention. Since the release of our Death Penalty Committee's report, [Mandatory Justice: The Death Penalty Revisited](#), in 2005, TCP has called for the federal government to provide a remedy for foreign nationals on death row in the United States who were denied consular access, since such denial increases the risk that they were not treated fairly in the course of the investigation, trial and sentencing.

TCP issued a [statement](#) urging Congress to quickly approve Senator Leahy's bill especially because Humberto Leal Garcia, a Mexican national, is scheduled for execution by the state of Texas on July 7th. After his arrest, Mr. Leal was never told that he had a right to contact the Mexican consulate for legal assistance. To protect Mr. Leal's rights under the Vienna Convention, TCP, working with many allies, organized a diverse group of former military officials, diplomats, judges and prosecutors to urge Texas Governor Rick Perry to hold off on executing Mr. Leal until Senator Leahy's legislation is considered, and urging Congress to pass the legislation quickly. TCP staff also spoke out. For example, TCP Counsel Christopher Durocher was [interviewed](#) by *Public News Service* and Christopher and I wrote an [Op-Ed](#) for the *Huffington Post* that explained the bill's significance. These letters were widely cited in nearly every news story and editorial about Mr. Leal's case, including in [The Washington Post](#), [The New York Times](#), and [Reuters](#). Senator Leahy also mentioned the letters in his statement introducing the bill. We remain hopeful that Governor Perry will do the right thing and grant a reprieve to Mr. Leal while this legislation is being considered, and that Congress will finally also do the right thing and ratify the Vienna Convention.

Congress, Media Seek out TCP Experts on Libya Debate

On June 28th, TCP Scholar-in-Residence Louis Fisher [testified](#) at the request of the Senate Foreign Relations Committee about the Obama administration's legal and constitutional justifications for using military force in Libya. Mr. Fisher, formerly of the Library of Congress, is one of the country's leading constitutional specialists and is an expert on the war powers issue. He was one of two legal authorities asked to testify after the Committee heard from the administration. Consistent with the 2005 [report](#) of our War Powers Committee, of which Mr. Fisher is a member, as well as Libya-related TCP press releases on [June 15th](#) and [June 20th](#), Mr. Fisher testified that the Constitution requires President Obama to obtain congressional authorization before using force abroad except in limited cases involving "repelling sudden attacks and protecting American lives overseas." Neither condition was present in Libya.

Throughout the month of June, the national news media sought the views of Mr. Fisher, as well as TCP War Powers Committee co-chairs and former Members of Congress Mickey Edwards (R-OK) and David Skaggs (D-CO) and TCP Counsel Mason Clutter. While in Congress, Mr. Skaggs served on the House Permanent Select Committee on Intelligence while Mr. Edwards was the ranking Republican on the House Foreign Operations Appropriations Subcommittee. TCP experts were quoted in interviews with [NPR](#), [The Christian Science Monitor](#), [Boston Globe](#), [CNS News](#), [Politico](#), [Bloomberg](#), and [FOX News](#). TCP also began an aggressive outreach to the nation's leading editorial boards and was pleased with this [editorial](#) in *The New York Times*, which said "the president must receive Congressional authorization or terminate the mission."

Death Penalty Developments in Texas and Florida

Texas executed Milton Mathis on June 21st, despite compelling evidence that Mr. Mathis had mental retardation. In 2002, the Supreme Court held in *Atkins v. Virginia* that the execution of an individual with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment. However, the *Atkins* decision came down after Mr. Mathis' conviction was final, and because of a complex interaction between state and federal procedural rules, he was

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never able to present his *Atkins* claim to a federal court for review on the merits. Mark White, former Governor of Texas, who approved scores of executions during his term in office and who now co-chairs TCP's Death Penalty Committee, authored an [Op-Ed](#) published in the *Dallas Morning News* on June 17th calling on Governor Perry to stay the execution and conduct an independent investigation of Mr. Mathis' mental retardation claims. The Op-Ed was featured in a *Reuters* [story](#) covering the execution.

Also, on June 29th, a federal judge for the U.S. District Court for the Southern District of Florida [determined](#) that Florida's death penalty statute was unconstitutional because it allows for a judge to override a jury's determination that a capital defendant should not be sentenced to death and instead impose the death penalty. The opinion stated that the "judicial override" provision in the state law violates the U.S. Supreme Court's 2002 decision in *Ring v. Arizona*, which stated that defendants are entitled to have juries rather than judges determine whether any aggravating factors in a crime justify enhanced punishment. TCP's Death Penalty Committee recommended that such judicial override provisions in state law be eliminated in its 2005 report [Mandatory Justice](#).

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Solutions to Address Broken Criminal Justice System Focus of Capitol Hill Event

On June 8th, a distinguished group of criminal justice practitioners and policy experts—including TCP Board Member and signatory to the Right on Crime initiative David Keene; former North Carolina Supreme Court Justice I. Beverly Lake; renowned economist Dr. Anne Morrison Piehl; and Director of the Rhode Island Department of Corrections A.T. Wall—provided detailed reform recommendations to address the urgent problems confronting state and federal criminal justice systems. A [story](#) about the [videotaped](#) Capitol Hill event, which appeared in *The Crime Report*, quoted Mr. Keene as saying "the stars are in alignment" to enact criminal justice reform because of the nation's current economic crisis.

Well over 100 congressional and administration staff, as well as members of the Smart on Crime Coalition that produced an earlier [report](#) featuring many of the reforms discussed by the panelists, attended the event. Moderator and TCP Counsel Christopher Durocher focused the discussion on reforms that could be successfully implemented during these challenging economic times.

TCP Scholar Testifies in Support of Congressional Oversight

On June 13th, Louis Fisher, TCP's Scholar-in-Residence, testified before the House Oversight & Government Reform Committee in a hearing about the Justice Department's purported failure to comply with a committee subpoena for documents. The Justice Department has been arguing that the committee cannot gain access to documents regarding ongoing criminal investigations. Mr. Fisher [testified](#) that congressional committees have obtained investigation-related documents in the past and that the Department's argument therefore "sweeps too broadly." The Oversight Committee also received [testimony](#) from TCP Fellow Morton Rosenberg, author of our 2009 report, [When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry](#). Mr. Rosenberg also urged Congress to exercise its "well established" investigative authority in this context, and we provided copies of our congressional handbook to members of the Committee.

U.S. Supreme Court: No Right to Counsel in Civil Contempt Cases

On June 20th, the United States Supreme Court ruled in *Turner v. Rogers* that defendants do not enjoy a constitutional right to counsel in civil proceedings where their physical liberty is at stake, so long as alternative substitute procedures are provided to protect defendants' due process rights. TCP filed an [amicus brief](#) in the case based upon the 2010 [recommendation](#) of its National Right to Counsel Committee, advocating for the appointment of quality representation to all persons unable to afford counsel in proceedings that result in a loss of liberty, regardless of whether the proceedings are denominated "civil" or "criminal."

In a [statement](#) released the day of the Court's decision, TCP's National Right to Counsel Committee co-chair Timothy K. Lewis, a former judge for the U.S. Court of Appeals for the Third Circuit, lamented the Court's ruling, saying, "Today, the Supreme Court issued a decision contrary to both its own precedent and to due process requirements enshrined in the Constitution. All indigent defendants at risk of deprivation of physical liberty ought to be provided effective assistance of counsel, regardless of whether the case is a civil or criminal proceeding."

Mixed Signals on U.S. Detention Policy

On June 24th, the Senate Armed Services Committee approved legislation that, if enacted, would codify a system of indefinite detention without charge and require military custody of some terrorism suspects detained in the current conflict. The language was included in the Senate's version of the 2012 National Defense Authorization Act ("NDAA"). In a [statement](#), TCP Counsel Mason Clutter criticized the language as a "step in the wrong direction." Ms. Clutter noted, however, that the Senate committee wisely chose not to include a new authorization for the use of military force against al Qaeda, the Taliban, and associated forces without holding public hearings. The House version of the NDAA contains such a provision. TCP's War Powers Committee sent a [letter](#) earlier this month urging the Senate to "exercise its constitutional powers and conduct full public debate including hearings" on the need for and proper scope of an authorization to use force abroad. Finally, Ms. Clutter also expressed support for a provision in the Senate bill that would allow for the use of "alternative courts," such as traditional federal criminal courts, instead of just military commissions, to try Guantanamo detainees and other terrorism suspects.

Coalition Urges Secretary Clinton to Exempt Peacebuilding from Material Support Laws

On June 21st, TCP [announced](#) that a [letter](#) was sent by a coalition of 45 groups and individuals, including TCP, to Secretary of State Hillary Clinton, urging her to exercise her statutory power to exempt peacebuilding activities from overly broad laws prohibiting "material support" to terrorist organizations. In addition, TCP joined a group of renowned conflict resolution experts, former public officials, former diplomats, and civil liberties experts in announcing the release of a "[Statement Supporting Reform of Security Laws that Hinder Charity](#)." The statement calls on the U.S. government to join us in working to reform these overly broad laws governing material support to terrorist organizations. Both coalition documents were released at a National Press Club panel marking the one-year anniversary of the Supreme Court's decision in *Holder v. Humanitarian Law Project*, in which the Court upheld an extremely broad interpretation of the laws prohibiting material support to terrorist organizations.

DOJ Called Upon to Strengthen Standards for State Post-Conviction Counsel

On June 1, 2011, TCP submitted [comments](#) to the Department of Justice in response to regulations it proposed for certifying states seeking to capitalize on the Chapter 154 Opt-in Program. Under this program, states agree to provide adequate counsel to indigent capital defendants for state post-conviction reviews of their cases, and in return, those states enjoy procedural advantages to speed federal *habeas corpus* review of those capital cases.

In the comments, TCP President Virginia Sloan urged the DOJ to revise its regulations to strengthen provisions designed to ensure that states adequately compensate counsel and provide the necessary litigation resources. She noted that, "When left to their own devices, States have often failed to meet the reasonableness standard for compensation of appointed post-conviction counsel and reimbursement of their litigation expenses."

New Faces of Reform Interview Focuses on Death Penalty

Every month we showcase a videotaped [interview](#) on our Web site with a national leader on criminal justice or rule of law issues. This month, former Texas governor and TCP Death Penalty co-chair Mark White shares his thoughts on the administration of the death penalty. View previous [interviews](#) with TCP Board chair Stephen Hanlon of Holland & Knight, and TCP Board Members former FBI Director and federal Judge William S. Sessions, former Congressman Mickey Edwards (R-OK), and Stanford Law Professor and former Special Assistant to President Obama for Justice and Regulatory Affairs Mariano-Florentino Cuellar, and others.

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