

TCP Helps Federal Defenders Avoid Devastating Cuts, More To Be Done

Right to Counsel

When Congress finally resolved the budget impasse that closed the federal government, one of the few programs to be funded above fiscal year 2013 levels was the Defender Services Account, which funds both federal defenders and private, appointed counsel for indigent defendants charged with federal crimes. The bill provides an extra \$26 million over the fiscal year 2013 funding level; however, much of that extra money will be needed just to cover delayed payments for legal services already performed by private, appointed attorneys.

For the past several months, TCP has worked in coordination with federal defenders and representatives of the appointed counsel who also represent indigent defendants to build support for the federal defender program. TCP assembled a team of advocates from the private sector, as well as former staff from Congress and the Department of Justice, to spread the word and help garner support. As a result of our coordinated advocacy, the federal defenders have received calls for support from both sides of the aisle in Congress and there seems to be a uniform view that the funding crisis is real and needs a solution. TCP helped demonstrate the bipartisan support for federal defenders that secured the funding increase.

Unfortunately, the increase will not be enough to restore adequate staffing levels or prevent further furloughs caused by sequestration in many public defender offices across the country. Federal defenders will continue to be furloughed, offices will operate at 10 percent below needed staffing levels, money for experts and investigation will be severely limited, and appointed counsel will still face delays in their payments and, for the first time, a reduction in their rates. TCP will continue to work to make sure that the funding bill that Congress must pass by January 15, 2014, provides the additional funding needed.

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Detainee Task Force, British Officials Discuss Joint Efforts on Torture and Rendition

Counter-Terrorism Policies & Practices

Two members of TCP's [Task Force on Detainee Treatment](#) met with British government officials in London on October 17 to discuss ways that the two countries can work together to promote better policies regarding the detention and treatment of suspected terrorists. Task Force co-chair Asa Hutchinson, a former undersecretary of the Department of Homeland Security during the administration of President George W. Bush, and Task Force member Thomas R. Pickering, a career ambassador and former undersecretary at the State Department in the administration of President Clinton, spoke with members of the All Party Parliamentary Group on Extraordinary Rendition (APPG) and other interested parties at the invitation of Andrew Tyrie, Conservative MP for Chichester and chairman of the APPG.

The Task Force released a [comprehensive report](#) in April that concluded American intelligence and military personnel used interrogation techniques on suspected terrorists captured in Afghanistan, Iraq and elsewhere that in many instances amounted to torture, in violation of U.S. laws and international treaties. The report also concluded that the U.S. and U.K. governments collaborated on the extraordinary renditions of numerous detainees to third countries where they were, in fact, tortured.

"It is in the national interest of not just the United States, but also of Britain, to get to the truth about

the scope of the extraordinary rendition programme. Rendition makes us less safe not more so. It is not only repugnant but inexpedient. The mistreatment and torture of detainees has eroded public trust, making the gathering of reliable intelligence information by the security services more difficult," Tyrie said.

The meeting in London is part of a larger plan to promote the Task Force's recommendations for accountability and reform. On October 21, Ambassador Pickering led a conversation about detainee treatment at the Commonwealth Club of California in San Francisco. And, just last month, two members of the Task Force, former ambassador and congressman James Jones and David Irvine, a retired Army brigadier general who taught prisoner-of-war interrogation and military law, spoke at the National Constitution Center in Philadelphia in an event moderated by Jeffrey Rosen, the Center's president and CEO. Their in-depth discussion about America's pre- and post-9/11 actions related to the capture, detention, and interrogation of suspected terrorists. The next stop is New York City on November 21, where Ambassador Pickering and Task Force member Dr. David Gushee, the Distinguished University Professor of Christian Ethics and Director of the Center for Theology and Public Life at Mercer University, will be at the Carnegie Council for Ethics in International Affairs. [RSVP here](#) if you want to join them.

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TCP Asks Supreme Court to Hear Ineffective Assistance of Counsel Case

Right to Counsel

The Constitution Project has asked the Supreme Court to take the case of convicted murderer Alan Ray Hinton because his defense counsel failed to hire a competent forensics expert. The State's case against Mr. Hinton rested solely on the testimony of its own forensic specialists. In a "[friend of the court](#)" brief filed October 21, TCP argues that the failure to hire a qualified expert constituted ineffective assistance of counsel in violation of Mr. Hinton's Sixth Amendment rights, which may have "led to a miscarriage of justice, and caused an innocent man to be sentenced to death."

Mr. Hinton was arrested in 1985 and charged with two separate murders involving a gun that occurred during robberies at two fast food restaurants near Birmingham, Alabama. He was convicted of murder based solely on ballistic tests, which both the National Academies of Science and the FBI have determined to be scientifically unreliable.

Mr. Hinton's court-appointed lawyer recognized prior to trial that the expert he had retained to challenge the prosecution's critical forensic evidence was not competent to do so, but wrongly believed he could not obtain the funds necessary to hire a better one. In fact, had he researched Alabama law, the lawyer would have found that the court was required to provide him with reasonable fees for an expert. TCP's brief argues that this mistake constitutes a "deficient performance that prejudiced the defendant" in violation of his constitutional right to effective counsel, a claim the Alabama Court of Criminal Appeals incorrectly rejected. As noted in the report of TCP's National Right to Counsel Committee, [Justice Denied](#), the constitutional right to counsel includes the ability to hire competent experts to ensure fair and equal treatment in the courts.

TCP is grateful for the pro bono assistance of Sidley Austin in preparing the brief.

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Bill to Curb Bulk Collections Earns TCP Support

Government Surveillance & Searches

The Constitution Project has endorsed legislation in both Houses of Congress to curb bulk collection

of American's telephone and internet records by the National Security Agency and to provide greater transparency of policies underlying government surveillance programs. Called the USA Freedom Act, the bipartisan legislation was introduced on October 29 by [Rep. James Sensenbrenner](#) (R-WI) and [Sen. Patrick Leahy](#) (D-VT). When it was introduced, the bill had more than 70 cosponsors in the House and 17 in the Senate.

"We applaud this effort to pass comprehensive intelligence reform that prohibits the government's massive and suspicionless spying on the American people and that gives them the information they need to determine whether government surveillance has gone too far," said TCP president Virginia Sloan in a [press release](#). The new bill provides "a good balance between protecting the American people's fundamental civil liberties and privacy rights, while still preserving the ability of the intelligence community to gather the targeted information it needs to help keep America safe," she said.

Earlier in the month, TCP [submitted comments](#) to the Review Group on Intelligence and Communications Technologies established by President Obama in August to examine how, "in light of advancements in communications technologies, the United States employs its technical collection capabilities in a manner that optimally protects our national security and advances our foreign policy while appropriately accounting for other policy considerations." TCP's comments were based on [recommendations developed](#) by its Liberty & Security Committee over the last several years. The president has asked the Review Group to complete its work by December 15.

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Open Government Groups Urge Obama Administration to End "Secret Law"

Transparency & Accountability

A coalition of nearly 50 organizations dedicated to promoting greater transparency and government accountability, including TCP, is urging President Obama to curb the "secret law" that enabled the National Security Agency's surveillance programs to become much broader and more invasive than previously known.

In a [letter](#) delivered to the White House on October 21, the coalition called on the president to address the issue at the Open Government Partnership meeting in London. Specifically, the groups asked the president to commit to giving the public substantial access to documents that significantly interpret laws authorizing the intelligence community's surveillance programs, including - but not limited to - legal interpretations by the Justice Department's Office of Legal Counsel and opinions of the Foreign Intelligence Surveillance Court.

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TCP Applauds Transfer of Terror Suspect to Federal Court

Counter-Terrorism Policies & Practices

On October 15, [McClatchy](#) reported that alleged al Qaeda operative Abu Anas al Liby had pleaded not guilty to federal charges that he helped plan the August 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The news report noted TCP's support for the Obama administration's decision to bring al Liby to federal court to stand trial and quoted TCP president Virginia Sloan: "Both before Sept. 11 (2001) and since, federal courts have safely and without fanfare gone about the business of adjudicating hundreds of complex terrorism cases."

TCP has [long advocated](#) for trying terrorism suspects in federal court. The record of federal courts in

disposing of suspected terrorists stands in stark contrast to the record compiled by military commissions. Operating in a new and uncertain environment, the commissions are moving at a glacial pace amidst a sea of controversy. Of the seven convictions secured in military commissions to date, two have been overturned by the D.C. Circuit Court of Appeals and the trial of the 9/11 defendants remains far off.

A suspect in the 1998 bombings of the U.S. embassies in Kenya and Tanzania that killed 224 civilians, al Liby was seized by a U.S. Army Delta Force squad on the streets of Tripoli, Libya on October 5. Intelligence officials interrogated him for a week without access to lawyers aboard the U.S.S. San Antonio in the Mediterranean. Also known as Nazih Abdul-Hamed al-Ruqai, al Liby was on the FBI's most wanted terrorists list. His family denies that he was in al Qaeda at the time of the embassy bombings.

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Federal Court Stays Regulations for Post-Conviction Counsel

Right to Counsel

On October 18, a federal court in California issued a temporary restraining order against the Department of Justice, enjoining it from putting into effect the rules for the "Certification Process for State Capital Counsel Systems." Under this certification process, 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. According to the court, the final rule, issued on September 23, 2013 and scheduled to take effect on October 23, 2013, is likely "arbitrary and capricious" because, among other things, it fails to provide clear substantive competency standards for counsel states appoints under the program.

Throughout the rulemaking process, which began in 2007, TCP has worked with the Habeas Corpus Resource Center and a broad coalition to improve the proposed rules. During the most recent round of comments, in 2012, TCP urged the Department of Justice to improve the proposed rule, noting its "failure to include in the proposed rule a mechanism for reviewing a state's adherence with its certified mechanism."

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Newsmakers in Brief

Current Events

- TCP's work on video surveillance is cited in an October 4 story in the [Ann Arbor News](#) about the city of Ypsilanti's plans to install security cameras to monitor its dumpsters and municipal lots.
- On October 13, the [Fayetteville Observer](#) quoted TCP policy counsel Katherine Stern in a story about the city's consideration of installing video surveillance systems.
- Ms. Stern was also quoted in an October 15 story in [TechNewsWorld](#), titled "NSA Helps Itself to Americans' Online Address Books," and in an October 27 story in the [San Francisco Chronicle](#) on Senator Dianne Feinstein's plans to introduce legislation codifying NSA bulk data collection.

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