

August 5, 2010

VIA FACSIMILE

The Honorable Daniel K. Inouye  
Chairman  
United States Senate  
Committee on Appropriations  
Room S 128, The Capitol  
Washington, DC 20510

The Honorable Thad Cochran  
Ranking Member  
United States Senate  
Committee on Appropriations  
122 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Patrick Leahy  
Chairman  
U.S. Senate Subcommittee on State,  
Foreign Operations, and Related Programs  
127 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Judd Gregg  
Ranking Member  
U.S. Senate Subcommittee on State,  
Foreign Operations, and Related Programs  
125 Hart Senate Office Building  
Washington, DC 20510

RE: Department of State, Foreign Operations, and Related Programs Appropriation  
Act for Fiscal Year 2011

Dear Chairman Inouye, Senator Cochran, Chairman Leahy, and Senator Gregg:

We urge you to support section 7082 of the Department of State, Foreign Operations, and Related Programs Appropriations Act for Fiscal Year 2011 (S.3676). Section 7082 would allow foreign nationals who were denied consular access while in law enforcement custody and were subsequently convicted in a U.S. court to seek judicial review of their conviction based on that denial. 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.

The purpose of consular access and assistance is not to provide special benefits to foreign nationals. It is simply 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 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.

Section 7082 would allow U.S. federal courts to review claims of individuals sentenced to a term of life in prison or death, when they assert that certain violations of the Vienna Convention resulted in actual prejudice to the criminal conviction or sentence. While appropriately limited in scope to Vienna Convention claims, section 7082 would 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 Section 7082 of S. 3676.

Sincerely,

Shirley M. Hufstedler

Former Judge, United States Court of Appeals for the Ninth Circuit; former Associate Justice, California Court of Appeal; former Judge, Los Angeles County Superior Court; former United States Secretary of Education

Miriam Krinsky

Former Assistant United States Attorney, Central District of California

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Former United States Attorney, Northern District of Texas; former Assistant United States Attorney, Northern District of Texas

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Richard J. Pocker, Esq.

Former United States Attorney, District of Nevada

Mark White

Former Governor of Texas; former Attorney General of Texas; former Secretary of State of Texas; former Assistant Attorney General of Texas, 1965-1969

cc: U.S. Senate Appropriation Committee