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FULFILLING OUR TREATY OBLIGATIONS AND PROTECTING AMERICANS ABROAD

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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FULFILLING OUR TREATY OBLIGATIONS AND PROTECTING AMERICANS ABROAD

WEDNESDAY, JULY 27, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Franken, Blumenthal, Grassley, and Graham.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today we are going to hear testimony about legislation I introduced last month, legislation with the support of the Department of Justice, the Department of State, and the Department of Homeland Security, to help bring the United States into compliance with its obligations under the Vienna Convention on Consular Relations. This is a treaty made under the authority of the United States. Of course, a treaty that we enter into carries the force of law in our country.

In an important way, we began our opening statements for this hearing a week ago when Senator Grassley raised the issue at an earlier hearing last Wednesday. We agreed on an important principle then—that treaties ratified by the United States are the law of the land and, like any law, must be honored. Senator Grassley appropriately made reference to the Supremacy Clause contained in Article VI of the Constitution that provides for the Constitution, Federal laws, and treaties to be treated as "the supreme Law of the Land." That is central to this hearing.

If we can remain focused on that shared principle, I am confident we can find a solution to the problem that continues to plague us. As you know, President Bush tried to get us to comply with our legal obligations, unsuccessfully. I supported President George W. Bush in that regard.

Each year, thousands of Americans—including from every State represented by this Committee—are arrested overseas while they study, travel, work, and serve in the military. Like many other Senators, I have gotten those calls at 2 o'clock in the morning or 3 o'clock in the morning from an anxious family member saying their husband, wife, son, daughter, brother, or sister have been arrested in—naming the country—"What can we do?" Well, I tell them their well-being often depends on the ability of United States

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consular officials to meet with them, monitor their treatment, help them obtain legal assistance, and connect them to family back home.

In those countries, we remind the people that we are all signatories to this Vienna treaty, and so our consular members have to be able to speak to them. I am worried about what has happened a few times in our country that some of these countries are going to say, "Wait a minute. You want us to follow that, but you do not follow it."

We know that access is protected by the treaty ratified in 1969 after a bipartisan vote in the Senate. This treaty has been supported by every President, Republican or Democratic, ever since. The treaty is not "foreign law." It is American law and has been for more than 40 years. And the United States joined the treaty and made it our law. Why? Because it protects our citizens.

The value of that treaty has never been questioned. But as with any treaty, with any law, it is only effective when enforced. And right now, in too many cases, the United States is not being faithful to this law. That failure puts Americans in other countries at risk, and those other countries are able to say, "Well, you do not follow the law, so we are not going to follow the law, and your American that we are holding in jail is now in trouble."

This should not be a partisan issue. President George W. Bush tried to fix the problem through an Executive memorandum, but the Supreme Court rejected that approach. In a decision by Chief Justice Roberts, the Court agreed that reciprocal observance of the treaty was a "plainly compelling" American interest, but ruled that the solution had to be implemented by Congress and not the President. The legislation I introduced follows the approach taken by President Bush but does it—as Chief Justice Roberts insisted—and I disagree with his conclusion in that, but I am doing it as he has insisted—by way of implementing legislation.

Now, I recognize that solving this problem requires us to deal with cases involving heinous crimes. In no way do I want to minimize the seriousness of these offenses or the importance of seeing justice done for the victims of these crimes. I am a former prosecutor. I prosecuted a lot of these heinous type crimes, and I feel as strongly about that as anyone. The bill is not about letting dangerous criminals go free. Criminals must be held accountable for their actions.

What the legislation does is offer a very narrowly crafted solution that will have the least impact possible on those cases and our courts while maximizing protections for United States citizens. In order to bring the United States into compliance with its legal obligations, the bill merely provides the Federal courts with the opportunity to determine if the denial of consular access resulted in an unfair conviction or sentence in a limited number of cases.

Now, some have suggested that the bill is an attack on the death penalty or an effort to further delay the habeas corpus review process. Of course, neither claim is true. That is not what is intended. The bill provides one-time review for a limited group of cases. It has no effect on habeas review for anyone else. It is not going to clog our courts; it is not going to delay future cases. In fact, moving forward, the bill seeks to eliminate the need for future habeas

claims regarding consular notification by ensuring that these issues are dealt with before trial.

So imagine the case, as I said before, of an American sentenced to death in a foreign country without any notification to the U.S. Government, not having the access that he is supposed to have. Every one of us—Republicans and Democrats alike—would be outraged. There are currently foreign nationals on death row in the United States, some of whom were never told of their right to contact their consulate, and their consulate was never informed of their arrest, trial, conviction, or sentence. That is not in compliance with our treaty and, thus, not in compliance with our law.

I have heard from retired members of the U.S. military urging passage of the bill to protect service men and women and their families overseas. I have heard from former diplomats of both political parties who know that compliance with the treaty is critical for America's national security and commercial interests.

In conclusion, the bill is about three things only. It is about protecting Americans when they work, travel, and serve in the military in foreign countries. It is about fulfilling our obligations and upholding the rule of law. And it is about removing a significant impediment to full and complete cooperation with our international allies on national security and law enforcement efforts that keep Americans safe. We have to bring the U.S. into compliance with our legal obligations. We cannot continue to ignore the treaty and at the same time expect other countries to honor the treaty.

Senator Grassley.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Yes, let me preface my remarks with a couple points based upon what you just said.

No. 1, you will see from my statement that I read your bill a little bit differently than you do, and maybe that can be clarified through this hearing or through private discussions you and I might have. But I see it a little bit differently than you do.

The second thing, I would say you do accurately reflect the 15-second discussion we had on the Supremacy Clause. But when you get into this issue, I think it is a little broader than what just our 15-second statement would be, and I will make some comment on that.

The United States fulfills its treaty obligations under the Vienna Convention, and we do protect Americans abroad. I appreciate the fine work of the men and women of the State Department who provide consular assistance to arrested citizens. And Secretary Clinton called me last night, and we had a very good discussion, and she told me about 9,500 Americans being helped abroad on this, and how even 24 or 25 Iowans were helped on this, and she saw this as a very important piece of legislation, and I said I would be glad to continue discussion with her.

The Supremacy Clause requires adherence to treaties, not to rulings of international judicial bodies, and treaties that conflict with emphasis upon later enacted statutes lose applicability to the extent of any conflict. That is the case here. Most importantly, the Supremacy Clause requires adherence to the Constitution.

The real subjects of this hearing are the retroactive ability of foreign murderers on death row to have another chance to delay the imposition of their sentences and the weakening of the sovereignty of the Nation and of our 50 States.

This bill is also about the death penalty. There is no reason to believe that any American would lose consular access if the International Court of Justice *Avena* decision were not enforced. None has done so since the 2004 ruling. But there is no doubt that the conviction and death sentences of scores of foreign murderers would face another round of judicial review if the bill is passed. Due to the broadest language in the bill—and the bill contains this language: "Notwithstanding any other provision of law, those habeas petitions will not be governed by the 1996 amendments that we made in the habeas laws."

There is every reason to expect that judges will use those habeas petitions to retroactively delay and sometimes block the imposition of lawful death sentences against clearly guilty killers. It is the families of the victims of those murderers who will be harmed if S. 1194 passes the way it is written now. This hearing is not balanced with four witnesses in favor of the bill and only one in opposition. Since we were allowed only one witness, we requested that a family member of a victim be allowed to testify perhaps as a joint witness, and we were refused.

The administration says that our noncompliance with the International Court of Justice is causing Americans not to receive consular notification, but the case of Ms. Gillis, the witness before us today, does not provide that at all. Her Libyan captors thought she was Spanish, so they did not deny her consular rights because of U.S. action. The more likely explanation of her denial of consular rights was that NATO was bombing Libya and the Qaddafi regime's general intentional failure to obey international norms.

The administration's claim that this bill is needed to protect the rule of law is satire of that concept. Two consecutive administrations have now done everything but comply with the rule of law in this area. President Bush unconstitutionally ordered a State to order foreign killers to challenge their death sentences in light of the International Court of Justice ruling. President Obama's Justice Department, with the State Department, filed a brief that argued that one of the individuals subject to the ICJ ruling should be granted a stay of execution. It relied on the International Court of Justice ruling which has no force under American law, policy considerations of the type we are going to hear today, and the unpassed bill—with emphasis upon "unpassed bill"—that is the subject of this hearing.

The rule of law depends on following only the law, but the administration's brief advocated—and, sadly, four Justices agreed—that a bill that has not satisfied the constitutional requirements for enactment into law should be given consideration in the law. Those Justices and everyone else should be on notice that this bill, in fact, will not pass. Like the Bush administration's disregard for federalism, the Obama administration's flouting of the separation of powers has real consequences for the rights of American citizens. The State and Justice Departments should start adhering to the

American Constitution if they really value our credibility in recommending that foreign countries follow the rule of law.

The administration also violates constitutional norms in this bill. The Tenth Amendment prohibits the Federal Government from commandeering State and local officials to perform federally mandated functions. Section 3 of the bill would do exactly that. The Constitution itself thus dashes any hopes that the question of adherence to the VCCR can be settled by this law once and for all, as the administration hopes.

Throughout our history our foreign relations have been complicated by our Federal system. That is the price that we pay for having a limited Government that divides power among branches and between the Federal Government and the States for the purpose of protecting liberty.

Professor Tribe, who is well thought of by many colleagues on the other side of the aisle, wrote recently that sometimes the Constitution "directs us back to the political drawing board." This appears to be one of those times.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Our first witness is Patrick Kennedy. He is a career member of the U.S. Foreign Service, nearly 40 years of experience. He currently serves as the Under Secretary of State for Management. He was confirmed to that position by the Senate. As Under Secretary, he is responsible for a wide range of issues at the Department, including security and consular affairs. In addition to his other roles, in 2005 he headed the transition team for the then newly established Office of the Director of National Intelligence. He also served as a U.S. Representative to the U.N. for management and reform with the rank of Ambassador. He has a bachelor of science in foreign service from Georgetown University.

On a personal note, he was recently in St. Albans, Vermont, where he was extremely well received in helping us with some of our important State Department efforts up there. I am told by the mayor of St. Albans and everybody else, Ambassador Kennedy, you are welcome back anytime.

Please go ahead, sir.

STATEMENT OF PATRICK F. KENNEDY, UNDER SECRETARY FOR MANAGEMENT, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Mr. KENNEDY. Thank you. Chairman Leahy, Ranking Member Grassley, distinguished members of the Committee, I am pleased to testify on the proposed Consular Notification Compliance Act. Secretary Clinton vigorously supports this bill and has submitted a statement that is appended to my written testimony. Three important reasons compel swift enactment of this legislation: protection of Americans detained abroad, preserving our vital foreign policy interests, and safeguarding our reputation as a country that respects the rule of law.

First, your constituents are among the 4.5 million Americans who live abroad, and those Americans who took 60 million trips abroad this past year, and the 103 million Americans who hold passports—all of whom depend upon consular protections to ensure

their safe passage through foreign countries. The Vienna Convention on Consular Relations—a binding U.S. treaty—mandates three simple rules: ask, notify, and allow access. Arresting authorities must ask detained foreign nationals if they want their country's consulate notified; if requested, must notify the consulate; and must allow access where the consulate seeks it. We strive to comply with these obligations not from altruism but from keen self-interest. We depend on other countries' mutual respect for these rules to secure safe travel for the millions of Americans who live, work, study, vacation, and serve in our armed forces abroad.

In 2010 alone, U.S. consular officers assisted more than 3,500 Americans detained by foreign governments. When in foreign custody, a consular officer is often the best and sometimes only resource a U.S. citizen has to navigate a confusing foreign legal system or, worse yet, one that does not respect due process or fundamental rights. In many countries, a defendant has no protection from government searches and seizures, no guarantees against cruel and unusual punishment, and no right to a lawyer. But when Americans are detained, the Vienna Convention can ensure that they can ask for a U.S. consular officer who can then visit the citizen, assist in finding a local lawyer, facilitate communications back home, provide food and medicine, and rigorously protest any mistreatment. Thousands of Americans from all 50 States benefit from these services annually, but gross numbers are only a part of the story.

A U.S. servicemember was detained in an African airport with a small souvenir that contained ivory. Local authorities charged him with trafficking, which carried a mandatory decades-long sentence. U.S. consular officers promptly visited, helped him understand his legal options, and obtained a lawyer who worked with police to pursue the souvenir sellers. As a result, the court accepted a plea agreement, and the servicemember was released.

A minor U.S. citizen was arrested and jailed with adult inmates. Because her parents could not afford a lawyer, she entered a plea. Once informed of her arrest, U.S. consular officers visited and closely monitored the case. Their intervention led to foreign authorities arranging for legal representation, and the minor was granted bail. And these are just two of many examples.

In short, Senators, if we fail to honor our consular obligations at home, American citizens, including your constituents, pay the price overseas.

Second, this legislation is essential to our foreign relations, as Deputy Assistant Attorney General Swartz will explain. Our ongoing failure to respect the Vienna Convention has placed great strains on U.S. relations with Mexico and could jeopardize our collaboration in many vital areas, especially border security and law enforcement.

Many other essential partners, including the United Kingdom, Brazil, Spain, and Switzerland, have repeatedly urged us to comply with our obligations. Failure to do so impairs our ability to advance U.S. interests across a wide range of law enforcement, security, economic, and other issues.

Third, this legislation is essential to our leading position as a Nation that respects the rule of law. In this increasingly inter-

dependent world, the United States simply cannot afford to have our partners at the negotiating table or countries that we ask to fulfill their obligations question our commitment to the rule of law. When we do not comply with our obligations, we lose credibility in insisting that other countries respect theirs.

This narrowly and carefully crafted legislation facilitates compliance with our consular notification and access obligations while respecting our interest in normal law enforcement operations and criminal proceedings. We need this legislation urgently to protect Americans abroad, to preserve vital bilateral relationships, and to maintain our reputation as a Nation that keeps its word. If the United States is to ensure the strongest possible protections for our citizens overseas, your support is needed to ensure that the Vienna Convention safety net continues to protect your constituents and all American citizens.

On behalf of Secretary Clinton, I thank you for your consideration of this vital legislation, and I would be happy to answer your questions. Thank you.

[The prepared statement of Mr. Kennedy follows:]

Chairman LEAHY. Thank you very much. I know in my conversations with the Secretary she is very, very concerned about what happens to Americans abroad if we do not fulfill our treaty obligations here in the U.S. She feels very strongly about that, as have past Secretaries of State.

Our next witness is Bruce Swartz. He is Deputy Assistant Attorney General at the Department of Justice, serves as the Department's consular for international affairs. He supervises the Department's Office of International Affairs and Office of Overseas Prosecutorial Development Assistance and Training. He also oversees the International Criminal Investigative Training Assistance Program. Prior to joining the Department, he was a partner at Shea Gardener. He has undergraduate and law degrees from Yale, a Henry Fellow at Trinity College at Cambridge University. No stranger to this Committee.

Mr. Swartz, please go ahead, sir.

STATEMENT OF BRUCE C. SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SWARTZ. Thank you, Mr. Chairman.

Mr. Chairman, Senator Grassley, distinguished members of the Committee, there are three points I would like to emphasize this morning.

First, we are here today because of an undisputed and unfulfilled treaty obligation of the United States. Forty years ago, President Nixon transmitted to the Senate the Vienna Convention and its optional protocol. The Senate gave unanimous advice and consent to that convention and its protocol, and thereafter they became part, as the Chairman noted, of the law of the land, the supreme law of the land under the Supremacy Clause of the United States Constitution.

Three years ago, in the Supreme Court decision authored by Chief Justice Roberts in the *Medellin* v. *Texas* case, the Supreme Court held that these treaties gave rise to an undisputed inter-

national law obligation—the unfulfilled obligation that brings us here this morning.

My second point is that the legislation before the Committee today fulfills that obligation and does so in exactly the manner suggested by the Supreme Court in the *Medellin* case.

Mr. Chairman, as you have noted, Senator Grassley, as you have noted, President George W. Bush also sought to fulfill this obligation of the United States, recognizing its importance. In the *Medellin* case, the Supreme Court struck down his attempt to do so by Executive memorandum, but indicated that it is up to Congress to fulfill that obligation. That is what this legislation does. It does so in a carefully crafted manner, and it does so in a constitutional manner. And, Senator Grassley I would be very glad to discuss at greater length why the Department of Justice believes this is constitutional.

It fulfills our obligations, but it also balances against that the need for finality and the need for justice for the victims and families of these heinous crimes.

My third point is that this legislation is critical not only to the protection of our citizens abroad, as Under Secretary has suggested, but also to the national security, counterterrorism, and law enforcement interests of the United States. Indeed, in the *Medellin* case, Chief Justice Roberts noted that the considerations for fulfilling this obligation were plainly compelling. In an era of globalized terrorism and crime, it is essential that we are able to have partnerships with our overseas law enforcement counterparts if we are going to be able to protect U.S. citizens.

Thanks to the work of the Senate, we have in place the framework of a treaty regime that allows that kind of cooperation. We now have extradition treaties with over 120 countries and territories, and we have mutual legal assistance agreements for criminal assistance with approximately 80 countries. We have as well a number of important multilateral law enforcement conventions.

In order to protect our citizens from terrorism and transnational crime, every day we ask other countries to live up to these treaties and to give us the reciprocal assistance for what we do for them. But as has been noted, some of our most important relationships are put at risk by our noncompliance here, most obviously with regard to Mexico, a country in which we have had unprecedented cooperation over the past decade, and a country that has taken extraordinary steps to meet our law enforcement priorities, including the recent investigation of an ICE agent murdered in Mexico. But at the same time, we have not met one of Mexico's key priorities—that is, enforcement, fulfillment of our treaty obligation. Indeed, during this time period two Mexican nationals have been executed.

But I want to emphasize this is not just about Mexico. As has been noted, many of our other closest law enforcement partners also have nationals on death row, including the United Kingdom, Spain, France, and others—the very countries we rely upon to protect our citizens against terrorism and transnational crime.

And, finally, this is not simply about that relationship, but also about the broader compliance with the rule of law. When the United States does not comply with a rule of law, that has direct impact upon our law enforcement relationships. Indeed, as the Su-

preme Court noticed in *Medellin*, that is a compelling interest. Courts overseas look to see whether we comply with the rule of law before they extradite foreign nationals. We train our counterparts overseas in the rule of law, and when we do not comply with the rule of law, those who oppose the United States take advantage of it in their propaganda and in their public statements.

For all of these reasons, then, we urge speedy passage of this legislation, and we appreciate the Committee having taken up this vital work.

Thank you. I would be pleased to answer any questions.

[The prepared statement of Mr. Swartz appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Swartz. Again, I would say I know I have been on the phone with the State Department Operations Center at 2, 3, 4 o'clock in the morning to talk about Americans, Vermonters, being held overseas. And I have also talked in some instances all the way to the head of state of some other countries, and I have heard more than once, "Well, we know the treatment you are asking for your U.S. citizen. What treatment will a citizen of my country get in your country?"

Let me ask this of both of you. You spent your careers advocating on the part of American interests and U.S. citizens. Some have said the failure of the United States to satisfy its treaty obligations has no real consequences. Secretary Kennedy, do you want to tell me whether you would agree with that?

Mr. KENNEDY. No, Mr. Chairman, I do not. I have served in the Foreign Service for 38 years, and I happen to be married to a Foreign Service officer who just retired who for 35 years was a United States consul at a variety of posts in both First and Second World Countries. Our ability to insist, to demand access by our consular officers to American citizens in distress is a critical element. Otherwise we cannot advocate for them, we cannot have access to them. If I had 15 minutes to respond, I could list example after example of American citizens who were detained, that because we were able to demand access to them, and continued to have access to them, we were able to address severe needs and requirements. So this will have consequences.

I am not going to say that a country is going to excise us from their partnership with us under the Vienna convention. But what I am going to say, is that this depends on each Nation at the very top, at the very leadership, pushing down through their entire chain to the lowliest constable on the beat that American citizens must be treated according to the precepts of the Vienna Convention, and I think it is very important that we continue that.

Chairman LEAHY. Mr. Swartz, you deal with law enforcement all over the world. Do you agree with what Mr. Kennedy said?

Mr. SWARTZ. Absolutely, Mr. Chairman. For the past 10 years, I have been responsible for our international relations at the Department of Justice in the criminal justice and counterterrorism context, and I cannot emphasize strongly enough how important it is for the United States to be able to say that it is meeting its treaty obligations when we ask other countries to do the same.

Chairman LEAHY. Well, you have heard some have said that this legislation raises constitutional questions regarding congressional

authority, regarding the application of the Tenth Amendment and so on. The Department of Justice has reviewed this legislation. We have a letter that supports it. Do you believe it raises any constitutional concerns?

Mr. SWARTZ. Mr. Chairman, we do not. As you say, this has been carefully reviewed by the Department of Justice, including the Office of Legal Counsel. And if I may, the legislation in the first instance is exactly what was invited by Chief Justice Roberts in his opinion for the Court in the *Medellin* case. So those who would suggest that it is unconstitutional I think first must confront that the Court suggested that the way to meet our legal obligation was precisely through legislation of this nature.

Chairman LEAHY. Well, what about the concern this would flood the courts with new habeas claims or create a free-standing right of foreign nationals accused of murder to sue in Federal court? Has the Department looked at this, its effect on death penalty and habeas corpus and so forth?

Mr. SWARTZ. We have, Mr. Chairman. As prosecutors ourselves, of course, the last thing that we would seek to do is to make it easier for those who have committed crimes, these kinds of horrific crimes, to escape punishment. That is not the intent of this legislation. It will not flood the courts. It deals with an extremely small and limited group of cases and the retrospective aspect of it to fulfill our treaty obligation. And as to the prospective aspect of it, in fact, what it will do, we believe, is eliminate the future litigation of this nature by ensuring that consular notification is given, and it has a number of techniques to assure that, but none that extend beyond the responsibilities already present under the Vienna Convention.

Chairman LEAHY. My last question would be first to you, Mr. Swartz. Do you see this would be any burden on law enforcement?

Mr. SWARTZ. Mr. Chairman, we do not. In fact, this is what law enforcement has been doing for 40 years. This legislation is designed to reinforce the practice, the practice that was adopted as standard operating procedure by police officers and officers around the country at the State, local, and Federal levels after the Vienna Convention came into place. It provides additional backstops, but, again, nothing not already contemplated by our obligations under the Vienna Convention. It will not make it more difficult.

Chairman LEAHY. Mr. Kennedy, does it complicate our immigration enforcement?

Mr. KENNEDY. No, sir, I do not believe so. We have engaged at the State Department, with the cooperation of the Department of Justice, in an extensive educational campaign, distributing informational material to State and local and municipal law enforcement officers, including mailing out 1 million copies of a very, very small card that clearly explains to the officer on the beat exactly what he or she should do to uphold our obligations under the Vienna Convention. It is very simple, it is very straightforward, and I do not believe it will in any way compromise our law enforcement efforts, sir.

Chairman LEAHY. And you know I am going to ask you for a copy of that afterward.

Mr. KENNEDY. I will be glad to make it available to every member of the Committee, sir.

Chairman LEAHY. Thank you.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

As we were visiting before the meeting started, I said I was skeptical, and my questions will probably reflect that skepticism. But, first of all, let me state a fact before I ask my first question, and that is: In regard to the Department of Justice under the Bush administration, they clearly thought that he could issue his Executive order constitutionally, and, quite obviously, they were wrong.

Mr. Swartz, the Justice Department filed an amicus curiae brief in the Leal case in the Supreme Court. The State Department's legal adviser was on that brief as well. The brief argued that Mr. Leal Garcia should receive a stay of execution based upon three points: the International Court of Justice ruling, which has no affect in American domestic law; policy reasons of the type that we are speaking about here on this bill; and the administration's strong support for the bill that is the subject of this hearing. An unpassed bill has no legal authority. Congress has the sole power to legislate. Congress has not legislated in this area. And a bill that has been introduced only in one House and is not passed, whether or not strongly supported by the administration, has no legal effect.

Last week, in your briefing for the Committee staff, you said that the administration's Leal brief showed "respect for the congressional process." How does asking the Court to rule in reliance on an unpassed bill show "respect for the congressional process"?

Mr. SWARTZ. Senator Grassley, let me begin by saying first that we regret that our action in this regard may have been interpreted as anything other than respect for Congress because, as I said in the staff briefing, that is precisely what it was intended to achieve.

In the *Medellin* case, as the Senator knows, the Supreme Court pointed out that the administration had not made any statement about legislation that had been introduced at that point and its possible effect on the execution of Mr. Medellin. In this context, Senator, the decision was made because this legislation was before Congress, in order to permit Congress to act and to prevent what otherwise would have been the irrevocable harm that once Mr. Leal was executed, nothing this Congress did could redeem that fact or change that fact, the decision was made that it was appropriate to seek a stay. And in this regard, Senator, I would also note that this is not different really from what has been done in other contexts. As we pointed out in our brief to Supreme Court, in the amicus brief, the Supreme Court had stayed—Chief Justice Kennedy stayed, for instance, in the *Mt. Soledad* case a matter pending a possible change in law. The Supreme Court routinely stays matters pending its decisions where there may be a possible change of law. And, of course, the Supreme Court in a number of instances has stayed its mandate, as in, for instance, the *Buckley* v. *Valeo* case in order to give Congress a chance to act.

So the intention was precisely to allow Congress to act in light of the Supreme Court having invited Congress to do so in the *Medellin* decision. But, Senator, I would be glad also to supplement that, if you would like, in a written answer.

Senator GRASSLEY. Yes, I would, but I still think it gets back to something very basic, and that is that a bill that has not passed is not the law under the Constitution, and only Congress can enact such legislation. And I do not think it shows respect for the congressional process for citing that the Court ought to base their decision based on something that Congress has not passed, because cases in controversy are brought under law or under the Constitution.

[The information referred to appears as a submission for the record.]

Senator GRASSLEY. I have another question. Could either of you cite an instance in which an American citizen has been denied consular access because a foreign government was unhappy about our failure to follow the *Avena* ruling?

Mr. KENNEDY. Senator, the *Avena* ruling, as I said, is a relatively recent ruling, and as I noted in response to the Chairman's question, the process is moving all the time. We have millions of American citizens traveling. It is imperative, in order to keep the safety net, to keep the consular access, that foreign governments at the highest levels continue to drill down through all the layers of their law enforcement and judicial systems to keep saying for example, that we, the government of Xanadu, continue to support this. This will be something that I believe will dissipate. When the United States fails to provide consular access to nationals of any country, the impetus for that country to continue to support the Vienna Convention dissipates, and we will have American citizens in tragic circumstances who are not able to avail themselves of our consular assistance.

Mr. SWARTZ. Senator, if I might add?

Senator GRASSLEY. Go ahead. First of all, I interpret that his answer to my question is no, there is not an example that he can give me. Go ahead, sir.

Mr. SWARTZ. Senator, in the criminal justice context, this is not simply a hypothetical. You have before you the statement of the Ambassador of Mexico to the United States, who has noted the great strain that this has placed on our relationship. We have heard from other countries in the law enforcement context whose nationals are on death row, including the United Kingdom. And I can assure you, having dealt with this issue for the entire period of the *Avena* decision, that other countries ask us why they should take and make a priority our cases, our concerns, if we are not going to respond to their priorities. And this is a priority for a number of our key law enforcement partners.

So this is not a hypothetical concern about whether it will affect our relationships. It does affect our relationships. And it affects them in ways that we cannot always control, because even if it is the executive that may be willing in another country to cooperate with us, courts are influenced by this as well. Courts overseas look to see whether we comply with the rule of law.

Senator GRASSLEY. We have got to move on to another question, but let me just say this: If Mexico is so upset with our noncompliance with this International Court ruling, how do you explain your statement that our cooperation with Mexico is at an all-time high. And you did state that. Go ahead, Mr. Chairman. I am done.

Mr. SWARTZ. Senator, I did state that, and, in fact that is the case. But it is also the case at the same time that when we continue to try and build upon that relationship, this is an obstacle. We can do more, and we should be doing more with Mexico. But when we are not responsive to their concerns, that has effects, and it has effects on the public in Mexico, and that affects things as well. It affects witnesses willing to cooperate in our matters. It affects the Mexican Congress, and it affects the Mexican Congress' approach toward their executive dealing with us on law enforcement matters.

Chairman LEAHY. You know, it is interesting. We have talked about the most recent action of the Supreme Court. I recall during Chief Justice Roberts' confirmation hearing, he was asked about the rule of five, that is, where four Justices have voted for a stay, it has been customary that the Chief or somebody else would make the fifth one. And he spoke, and I realize under oath, but that he thought that—basically, he thought that was a pretty good rule. I am sorry that his opinion after he had been confirmed seemed to have change from when he was seeking confirmation.

I will yield to Senator Franken, and we will then go to Senator Graham. Senator Blumenthal has offered to take the Chair. As you know, there are a lot of discussions on a different subject going on here on the Hill, and I am going to be going back and forth on that. But I appreciate the testimony, and I would say—and I wanted Senator Grassley to hear this—we had an interparliamentary group meeting here in Washington this weekend, and we had a number of parliamentarians from that country raise the question about are we going to play by the same rules that everybody else is expected to play by.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Swartz and Mr. Kennedy, I wanted to follow up on the last part of your discussion with the Ranking Member and talk about our relationship with Mexico. We obviously share a long border with Mexico, and I understand it is the most frequently crossed international border in the world. We work closely with Mexican law enforcement to make sure the border is properly policed, and we rely on good will with Mexican authorities to prevent violence and drug trafficking across the border.

This question goes to either of you. Can you discuss in practical terms how our relationship with Mexico is hurt by our noncompliance with the Vienna Convention? And how will this potentially impact our ability to prevent and solve cross-border crimes?

Mr. SWARTZ. Senator, thank you. I will begin and then turn to the Under Secretary.

As you suggest, this noncompliance has practical consequences. When we go to a foreign country, Mexico, for instance, and ask them to investigate a crime, we do it both under a treat basis, if a treaty exists, but also on an informal basis, on a basis of reciprocity. And that reciprocity is key to our law enforcement relationships.

To take one recent example, as I mentioned in my opening statement, there was the tragic murder of an ICE agent in Mexico earlier this year. We asked Mexico to make that a priority in terms

of working with us to investigate that crime, and they did. They recognized that as a priority for us. But at the same time, Mexican officials asked me and asked the Attorney General and asked others—I know they have asked Congress—why it is we are unwilling to meet our obligations and make a priority what they seek to accomplish in this context.

That has consequences. It has consequences because, as the Mexican ambassador has pointed out in his letter, which has been part of the record in the *Medellin* case, his letter to Secretary Clinton, that causes pressure from the Mexican public; it causes pressure from the Mexican Congress who ask why should their law enforcement agents make our cases a priority if we are unwilling to make theirs a priority.

Senator FRANKEN. Thank you.

Mr. Kennedy.

Mr. KENNEDY. If I could add, Senator, Mexico has two statutes in their code that say that if a foreign national is detained, they must have access to their consul. On the other hand, the Mexicans also have a Federal system like we do, and so it is imperative that we at the national level demonstrate the kind of leadership of insisting that all elements of our Government—Federal, State, and local—adhere to the consular notification requirement so the Mexican Government and other governments as well will continue to drill down through all the levels of their system to ensure that everyone is notified that this is their obligation to ensure U.S. consular access. And I could give you numerous examples of American citizens who have suffered, sometimes physically, sometimes by other means, because a nation failed to provide consular access to the United States in a timely fashion.

Senator FRANKEN. We have, as I understand it, more Americans incarcerated in Mexico than in any other country. Almost 1,000 citizens were incarcerated just last year. Does our failure to provide consular notification to Mexican nationals threaten the safety of these Americans in your opinion?

Mr. KENNEDY. I think it does, Senator. There are two parts to consular notification and consular access. The first is when an individual is initially detained, during the initial encounter with local law enforcement. The second is if the individual is convicted of a crime because there is the right of continual consular access. And we have had cases like this; for example, in Mexico, for an individual, an American citizen who was thought by one gang to be a member of a rival gang, we were able to intervene because we were aware of it and had consular access, and we were able to get that individual moved from one prison to another so that the individual would not become the victim of prison violence. And I think in doing that we literally saved that individual's life.

Senator FRANKEN. That is the positive side. Is there a potential downside? I see that my time is up, so I will submit any questions I am not able to ask.

Thank you, Mr. Chairman.

Senator BLUMENTHAL [Presiding.] Thank you, Senator Franken.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I would like to introduce into the record a letter I received from Secretary Clinton about this matter.

Senator BLUMENTHAL. Without objection.

[The letter appears as a submission for the record.]

Senator GRAHAM. She indicated that last year 3,500 Americans were detained abroad and that we had 9,500 consular visits. One thing I would like both of you to provide, if you could, could you call the Department of Defense and see how many American servicemembers have been detained in foreign countries and we were able to provide consular access over the last 5 years? A lot of times it is through the Status of Forces Agreement. During my time as a judge advocate, particularly overseas, I had many cases in Turkey where people would be detained for various crimes, American military personnel, and we jealously guarded our right to go into that prison and, you know, consult with our servicemember and make sure they were being well treated. And I do not want to do anything to ever jeopardize that in the future.

Now, whether or not this bill is the right answer, I do not know, and I look forward to hearing from Senator Cornyn, Senator Grassley, and others, but I would hope to come up with a bipartisan solution. Just to make sure I understand the requirement here, our Supreme Court has said that the memo from President Bush is not enough, that the Congress actually needs to enact the terms of the treat. Is that correct?

Mr. SWARTZ. Senator Graham, that is correct. It is up to Congress, the Court made clear in *Medellin*, to implement the obligation under the Vienna Convention.

Senator GRAHAM. So I just hope that this Committee, made up of very smart folks, can find a way to honor that obligation, because I just want to be on the record as indicating the need. Not only were there 3,500 people detained abroad last year that we provided assistance to, from my time in the military there is a real need to protect our servicemembers. The CIA case involving the gentleman that was detained in Pakistan is a classic example of a situation where we were very appreciative of having access to an American citizen detained in a foreign country, which was a political football for the government in question.

So I just do believe that the Vienna Convention, it was a smart thing to have entered into over 40 years ago, and we need to make sure it is viable today. So I would like to introduce the Secretary of State's letter to me talking about the need for this legislation in terms of real-world events. We have had a CIA agent that was in foreign custody. We have had several cases. In South Carolina the most notable was a Pastor Miles of Conway, South Carolina, who did mission trips to Russia. He was going all over Russia to try to establish Christian churches, and in 2008 he was detained and sentenced to 3 years in jail because he had 20 rounds of hunting rifle ammunition in his bag. And he was going to deliver this ammunition as a gift to a fellow pastor in Russia who enjoyed hunting. And this was a major problem in South Carolina and for the country, and I just appreciated all the help that we received from the State Department, and we did have access to Pastor Miles. He was visited regularly by our consular embassy office in Moscow, and I would like to introduce in the record letters I wrote to the Russian

Government and media articles. And I would just say to both of you, in that case it was a godsend to be able to go to the family in South Carolina and say, "We have legal avenues. I promise you that we are going to make sure that your loved one is well taken care of and that we will exercise all of our rights to make sure he is being well taken care of."

If we do not pass this legislation, is there anything on the horizon near in real terms or are there any cases out there that you particularly worry about going badly for us?

Mr. SWARTZ. Senator Graham, if I may, I will turn to Under Secretary Kennedy with regard to the Department of Defense's support for this legislation for the reasons that you have mentioned.

With regard to cases going badly for us, I think there are really two categories. The first would be further executions of individuals covered by the *Avena* judgment, those to whom the Court in *Medellin* held to have a treaty obligation. We understand that there are possible executions scheduled, if not this year perhaps early in 2012, and that will again create a crisis in our relationship with the countries involved. And I stress again this is not simply Mexico. The United Kingdom has a national who is on death row and subject to the same provisions.

The second category would be cases in which we are asking other countries to assist us, and while not wanting to go into particulars, we do ask really every day that countries take particular steps to make our cases a priority. And I can state from personal experience that is very difficult when the country in question responds by saying, "Well, will you be able to meet your obligations in this and other regards?"

Senator GRAHAM. Thank you.

Mr. KENNEDY. If I could add, Senator.

Senator GRAHAM. Very briefly.

Mr. KENNEDY. We will certainly get additional information from the Department of Defense, but you are entirely correct. DOD directives specifically instruct facility and base commanders to notify the United States embassy or consulate and to make sure that we also are ready to intervene, which we do regularly.

If I might, in a tragic example, recently there was a veteran who ran afoul of the law overseas, suffering from mental illness. He was put into prison. He was deteriorating quickly. Because of our excellent relationships, we were notified of that case. We were able to work with the prison, and we were able to get him the psychiatric help he needed and have him moved into the appropriate place in the foreign prison system. This is exactly what I refer to as "the safety net" of the good relationships we have with countries that get us the consular notification so we are able to assist American citizens in real distress.

Senator GRAHAM. I know my time has expired, but I would like to—I think there are some concerns about this legislation. Senator Cornyn is a very smart guy, and I would like to work with him to see if we can find some bipartisan solution and come up with a legislative proposal that will bring us all together. I again ask unanimous consent to insert into the record the documents I just mentioned.

Senator BLUMENTHAL. Without objection.

[The information referred to appears as a submission for the record.]

Senator GRAHAM. Thank you all.

Senator BLUMENTHAL. Thank you, Senator Graham.

I have just a couple of questions in conclusion with this panel to just pursue the line of questioning that Senator Graham raised with regard to the Department of Defense. My understanding is that DOD supports this legislation.

Mr. KENNEDY. They do, Senator, and their own DOD directive—DOD Directive 5525.1—instructs base commanders, facilities commanders, to work with the American embassies and consulates to ensure that their servicemen and -women overseas receive the consular protection and consular access that they need. And we do that all the time.

Senator BLUMENTHAL. In fact, the largest group of United States citizens serving abroad or living abroad are military personnel or military contractors or individuals, citizens of the United States somehow serving in the capacity of the Department of Defense. Is that correct?

Mr. KENNEDY. Yes, sir. It is the largest single group, absolutely.

Senator BLUMENTHAL. They may not be the ones who most commonly need this kind of service, but they are the largest group that potentially may make use of it.

Mr. KENNEDY. That is right, and our consular officers assist DOD personnel. I gave the example of the veteran. I gave an earlier example of another U.S. servicemember who was arrested at a foreign airport for just carrying a small amount of ivory. He was facing a multi-decade prison sentence. The United States consul intervened. We were able to get him a local attorney, and he walked out of there and was able to return to his unit.

Senator BLUMENTHAL. Let me ask you, Secretary Kennedy, because for literally decades as a State Attorney General and now as a U.S. Senator, I received calls from parents of young people in exactly this situation. Obviously "concerned" would be to understate their emotional reaction to the news that one of their children or one of their relatives has been detained abroad.

What would you advise that parent to do in that situation?

Mr. KENNEDY. If they believe that their son or daughter has been detained, they should immediately contact the nearest American embassy or consulate. If the parents happen to be in the United States, we have a hotline that is answered 24 hours a day, 7 days a week, 365 days a year. We have teams of officers from our Bureau of Consular Affairs who will immediately begin working on this case, and contact the relevant embassy or consulate where the child is believed to be. We will then contact the local police authorities, and we will get in, and we will get to that child as fast as we can. So what they need to do is tell us.

But it is absolutely important for consular notification—and that is why we think this legislation is so important. In the time while the parent is trying to figure out, well, did Sally not call just because she is having a good time or is Sally in trouble, if we get what we need under the Vienna Convention from foreign nations and give them that same reciprocal right, as soon as that child is detained by foreign law enforcement, they are obligated to notify

the American consulate, and then the American consul will begin to act immediately to assist that child.

Senator BLUMENTHAL. So the great advantage of this legislation is it supports a system that in effect provides that notification abroad that should be reassuring to countless parents and relatives and loved ones who are worried that that child or loved one is out there alone and isolated and the consulate can come to his or her aid.

Mr. KENNEDY. Absolutely. Senator, 103 million Americans have passports, and there were 60 million foreign trips last year, and that is a lot of Americans and a lot of potential for encounters with local law enforcement. This legislation would confirm and put into place a system in which we can say to every nation in the world that we honor our commitments under the Vienna Convention, and you must honor yours by giving us immediate notification when an American citizen is detained.

Senator BLUMENTHAL. And we are going to hear in the next panel from Clare Gillis, who was detained by the Libyan Government abroad. Is it your opinion that this legislation would have supported and aided the process by which she was eventually freed—obviously not through a United States consul. It was through the Turkish and Hungarian governments, but the principle that applies here also would apply there.

Mr. KENNEDY. The principle is absolutely correct, Senator. And if I might add, though, it is because of our relationships under the Vienna Convention. When the United States withdrew its diplomatic and consular personnel from Libya, we appointed what is called a protecting power, and the consular officers of that Nation assume and can invoke the rights under the Vienna Convention, so they can go in and say, "I am acting on behalf of the American consul according to law, and you must give me the same access to detained American citizens as if I was the United States consul."

Senator BLUMENTHAL. Thank you. My time has expired, and I have some additional questions that I would like to submit in writing, particularly focusing on, General Swartz, the upcoming death penalty cases that may involve executions in the very near future so that we have some sense of the immediacy of this issue that may arise again, and also the numbers of cases that might be affected, even if they are not death cases, the range of cases that might be affected in our State courts, if it is possible to provide that kind of information.

Mr. SWARTZ. We will be glad to provide that information, Senator.

[The information referred to appears as a submission for the record.]

Senator BLUMENTHAL. Thank you very much. Thank you to both of you. Your testimony has been excellent and very, very helpful to the Committee, and we appreciate your good work on this issue and on so many others. So thank you for being here today.

We are going to go to the next panel, take a couple of minutes so that they can come forward, if you would, and we will proceed.

[Pause.]

Senator BLUMENTHAL. Good morning again. I am very pleased to introduce our next panel, a very distinguished panel, and I will go

through the introductions for all three, and then we can proceed your right to left, my left to right.

Our first witness on the next panel will be John Bellinger. He is a partner in the international and national security practice of Arnold & Porter. He advises governments and domestic and foreign companies on a range of international law, United States national security issues. Prior to his work at Arnold & Porter, Mr. Bellinger served as legal adviser for the Department of State under Secretary of State Condoleezza Rice from 2005 to 2009. While he was at the State Department, he directed almost 200 staff lawyers who advised the Secretary, Ambassadors, and others at the Department on legal matters relating to foreign policy. Prior to joining the Department of State, he was also senior associate counsel at the White House under President George W. Bush, where he served as legal adviser to the National Security Council. Mr. Bellinger received his undergraduate degree from Princeton University, his law degree from Harvard Law School, and a master's degree in foreign affairs from the University of Virginia.

I am particularly pleased to welcome Clare Gillis, who is a freelance journalist who was captured by pro-Qaddafi forces in Libya this past April. She is a native of New Haven, Connecticut, and holds a Ph.D. from Harvard University. Ms. Gillis was working for The Atlantic and USA Today when she was taken prisoner along with another American journalist and a Spanish journalist and held for nearly a month and a half. During her captivity Ms. Gillis was subjected to multiple interrogations and forced to stand trial with no legal representation. Through the efforts of the Department of State, working in conjunction with Turkish and Hungarian diplomats who represented the United States' interests in Libya, Ms. Gillis was finally released on May 18th. We welcome you today from Connecticut and are very glad you are here.

David Rivkin is a partner in the office of Baker Hostetler and co-chairs the firms appellate and major motions practice. He is also co-chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracy and a contributing editor to the National Review. Before returning to the private sector in 1993, Mr. Rivkin worked in both the Reagan and George H.W. Bush administrations in the White House Counsel's Office and the Department of Justice. Mr. Rivkin received his undergraduate degree and master's degree from Georgetown University and his law degree from Columbia University Law School.

Again, thank you and welcome to all three of you, and we will begin with Mr. Bellinger. Thank you.

STATEMENT OF JOHN B. BELLINGER III, PARTNER, ARNOLD & PORTER LLP, AND ADJUNCT SENIOR FELLOW IN INTERNATIONAL AND NATIONAL SECURITY LAW, COUNCIL ON FOREIGN RELATIONS, WASHINGTON, DC

Mr. BELLINGER. Thank you, Mr. Chairman and Ranking Member Grassley. It is a privilege to be back before the Committee today. I was deeply involved in the issues that are the subject of today's hearing while I was serving as the legal adviser for the State Department and previously at the National Security Council during the Bush administration.

I would like to review this morning why the Bush administration, which has never been accused of an overabundance of enthusiasm for international courts, nevertheless decided to work so hard to comply with the decision of the International Court of Justice in the *Avena* case.

The administration did so not because of any lofty commitment to international tribunals or international law, but because *Avena* is a binding legal obligation and complying with it is important to protect Americans who travel in other countries.

When I moved from the White House to the State Department with Secretary Rice in January 2005, the first international legal challenge that we confronted was how to comply with the *Avena* decision. We recognized that the 51 Mexican nationals covered by the decision had been convicted of horrific murders and that the families of the victims had waited for many years for closure.

Moreover, the U.S. disagreed with the ICJ's decision, which had interpreted the Vienna Convention in ways that we had not anticipated when the U.S. joined the treaty. Nevertheless, once the ruling was issued, it was absolutely clear to the Bush administration that as a matter of treaty law the U.S. was required to comply with it.

Under Article 94 of the U.N. Charter, which was approved by the Senate in 1945, "Each member of the United Nations undertakes to comply with the decision of the ICJ in any case in which it is a party." With the consent of the Senate, the United States had given our binding legal obligation to other countries that we would comply with the rulings of the ICJ.

Now, contrary to some public perceptions that it was not committed to our international law obligations, the Bush administration took this obligation very seriously. In particular, Secretary Rice believed that it was vitally important for the U.S. to make every effort to vindicate the right of consular notice required by the Vienna Convention in order to ensure that Americans who are detained in foreign countries are notified of their rights.

President Bush decided that the most effective way to comply with the *Avena* decision would be to issue an order directing State courts to review the Mexican cases. This decision could not have been very easy for the President, especially since 15 of the Mexicans had committed murders in his home State of Texas. The President was a former Governor of Texas, a staunch believer in States' rights, and a supporter of the death penalty. Most Texans opposed giving any further appeals to Mexicans who had been convicted of rape and murder.

In March 2008, the Supreme Court ruled against the President, holding that neither the *Avena* decision standing alone nor the President's February 2005 order constituted directly enforceable Federal law. Nonetheless, the Supreme Court unanimously concluded that the *Avena* decision is a binding international law obligation. Chief Justice Roberts specifically stated, "No one disputes that the *Avena* decision constitutes an international law obligation on the part of the United States." Moreover, the Court acknowledged that the United States has a "plainly compelling" interest in ensuring the reciprocal observance of the Vienna Convention.

Today I support passage of Senate bill 1194, which would enable the U.S. to comply with the *Avena* decision. As a Nation committed to the rule of law, our Government must take its international law obligations seriously. Under Article VI of the Constitution, all treaties made shall be the supreme law of the land.

I understand that there are many principles that others claim to constitute customary international law that the U.S. does not accept. But the *Avena* decision does not fall into that category. The U.S. has a clear treaty-based legal obligation to comply with the *Avena* decision even if we do not agree with it. The Senate accepted this obligation when it gave its advice and consent to the U.N. Charter.

Complying with the *Avena* decision is especially important because it involves the vital right of consular notification required by the Vienna Convention. This right is not a favor that we give to foreigners because we believe in world government. This right is vital for Americans who travel to foreign countries for business or pleasure and who may be arrested or detained, sometimes on trumped-up charges.

Mr. Chairman, if a constituent of any Member of Congress is detained in a foreign country, whether it is Mexico or Libya, I am sure that member would want that constituent to be told of his right to have a State Department official notified; and if a foreign country fails to provide notice, Congress will expect the State Department to complain vigorously to the foreign government for violating its treaty obligations.

It makes it extremely difficult for the State Department to insist that other countries honor their treaty obligations to us if we do not comply with our treaty obligations to them.

In closing, to comply with the clear international legal obligation and ensure reciprocal observance of the Vienna Convention, an interest that our Supreme Court found plainly compelling, I urge this Committee to approve and the Senate and Congress to pass the Consular Notification Compliance Act.

Thank you.

[The prepared statement of Mr. Bellinger appears as a submission for the record.]

Senator BLUMENTHAL. Thank you, Mr. Bellinger.

And we will turn now to Ms. Gillis. Thank you.

STATEMENT OF CLARE GILLIS, FREELANCE JOURNALIST, NEW HAVEN, CONNECTICUT

Ms. GILLIS. Thank you, Mr. Chairman. I am pleased to testify in support of this legislation today—and Ranking Member Grassley.

Senator Grassley, I do need to clarify something that you said earlier about my case, that I was taken to be a Spanish citizen. This was true for about 1 minute during one of my interrogations, but we promptly figured it out, and for the rest of the 6½ weeks they knew that I was an American. So if you want to ask me a question about that later, I will be happy to continue clarifying if you need it.

I was working as a freelance journalist in eastern Libya, reporting for The Atlantic and USA Today, among other publications, when I learned what it was like to be a prisoner. On April 5, 2011,

I was with three other journalists at the front line when we came under fire from Qaddafi's troops. One of our party, the South African Anton Hammerl, received what we believe were fatal wounds, and the rest of us were captured. The soldiers punched us and hit us with the butts of their rifles; they tied our hands behind our backs and threw us in the back of their pickup truck. We were blindfolded and interrogated several times. One of my sessions lasted for 6 hours. We went before prosecutors and judges with only a translator to assist us. Our requests for a lawyer were not honored. Our captivity lasted ultimately for 44 days, when we were finally freed, with the stipulation that if we were to be caught again by Qaddafi's forces, we would have to spend a year in prison.

As we lay awake at night, we listened to NATO planes and the bombs they dropped, occasionally even feeling the building that we were staying in shake with their impact. We knew that we were being detained in a military facility and worried that the bombs could even be targeting our building. We wondered if anyone knew where we were or even that we were alive. Our guilt at what we were putting our families through back home is indescribable and was tempered only by fear. We did not know if the Libyans were even acknowledging publicly that they were holding us. And essentially since we had witnessed the murder of a civilian, we thought we might just be at the mercy of our captors.

We also wondered quite frequently who could possibly secure our release. We were two U.S. citizens and one Spanish. The U.S. embassy in Tripoli closed up shop on February 25th, actually the day that I crossed over the border from Egypt in order to enter the rebel-controlled eastern part of the country. Based on the example of the New York Times team which had been captured in circumstances very similar to ours a month earlier, and whose release was eventually secured by the Turkish embassy, who was acting as the protecting power for U.S. citizens in Libya at that time, it seemed that the Turkish embassy would be the ones to step in.

Indeed, when I was finally allowed a phone call, after being held for 16 days—and this is something that the State Department worked very, very hard to get me to get access to the phone—my mother asked me if the Turks had visited me. I had had no idea that they were even trying to visit me. We had no communication with anybody during this time. We were simply held in a cell. And it was tremendously reassuring to hear my mother tell me that the State Department was putting great efforts into my case even though it was no longer possible for them to be on the ground in Libya.

I also learned that our media outlets were working more than full-time to publicize our case, and this was especially gratifying because as a freelancer, I had assumed I would be more or less on my own. When we were eventually transferred to a private guesthouse and had access to television, we watched with dismay as the news was broadcast that the Turkish Embassy in Tripoli had also closed. We wondered: Who is looking after our case now?

After 35 days we received a surprise visit: the Hungarian ambassador and consul to Libya and the Spanish deputy Ambassador came to see us. Upon the departure of the Turks, the U.S. State Department enlisted the Hungarians as the protective power for

U.S. citizens in Libya. Within several days, they managed to secure access to visit us.

Consular access is vital for people in our situation. They were able to get a sense of what we looked like, how we acted, if we were being treated well; and we certainly hoped, though we could not know for sure, that they would be able to inform NATO pilots of our location so that we would not suffer friendly fire.

When we went before the judge and got our formal release, we still had no permission to be in the country. The charges we were being held on were illegal entry since we had entered through the rebel-controlled eastern border and did not have Tripoli-issued visas, and that we were reporting without permission from Tripoli. And the big problem was we still had to get out. It is about a 2-hour drive between Tripoli and the Tunisian border, and we did not know who would take over security for us.

The Hungarians managed to get our passports back from the Libyans, and they drove us through the dozen or so checkpoints to the Tunisian border. There they waited with us for 3½ hours as border officials struggled with paperwork to let us pass. Without consular access, I do not know when we would have been released or who would have negotiated the delicate process of actually getting us to that border.

If the U.S. continues to ignore its obligations under the Vienna Convention on Consular Relations, that makes it easier for foreign governments to ignore their obligations to imprisoned American citizens abroad. If we expect other nations to take our concern for human rights seriously, we should honor the terms of a treaty we have already signed.

Qaddafi's Libya honored its obligations to me under the Vienna Convention, and I think and I hope that we can at least do as well as they did.

Thank you.

[The prepared statement of Ms. Gillis appears as a submission for the record.]

Senator BLUMENTHAL. Thank you very much, Ms. Gillis.

Mr. Rivkin.

STATEMENT OF DAVID B. RIVKIN, JR., PARTNER, BAKER HOSTETLER LLP, WASHINGTON, DC

Mr. RIVKIN. Thank you, Senator Blumenthal, Senator Grassley. While I appreciate an opportunity to appear before you today, I am unable to support this legislation.

S. 1194, despite its laudable goal of seeking to enhance the U.S. compliance with the Vienna Convention, raises significant constitutional concerns by improperly intruding in the sovereign domain of the States. Accordingly, I believe that an entirely different legislative framework that is compliant with the U.S. Constitution is needed.

To begin with, I fundamentally disagree with the notion that we heard described in some detail this morning that a failure to enact S. 1194 would somehow cause other nations to impair the rights of Americans by causing their requests—and I emphasize that we are talking about their stated requests—for consular access to go unheeded. Indeed, we know that foreign nations by and large honor

these requests. While there have been some failures, they have not been frequent and have been primarily perpetrated by governments which, shall we say, do not comply with their international or domestic law obligations.

These violations are particularly likely to occur, as was the case with Ms. Gillis, when the foreign government involved has embarked on a path of confrontation with the United States. And I would submit to you that in such an extreme situation, it would be utterly unrealistic to expect that the passage of S. 1194, or for that matter, if any other legislation in the U.S. Congress would enhance foreign compliance with the Vienna Convention.

Significantly, there is no indication, public or private, that any country intends to reverse or diminish its Vienna Convention compliance policy as a result of having U.S. law stay the way it is in place, which provides no judicial remedy for failure to inform a foreign national of his or her consular rights in a situation when it was not clear at the outset that the individual involved was a foreign national.

Frankly speaking, I am concerned, though, that by acting as if the status quo is an intolerable affront to other nations, and by claiming that a failure to enact S. 1194 is a major breach by the United States of its international law obligations, we may actually increase the prospects that foreign nations hostile to the United States may use this issue as an excuse to stop complying with their Vienna Convention obligations as they apply to American citizens.

Now, more importantly, and quite aside from policy considerations, although I am not prepared to say flatly that S. 1194 is unconstitutional in its entirety, it raises serious constitutional problems that weigh heavily against enactment. In our Federal system, the Federal Government is limited to certain enumerated powers, while the States retain general police powers. This dual sovereignty is the key feature of our constitutional architecture and the key element in protecting individual liberty. It has been recognized as such in centuries of case law.

The treaty power should not be, and cannot be, an exception to these fundamental constitutional principles of dual sovereignty and separation of powers.

Significantly, combating crime and providing punishments lie at the very core of the States' police power and very much at the periphery of the Federal Government's proper domain. If a statute like S. 1194 can be constitutionally enacted and upheld, there would be no remaining area—be it education, family law, inheritance, or professional licensing issues—in which the States would retain their autonomy, particularly given the range of issues that can be addressed by international conventions these days. I certainly can discern no viable judicially enforceable limiting principle that would ensure that such an outcome does not occur.

The bill also presses into service State officials and, through them, seeks to carry out Federal obligations. For example, when a State arrests a foreign national for a death-eligible offense, a State officer would be required to inform the foreign national of his consular rights.

All of these are worthwhile things, I want to emphasize, but they are utterly beyond the power of the Federal Government to accomplish by commandeering State officials.

This is not just a matter of fundamental principles. These limitations are plain and well described in Supreme Court case law, including such seminal cases as *New York* v. *United States* and *Printz* v. *United States*.

In my view, bending these rules and principles of federalism is not just a bad policy decision, but would compromise the liberty of all Americans. We know that dual sovereignty itself goes to more than just protecting State rights. It is a key way of protecting individual liberty, a point made with particular vigor by the Supreme Court's in a unanimous decision styled *Bond* v. *United States* during the just completed term.

With this in mind, I would submit that S. 1194 is unnecessary to protect Americans abroad. It upsets the basic principles of federalism and raises serious constitutional concerns. It should be rejected.

I would be pleased to address any questions you might pose and particularly would like to speak about what is it that the *Medellin* decision and the *Avena* decision really provide for since there were some points made in this regard this morning which I find myself to be in disagreement.

Thank you.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Senator BLUMENTHAL. Thank you, Mr. Rivkin.

I am going to ask Senator Grassley to ask the first round of questions.

Senator GRASSLEY. I thank you for your courtesy, Mr. Chairman, because at about 11:40 I have a phone call I would like to take.

I am going to ask Mr. Rivkin this. The bill before us would require State and local officials to inform foreign arrestees of their right of consular notification, to communicate such requests, and to make sure that consular officials obtain access. Although the Vienna Convention currently imposes those duties, it does not actually direct those State and local officials to do so. The State and Justice Departments provide assistance and education to State and local law enforcement to adhere to those duties. By contrast, the bill before us would impose a Federal statutory duty on those officers.

My first question is: Do you believe that if the bill would codify what the Vienna Convention says that it can do so consistent with constitutional principles?

Mr. RIVKIN. Thank you, Senator Grassley. I believe the answer is no. Consistent with our dual sovereignty system, the kind of duties imposed on State officials cannot be legislated by the Federal Government without violating the Constitution. And with all due respect—my utmost respect for Chairman Leahy, it is the Constitution that is the supreme law of the land. I do not think it is open to any serious debate that a treaty, or a particular interpretation of a treaty or a particular mode of implementing the treaty, to the extent that it contradicts the Constitution, is not entitled to any obedience by federal or state officials.

Senator GRASSLEY. I think you just touched on the second question, but let me ask it anyway. How do you reconcile the tensions when a treaty requires one thing and the Constitution requires another?

Mr. RIVKIN. That is an excellent question, and it really addresses a broader issue that is often misunderstood. I think we can do a number of things, and we do not really have the alleged binary choice that I think underlies the policy imperatives reflected in S. 1194.

First of all, we would do very well to keep informing our foreign partners about the constitutional distinctiveness of the United States. In this regard, nothing can be more troubling than signing treaties with broad and capacious language. Conventions banning hateful speech, for example, as utterly inconsistent with the First Amendment, whatever the policy merits may be. Or we sign a treaty like the Vienna Convention, of 1963, which is an excellent convention, but it would have behooved us in the form of a reservation, for example, when the Senate ratified it or consented to ratification in 1969, to remind everybody that there are some things in our dual sovereignty system that the Federal Government cannot—repeat, cannot—compel State officials to do. It is not too late, as a matter of fact, to do that even now. International law recognizes even in the context of a treaty that has been in force for a considerable time that each State party can put forward its position construing its obligations. As a matter of fact, that is one distinctive feature of international law that the treaty commitments are defined and measured, Senator Grassley, exclusively by the views of the State parties.

Now, that does not dispose of the problem posed by the *Avena* decision, which I think is fundamentally incorrect. And, by the way, I hope my good friend and former colleague, John Bellinger, would agree with me that the *Avena* decision was incorrectly decided because, after all, that is what the Bush administration was arguing. So we do not have a problem with the Vienna Convention properly construed, Senator Grassley. We have a problem only with the *Avena* decision, and even so we have a range of possibilities for dealing with this problem.

One possible way to look at it is to say we are in violation of our obligations under Article 94 of the U.N. charter. By the way, we heard a number of statements about the *Medellin* decision this morning. To clarify, what Chief Justice Roberts' opinion says is that the *Avena* decision establishes an international legal obligation. It never says—and it was not a matter before the court—we are in violation of it. Now you can obviously say we are technically in violation of our obligations under Article 94. Or, if you want to be a bit more aggressive, you parse the language of Article 94, it says "undertake to comply." You read the "undertake to comply" language in accordance with our constitutional obligations and say we are not actually in violation of Article 94. Another way we can deal with it, we can certainly withdraw from the Optional Protocol of 1964, since we already withdrew from the compulsory jurisdiction, general of ICJ.

To summarize, there are many ways in which we can reconcile our international obligations and our constitutional obligations, but

I would submit to you that all of the tweaking, all of the adjustments have to occur on the international law side. We cannot possibly tweak and adjust the Constitution without going through the process of a constitutional amendment.

Senator GRASSLEY. Mr. Chairman, I think I will yield back my time because I have got to go, and thank you for your courtesies, and I will submit some questions for answer in writing.

Senator BLUMENTHAL. Thank you, Senator Grassley.

I am going to ask Mr. Bellinger to respond to Mr. Rivkin in just a moment, as he invited Mr. Bellinger to do, but first I have a few questions for Ms. Gillis, who is not a lawyer but a very distinguished scholar and journalist and has come here really to relive a horrific experience and give us a face and a voice that very powerfully shows the benefit of this proposed law and a benefit not just to lawyers and diplomats or even military people, but to ordinary citizens and journalists who may be in peril when they are in other countries. And the irony here, one of the ironies, is that a government that physically abused you, detained you without access to telephones under circumstances that most Americans would find absolutely unacceptable, nonetheless followed the requirements of law that it give you access to some consular service. And so I wonder if you could tell us, Ms. Gillis, your feelings. You have described the fear as, in fact, indescribable when you were first detained, and you have given us some benefit of the description of what you felt, but I wonder if you could elaborate a little bit on what it meant to you to be, in effect, incarcerated, detained under those circumstances and what it meant also have access to the Turkish and then Hungarian officials.

Ms. GILLIS. Well, essentially we knew that we were in a place where there was no rule of law. We knew that, you know, our requests for lawyers were ignored. We asked for phone calls on numerous occasions, and only after 16 days did we get one. And I think since the U.S. embassy had pulled out so long ago, we did not even know who to ask for. And I think being at the mercy of a foreign justice system, which, you know, I would not want to describe the Libyan system as having much to do with justice, and certainly the simple fact of everything happening in a foreign language, when I think about other prisoners who come somewhere and, you know, I hope they have a translator. But the simple fact of not being able to use your native language when you are in these circumstances, that you are at the mercy of a foreign system was really overwhelming for us. We did not know—we did not have any idea if our families knew if we were alive or dead, and when I heard from my mother that at least the Turks were trying and working very hard to get this access to us, it made a big difference in terms of our levels of hopelessness, basically. We did not know before then that anyone was looking for us. We did not know if people knew we were alive or that we had been captured or what.

Senator BLUMENTHAL. And, in fact, during the initial period of your detention you were interrogated for some 6 hours between 1 and 7 in the morning.

Ms. GILLIS. Yes.

Senator BLUMENTHAL. And then you were given a piece of paper or several pieces of paper in Arabic which you could not understand to sign and were told you had to sign it.

Ms. GILLIS. Yes, well, I was blindfolded for the 6 hours of the interrogation, and when they took the blindfold off, they said, OK, you know, you can go back to your cell, go to sleep, but you have to sign these first. And, you know, that is why I would say I cracked. I started crying, and I said, you know, I really—how can I sign this? I do not know what it says. It could say that I am a spy. I could be signing my own death certificate. And I realized—you know, he just kept waving the pen, and I realize I do not have a choice, and so I signed everything, and I put my green thumbprint on each page. Just to imagine someone else in that situation I think—yeah, I would not—I would not want to see someone else in that situation without some kind of access to at least speak their native language.

Senator BLUMENTHAL. And that situation could be recurring for citizens around the globe at this moment given the lawlessness of many regimes in this world.

Ms. GILLIS. Absolutely.

Senator BLUMENTHAL. And, in fact, particularly for journalists, 20 of whom have been detained in Libya, 4 of them killed.

Ms. GILLIS. Yes.

Senator BLUMENTHAL. This situation arises even more frequently.

Ms. GILLIS. Yes. And I would like to mention Matthew VanDyke who is, I believe, a native of Baltimore. He is still being held in Libya. He has been sighted a few times, but it has not been confirmed. And, you know, we wonder where he is, and we are all looking for him.

Senator BLUMENTHAL. Well, thank you, and I again want to thank you for your courage, there and here, and giving the entire Committee who will review this testimony, and their staffs, the benefit of this really firsthand experience with this lawless regime but, nonetheless, one that gave you access to the means to be rescued. Thank you.

Ms. GILLIS. Eventually they did, yes.

Senator BLUMENTHAL. Eventually. It took 6 weeks.

Ms. GILLIS. Yes.

Senator BLUMENTHAL. But they did eventually.

Ms. GILLIS. Thank you.

Senator BLUMENTHAL. Mr. Bellinger, I wonder if you could please respond to some of the points that Mr. Rivkin has made about *Medellin* and *Avena*.

Mr. BELLINGER. Certainly, Senator. Thank you. Let me make a couple of the points. David Rivkin is a good friend, and we agree actually on most points of international law. I think on this one we do disagree. Let me just take these one at a time.

One, there clearly is a legally binding obligation under the U.N. Charter to comply with the ruling of the ICJ. There really is no dispute about that. All members of the Supreme Court, all nine, said that there is no dispute that we have to comply with the international law obligation. The question is how we implement it.

The Bush administration believed that the President had the power under the Constitution to order compliance. That would be the most efficient way to do it rather than to wait a long time for Congress to pass legislation. After all, the Senate had agreed to the U.N. Charter, which included Article 94, so it seemed reasonable to conclude that between the President's inherent constitutional powers and the Senate's advice and consent to the U.N. Charter that he had the power to order compliance. The Supreme Court said, no, he could not do it directly, but invited Congress to pass legislation.

So, one, the issue is not now compliance under the Vienna Convention. We have already violated the Vienna Convention. But now we have to comply with the ruling of the ICJ under the U.N. Charter even though we disagree with that.

Second, I have to disagree with the policy point that because other countries comply—which they do, even in the case of Libya ultimately—because other countries comply with their obligations to us that we are off the hook, that we should not have to do it. We should lead, not follow. I think it is remarkable that anybody could suggest that because other countries in the world generally follow their obligations to us, why bother for the U.S. to comply? One, that is not what this country is about. And, two, it is very short-sighted because there are cases when other countries do not comply with us and they do, as you heard this morning, come back to us and say, "Well, why should we comply with our obligation to you? You do not comply with your obligations to us."

A case that Senator Graham mentioned with is apropos was the case of Raymond Davis, the CIA agent in Pakistan, where, interestingly, the state regional authorities in Pakistan who had arrested him said, "We do not have to comply with Pakistan's international law obligation to observe immunity. This is a matter of local criminal justice, and we want to keep Raymond Davis," even though there was an international law obligation binding on Pakistan. Members of Congress were threatening to cutoff aid to Pakistan because the country was not complying with their international law obligations to us.

The principle is exactly the same here. In this case the Federal Government can require the States to comply with our international law obligations, which gets to my last point. I do not think we are commandeering State rights in this case. Even Texas does not dispute that they have an obligation to inform people who are arrested of their consular rights. They only dispute now that after the individuals who have been tried, prosecuted, convicted, and have exhausted all of their appeals, they essentially are saying their hands are tied under State law.

Governor Perry even wrote to Secretary Rice, my boss at the time, to say, "We will offer review and reconsideration in the cases where we can continue to do so," and said in a brief to the Supreme Court that it would impose minimal burden. So even the States are not suggesting that this is an infringement on their affairs to require State law enforcement officials to notify individuals who are arrested of their individual rights. And I do not think that this bill—although I certainly would be open to certain tweaks to it—as a conceptual matter, requires State officials to do anything that

they are not already doing or trenching on States' rights in a way that is inappropriate.

Senator BLUMENTHAL. Thank you.

Mr. Rivkin, I do not guarantee the last word, but you certainly are entitled to respond.

Mr. RIVKIN. Very kind of you. First of all, a couple of legalistic points that are at least dear to the hearts of lawyers. I never suggested that the *Medellin* majority decision does not say that Article 94 is a binding international obligation. What I did say—and I have not heard John disagree with me—is that the *Medellin* decision never found that we are in violation of our obligation under Article 94 of the U.N. change. The reason that is important, Senator, is because there were a number of statements made this morning that create the impression that somehow we are in default, that we have committed a delict under international law and so we are in a bad situation.

That is not true. In fact, the Bush Administration—and I am sure John recalls this—specifically said that Article 94, the language of Article 94, establishes a commitment on the part of U.N. members to take future action with no specific indication as to a timeline. So as a technical matter, I do not think that even today we are in violation of Article 94. We should of course try to implement *Avena* decision in good faith and in a way that comply with the constitution.

The way that S. 1194 goes about doing this does violate the well-established principles of constitutional law. It is one thing to say that State officials are obliged to comply with a stayed request for consul access. There has not been a single instance I am aware of or brought to the attention of this Committee where a foreign national a state official asked for consular access and was not given it. The problem arises because in our multi-ethnic society, in our multi-ethnic democracy where people speak with foreign accents, it is considered to be improper to ask people about their ethnic and national origin even if they have been detained. Moreover, unlike in Europe or in many other counties we do not have people carrying identification papers. If you are arrested in Switzerland or Germany, the government immediately knows who you are. To emphasize, the problem arises because we have people who did not ask for consular access, and years later, after they have received the highest level of due process, their lawyers discovered that maybe they are foreign nationals. The Court in *Avena*, by the way, said that it is not clear that Article 36 that we are talking about today, even applies to dual nationals, nor is it even clear it applies to individuals, who have permanent residency in the United States.

So there are all sorts of difficult compliance questions here that do not in any way get close to the violation of international law, in my opinion.

Senator BLUMENTHAL. Thank you very much.

I would certainly entertain a brief response from any of the other witnesses, or we could take in writing any supplementary comments that you may have. We are going to keep the record open for 1 week.

Did you have anything, Ms. Gillis or Mr. Bellinger, that you would like to add?

Mr. BELLINGER. I would just very briefly state that it is clear that when it comes to certain treaty obligations, even if they require States to do certain things, the States are required to comply. No one would suggest—and I am sure Texas would not suggest—that if a State law enforcement official arrested a foreign diplomat and the Federal Government were to require Texas to release that diplomat, that under some principle of federalism Texas would not be required to do that. This principle is exactly the same here. We certainly can require as a matter of Federal Government power to comply with our treaty obligations, which are binding on all of the States as a general matter of international law, to require State officials to take certain actions, and this bill I think is consistent with our obligations under international law, as the Supreme Court saw them in the *Medellin* case. We are now taking up the invitation that Chief Justice Roberts gave to Congress to pass legislation that would allow us to comply with our clear international law obligation.

Thanks very much.

Ms. GILLIS. Yes, I would just like to add that it seems to me that the willingness of the Turkish Ambassadors or the Hungarian ambassadors to take over as protective powers for U.S. citizens in Libya has to do with the fact that when they look at us, they want to see us respecting our obligations. And the same for the Swedish Ambassadors who stepped in for the journalists who were caught in North Korea and the Swiss Ambassadors who handled the case of the Americans who are currently being detained in Iran. That is to say, these countries that we do not maintain diplomatic relations with, the most dangerous, darkest places for American citizens, I think the willingness of other countries to step in and act as our protective powers probably has a lot to do with the fact that they feel that we obey the rule of law.

Senator BLUMENTHAL. And that we are, in fact, a model for the rule of law.

Ms. GILLIS. Yes.

Senator BLUMENTHAL. Not the lowest common denominator, that we embody the principles of due process and fairness, not just that we are grudgingly observing them as part of the lowest common denominator.

Ms. GILLIS. Yes, exactly. We want to think of ourselves as the standard bearers in this, and others look to us in this sense. So I think it is important to honor that obligation. Thank you.

Senator BLUMENTHAL. Thank you. Well, again, we will stand adjourned. The record will remain open for 1 week in case anyone wants to supplement anything.

This hearing is adjourned. Thank you very much.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Questions for the Record Submitted to
Under Secretary Patrick F. Kennedy by
Senator Patrick Leahy (#1-4)
Senate Committee on the Judiciary
July 27, 2011

Question 1:

It has been asserted that there is no evidence that the United States' failure to comply with its treaty obligations under the Vienna Convention on Consular Relations has or will cause other countries to deny consular access to Americans arrested overseas, and as a result there is no need for legislation such as the Consular Notification Compliance Act of 2011. Is that assessment accurate?

Answer:

There is an urgent and compelling need for this legislation. Congress's failure to act will put U.S. citizens abroad at greater risk of being detained in a foreign legal system without the benefit of critical services that U.S. consular officers routinely provide. U.S. citizens arrested in a foreign country are likely unfamiliar with the legal system, may not understand the language, and often have no ability to contact the outside world other than through a U.S. consular officer. The safety net of consular access is critical to protect them from possible mistreatment and an unfair foreign legal process. U.S. consular officers routinely provide services including prison visits to meet with the person; communicating with the person by phone or in writing; assisting them in finding legal representation; monitoring the progress of judicial proceedings; speaking with

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prison authorities about the conditions of confinement; securing food, medicine, religious items, reading material, and other necessities; and transmitting correspondence to and from the person's family. The lack of such services can significantly and adversely impact how our citizens are treated while in the custody of the foreign government, as well as the quality of the legal process they receive.

It is difficult to overstate the importance of consular access to our own citizens. To take one example, U.S. journalist Euna Lee recently published an op-ed in the Washington Post recounting her ordeal in 2009 as a prisoner in North Korea. She said her "biggest fear was nobody knowing where I was or what had happened to me," which was why it was so significant when the Swedish ambassador, who represented U.S. interests, was able to meet briefly with her in her second week of imprisonment.

The international system of consular notification and protection established by the Vienna Convention on Consular Relations ("Vienna Convention") and similar provisions in bilateral agreements creates a network of reciprocal obligations to ensure protection of citizens in the custody of a foreign government. To be effective, this safety net of protection depends on mutual compliance by the United States and our other treaty partners. When the United States fails to comply with these obligations, our own citizens abroad are placed at risk. As Judge Butzner aptly stated:

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> United States citizens are scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.

Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring).

The potential harm to U.S. citizens is very significant. U.S. citizens travel internationally in greater numbers than those of most other countries (making an estimated 60 million trips by air last year), so we have the most to lose if the system of consular notification and access falters. Indeed, with respect to just Mexico alone, more U.S. citizens travel to Mexico than to any other country – U.S. citizens made over 68 million entries into the United States from Mexico in FY 2010.

As a result of repeated and high profile incidents over more than a decade in which foreign nationals detained in the United States have not received timely consular notification and assistance – including foreign nationals who were ultimately convicted on capital charges and executed – this safety net has been severely tested.

The harm caused by the United States' continued failure to comply with its consular notification and access treaty obligations can take many forms. Other countries are unlikely to state expressly that they will violate their obligations as a result of, or in retaliation for, our non-compliance. But where one country,

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especially as influential a country as the United States, is seen to take a cavalier approach toward its obligations, other countries, or their officials, can readily be expected to take a more cavalier approach to theirs, particularly when U.S. citizens are involved.

For example, in pressing for access to a detained U.S. national, or for reform of a foreign government's consular notification and access practices in general, U.S. consular officials frequently point to the United States' own protocols and practices as examples of best practices to be followed. The persuasiveness of these efforts is directly undermined by perceptions that the United States itself does not comply.

Our perceived failure to strictly adhere to consular notification and access obligations has been pointedly noted by other countries. One recent case in the Philippines provides a concrete example of how U.S. failure to give domestic legal effect to our treaty obligations – and specifically to the *Avena* judgment – can directly affect our ability to protect our own nationals. The case involved a member of the U.S. armed services, who was arrested and prosecuted in the Philippines on criminal charges, but was held in U.S. custody pursuant to the operative U.S.-Philippine Visiting Forces Agreement (VFA). A lawsuit was filed in the Philippine courts contending that the Philippines should retain custody of the service member and that the VFA was invalid because, under the U.S. Supreme

Court decision in *Medellín v. Texas*, the VFA would not be equally enforceable under U.S. domestic law. After closely scrutinizing U.S. treaty practice in general and the *Medellín* decision in particular, the majority of the Philippine Supreme Court concluded that the VFA should be honored, based in significant part on the fact that the United States had consistently complied with its VFA obligations. Two dissenting justices disagreed,[1] however, and warned:

> It would be naïve and foolish for the Philippines, or for any other State for that matter, to implement as part of its domestic law a treaty that the United States does not recognize as part of its own domestic law. That would only give the United States the "unqualified right" to free itself from liability for any breach of its own obligation under the treaty, despite an adverse ruling from the ICJ.[2]

In this case, the United States' perceived record for treaty compliance, compliance with the *Avena* judgment, and respect for treaties under its domestic law, were all starkly relevant to the Philippine court's willingness to recognize and enforce the Philippines' reciprocal obligations.

Likewise, the Iranian Foreign Ministry repeatedly justified its refusal to provide more frequent consular visits to the three young U.S. hikers arrested by the Iranians for espionage by accusing the United States of violating the consular

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[1] The dissenters explained as follows: "Under *Medellin*, the VFA is indisputably not enforceable as domestic federal law in the United States. On the other hand, ...the VFA constitutes domestic law in the Philippines. This unequal legal status of the VFA violates Section 25, Article XVIII of the Philippine Constitution, which specifically requires that a treaty involving the presence of foreign troops in the Philippines must be equally binding on the Philippines and on the other contracting State." *Sombilon v. Romulo*, G.R. No. 175888 / G.R. No. 176051 / G.R. No. 176222 (Feb. 11, 2009), Supreme Court of the Philippines (Carpio, J., dissenting), *available at* http://sc.judiciary.gov.ph/jurisprudence/2009/feb2009/175888_176051_176222_carpio.htm.

[2] *Id.*

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rights of detained Iranian nationals.[3] On May 24, 2011, a day after the State Department urged Iran to permit "immediate consular access" to the detainees, Fox News reported that a Foreign Ministry spokesperson "rejected" the request, alleging that "Washington had not granted such treatment to Iranians jailed in the US." "Many innocent Iranians .... are being kept under the worst conditions in US jails," he said. "They have neither consular access nor contact with their families."[4]

Other countries also have repeatedly reminded the United States that the consular notification system depends on mutual compliance. Nearly 60 parties to the VCCR made legal submissions to the U.S. Supreme Court in the case of *Medellín v. Dretke*, 544 U.S. 660 (2005). The 45 Member States of the Council of Europe joined in an *amicus curiae* brief arguing that under the ICJ judgment, "judicial review of conviction and sentence is required if Article 36 is violated."[5] Thirteen Latin American nations submitted an *amicus* brief arguing that the United

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[3] On January 12, 2010, an Iranian spokesperson announced that the detainees would be tried "soon," after the head of the National Security Commission linked the cases to alleged U.S. violations of the VCCR. "The United States violated the Vienna Convention and international regulations by arresting Iranian diplomats and keeping them in prison for a long time," the spokesman said, referring to five Iranians detained by U.S. forces in northern Iraq in 2007. Fars News Agency, *Spokesman: Iran to Try 3 US Nationals Soon*, Jan. 12, 2010, *available at* http://english.farsnews.com/newstext.php?nn=8810221286.

[4] *Iran Refuses to Improve Access to Jailed US Hikers*, FOX NEWS, May 24, 2011, *available at* http://www.myfoxtwincities.com/dpps/news/iran-refuses-to-improve-access-to-jailed-us-hikers-dpgonc-20110524-fc_13347514.

[5] Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellin v. Dretke*, 544 U.S. 660 (Oct. 20, 2004), *available at* http://www.debevoise.com/publications/pdf/dpny-21879793-v1-EU%20Merits%20Brief.PDF.

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States must comply fully with the ICJ ruling and "furnish a legal remedy" for the Vienna Convention violation.[6] Prior to the execution of Humberto Leal García, a number of Latin American countries, Switzerland, and the European Union all sent letters to the Governor of Texas emphasizing the consular violation in that case. These countries all underscored that the Vienna Convention is crucial for the protection of all nationals who travel abroad and that "[e]nforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention." They noted that "such a breach [as Leal's execution] would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties."

The United States has also long recognized the essential importance of reciprocity and strict adherence to our own consular obligations. Following the 1998 execution in the State of Virginia of Angel Breard, a Paraguayan national who had not received consular notification, the United States issued an apology to Paraguay, which stressed that the United States would redouble its efforts to ensure domestic compliance. It stated that "We fully appreciate that the United States

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[6] Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 544 U.S. 660 (Oct. 20, 2004), *available at* http://www.debevoise.com/publications/pdf/Brief%20amicus%20curiae%20of%20Foreign%20Sovereigns%20merits_v1.PDF.

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must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard."[7]

It is important to reiterate, however, that the harmful consequences of noncompliance are not limited to consular protection. The United States faces serious adverse foreign policy consequences as a result of our continued failure to address our consular notification and access treaty obligations. Many of our most important allies – including Mexico, the United Kingdom, and Brazil – have repeatedly and forcefully called upon the United States to honor its treaty commitments and have pointedly noted the reciprocal nature of these obligations. Over time, such vociferous objections about U.S. treaty noncompliance impair our ability to advance other critical national interests in bilateral and multilateral relationships.

Mexico, in particular, considers compliance a top priority in our bilateral relationship, and continued noncompliance has become a significant irritant in U.S.-Mexico relations. Our partnership with Mexico in cross-border law enforcement and security cooperation, including the fight against drug trafficking and other organized crime, has reached unprecedented levels in recent years as a result of the $1.5 billion Merida Initiative, and extraditions with Mexico over the past few years have been at an all-time high. Yet as the Mexican Ambassador

[7] U.S. Department of State, Office of the Spokesman, *Text of Statement Released in Asuncion, Paraguay*, Nov. 4, 1998, *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html.

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wrote to the Secretary of State on June 14, 2011, the execution of Mexican nationals in violation of U.S. consular notification and access treaty obligations has "seriously jeopardized" Mexico's ability to work collaboratively on several joint ventures, "including extraditions, mutual judicial assistance, and our efforts to strengthen our common border," and could cause the Mexican Congress to "revise our cooperation" and "re-examine [Mexico's] commitment to other bilateral programs."

More generally, it is essential that the international community regard the United States as a nation that respects its treaty obligations. When we fail to do so, we lose credibility with our treaty partners, not just on consular notification and access, but across a broad range of issues, including mutual legal assistance, extraditions, nuclear nonproliferation, protection of U.S. diplomats and other officials overseas, and trade. In its July 2011 Letter to Governor Perry regarding the Leal case, for example, the European Union emphasized that "The EU considers the respect for reciprocal treaty obligations based rights to be of vital importance to all aspects of the transatlantic relationship." The United States cannot afford to have our partners at the negotiating table question our commitment to the rule of law. For all of these reasons, passage of the Consular Notification and Compliance Act is essential to advance vital U.S. interests and the protection of U.S. nationals abroad.

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Question 2:

What impact would this legislation have on U.S. citizens' access to consular services when they are detained overseas? It has been asserted that Americans detained overseas do not rely on notification of their right to request consular access under the Vienna Convention on Consular Relations because they consistently request it of their own accord. Is that accurate?

Answer:

Passage of this legislation would affirm the U.S. government's commitment to vigorous compliance with our consular notification and access obligations, and thus improve reciprocal protections for U.S. citizens overseas. As a practical matter, it would clarify the steps that federal, state, and local authorities already must take under the Vienna Convention on Consular Relations ("Vienna Convention") and comparable bilateral agreements, thereby directly improving U.S compliance.[8] We think that this, in turn, will encourage foreign authorities to intensify their own efforts to comply with these obligations. It will also strengthen the U.S. government's position when we are demanding access to U.S. citizens in particular cases and when we are trying to persuade foreign governments, as we regularly do, to improve their treatment of U.S. citizens and their processes for

[8] As explained in more detail in response to Question 3, domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention to follow three simple rules with respect to any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must *ask* the individual without delay if he or she wants to have the consulate notified; *notify* the consulate without delay if so; and allow the consulate *access* to the individual if the consulate requests it.

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ensuring that law enforcement officials at all levels and in all jurisdictions are providing consular notification and access to detained foreign nationals.

U.S. citizens live and travel abroad extensively and their welfare is of one of the highest priorities of the Department of State. Approximately 6.5 million U.S. citizens live abroad, and 103 million hold passports, taking 60 million trips abroad last year. In 2010 alone, Department of State employees conducted more than 9,500 prison visits, and assisted more than 3,500 U.S. citizens who were arrested abroad. Thousands of U.S. citizens benefit from these services annually. In the past five years, we have provided consular services to arrested U.S. citizens from each of the 50 states, the District of Columbia, and the other U.S. territories. U.S. citizens who reside in the states represented by Members of the Judiciary Committee have benefited specifically from consular assistance.

We strongly believe that most U.S. citizens need to be explicitly informed that they can seek the assistance of their consulate if they are detained abroad. There is no evidence to suggest that they will voluntarily request access to their consulate of their own initiative in the absence of such notification. However, even if they did, this fact would not alter the vital importance of the Vienna Convention consular notification and access regime to ensuring that U.S. nationals are protected when they are detained abroad, and that the U.S. government is aware of their custody and able to offer assistance. More importantly, leaving it up

to the detained national or a family member to call the U.S. consulate is not sufficient to discharge the treaty obligation. The Vienna Convention requires that the host government authorities themselves notify the consulate as a central part of its protective regime, and the United States routinely demands that foreign governments honor this core commitment. Many U.S. citizens who travel overseas are not aware that they are entitled to have their consulate notified if they are arrested or detained by foreign authorities. These include all types of U.S. travelers, although certain types of travelers have less awareness of their rights than others, such as minors, younger students, U.S. citizens traveling overseas for the first time, and individuals who are mentally unstable or who may be incapacitated by alcohol or drugs. In all such cases, we must and do rely every day on foreign governments to comply with their obligation under Article 36 of the Vienna Convention to provide this information to our nationals. Even when our nationals themselves request access to U.S. officials, the foreign government may not acquiesce based solely on the request. Some travelers are easily intimidated in a detention setting, in the custody of foreign law enforcement officials, and either are silenced by fear or force, or do not know how to assert their rights effectively. In most countries, foreign authorities do regularly inform U.S. citizens that they may request to meet with U.S. consular officials, and U.S. citizens usually request that their consulate be notified when informed of this option.

With the proliferation of channels for instant communication, more detained U.S. citizens are now able to notify their families, or our consular officials, directly of their situation. However, these communication options often are not available – particularly in situations where detained U.S. citizens may be most vulnerable and at risk – and the cell phones and computers that make such communication possible are often confiscated by the detaining authorities or otherwise not available in detention. And again, the fact that a detained U.S. citizen may be able to contact family or U.S. consular officials independently does not relieve foreign authorities of their obligation to inform him or her of the option to have consular officials notified and their obligation to notify U.S. consular officials if the person so requests. We regularly inform foreign law enforcement, for example, that simply giving the U.S. citizen detainee access to a telephone, and leaving it up to him or her to call the consulate, is not sufficient to discharge the treaty obligation; instead, the authorities must themselves notify the consulate.

Once notified (whether by foreign authorities, the detained U.S. citizen, or other parties), we rely on foreign authorities' ongoing cooperation to obtain access—often repeated access—to the detained citizen, and to provide other forms of assistance.

Examples of U.S. citizens who have benefitted from U.S. consular services abound. Some examples were provided in my testimony before the Committee.

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But securing consistent notification and access remains challenging around the world. The examples set forth in Tab 1are additional examples of U.S. citizens who have been detained abroad and were in need of consular assistance. These examples demonstrate how vital the consular notice and access system continues to be for our ability to protect our citizens abroad, regardless of how the Embassy may first learn of the detention. They also demonstrate how critical it is for United States officials to be able to claim, on a daily basis, that proper notification and access would be afforded to that nation's citizens in the United States, and why an impeccable U.S. record of compliance is essential.

Question 3:

What obligations regarding consular notification currently apply to the states and why?

Answer:

The Vienna Convention on Consular Relations ("Vienna Convention") is a multilateral international treaty to which the United States has been a party since 1969. President Kennedy signed the treaty in 1963, and in 1969 President Nixon transmitted the Vienna Convention to the Senate for advice and consent under Article II, Section 2 of the Constitution, which the Senate unanimously provided by a vote of 81 to 0. The United States is also party to over 50 bilateral consular conventions containing similar provisions on consular notification and access. The United States became a party to each of these conventions by ratifying them upon the Senate's advice and consent. All of these conventions have been the law of the land, binding on U.S. federal, state, and local authorities, since their ratification.

Domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention[9] to follow three simple rules with respect to

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[9] Article 36 of the VCCR provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

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any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must *ask* the individual without delay if he or she wants to have the consulate notified; *notify* the consulate without delay if so; and allow the consulate *access* to the individual if the consulate so requests. "Asking" an individual means that if authorities ascertain that the detained individual is a foreign national, they must tell the individual that he or she may have the consulate notified of the detention. This may be accomplished by asking the individual if he or she is a foreign national, or by informing all individuals taken into custody that if they are a foreign national, they may have their consulate notified. "Without delay" means that the authorities should inform the individual promptly. This means that there should be no deliberate delay, and notification must occur as soon

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(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

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as reasonably possible under the circumstances. In criminal proceedings, this ordinarily means that the person should be informed about the option to seek consular assistance at booking, when identity and foreign nationality can be confirmed in a safe and orderly way. Notification of the consulate "without delay," in turn, means as soon as possible but generally no later than 72 hours after arrest.[10]

For nationals of countries that are parties to relevant bilateral conventions, the rules may differ slightly. Most commonly, bilateral conventions, including those with China, Russia, and the United Kingdom, require state authorities to notify the consulate of an arrest or detention, whether or not the individual requests it. The specific requirements of these "mandatory notification" conventions and other information are provided in the Department of State's Consular Notification and Access Manual, available at *www.travel.state.gov/consularnotification*.

These treaty obligations are directly binding on state and local governments, as well as the federal government, by virtue of the Supremacy Clause, Article VI of the Constitution.[11] *See Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879) (By

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[10] As noted below, the Federal Rules Committee currently is considering a recommendation from the Department of Justice to amend Rule 5 of the Federal Rules of Criminal Procedure to require that federal courts ensure that consular notification has been provided to foreign national defendants at the time of their first appearance.

[11] The Supremacy Clause provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const., Art. VI.

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virtue of Supremacy Clause, "every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State."); *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (provisions in bilateral treaty with Yugoslavia prevailed over inconsistent provisions of Oregon law); *Clark v. Allen*, 331 U.S. 503, 508 (1947) (same for treaty with Germany and California law); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924) (under the Supremacy Clause, U.S. treaty with Japan was "binding within the state of Washington" and prevailed over a municipal ordinance); *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) ("The Supremacy Clause mandates that rights conferred by a treaty be honored by the states.").

These obligations are also self-executing, and domestic legislation to implement these treaty obligations is not required. In other words, these consular notification and access obligations are already automatically obligatory on federal, state, and local authorities, and implemented through their existing powers.[12] *See, e.g.*, *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008) (The Vienna Convention "has the force of domestic law without Congress having to implement legislation."); *Cornejo v. County of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007) ("There is no question that the Vienna Convention is self-executing. As such, it

[12] The Consular Notification Compliance Act is needed, however, because it will give domestic legal effect to the *Avena* judgment and prevent further violations of the Vienna Convention by enshrining existing treaty obligations on consular notification and access in Federal law.

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has the force of domestic law without the need for implementing legislation by Congress."); *Jogi v. Voges*, 480 F.3d 822, 831 (7th Cir. 2007) ("When the United States Senate gave its advice and consent to the ratification of the Vienna Convention in 1969, . . . the Convention became the 'supreme Law of the Land,' binding on the states."); *Breard*, 134 F.3d 615 at 622 ("The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states.").[13] Section 3 of the Consular Notification and Compliance Act merely confirms these existing obligations on federal, state, and local governments, and sets forth the simple, practical steps their officials must take to discharge the treaty obligations.

For decades, federal, state, and local governments have applied the Vienna Convention and bilateral conventions directly on the basis of the relevant treaty language and written guidance such as the State Department's Consular Notification and Access Manual. Many state and local authorities have also issued internal regulations, directives, orders, or similar instructions for their officials. For example, effective January 1, 2000, California adopted legislation setting forth the obligations under state law, Cal. Penal Code § 834c. Texas, Virginia, Indiana,

[13] It is important to note that the U.S. Supreme Court in *Medellín* did not hold that the consular notification requirements of the Vienna Convention are not binding on the United States or the several states. Instead, it addressed the nature of the International Court of Justice's judgment in the *Avena* case, holding that the judgment was not, on its own, directly enforceable in state courts even though President Bush had issued an executive memorandum directing state courts to give effect to the judgment. *Medellín v. Texas*, 552 U.S. 491, 522–23, 525–26 (2008).

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and Wisconsin have all published manuals setting forth consular notification guidance; and a number or local jurisdictions have issued formal policies and guidance to law enforcement, including Peoria and Chandler, Arizona; Bowling Green, Kentucky; Truro, Massachusetts; Suffolk County, New York; and Chesapeake, Virginia.

At the federal level, providing consular notification is standard operating procedure, and is incorporated into the internal procedural manuals and directives of federal law enforcement agencies. The Department of Justice and the Department of Homeland Security (DHS) have promulgated regulations on the steps their officials must take in order to discharge the obligations. *See* 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. Within these agencies, U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the U.S. Marshals Service, the Drug Enforcement Agency, and the Federal Bureau of Investigation, as well as the U.S. Postal Inspection Service and the Internal Revenue Service Criminal Investigation Division, have all issued standard operating procedures relating to consular notification and access.

For example, guidelines set forth by two components of DHS that frequently detain foreign nationals—CBP and ICE—provide as follows:

- CBP policy requires that foreign nationals (including lawful permanent residents) who are arrested or detained be advised of the right to have their consular officials notified of that fact "without delay," i.e., as soon as it becomes feasible. Under CBP policy, the notification to consular officials should be made within 24 to 72 hours of the arrest. Also, if the removal of any alien cannot be completed in 24 hours or the alien is turned over to another agency, CBP officers notify the alien of his or her right to communicate by telephone with the consular or diplomatic officers of his or her country of nationality. CBP policy also requires that this notification be annotated on a Form I-213. Additionally, aliens deemed inadmissible who request to communicate with their consular officers or diplomatic officers, regardless of the period of time the alien has been/will be detained at the port of entry, will be allowed access to communicate with these entities under CBP's policy.

- Aliens in ICE custody are informed of their option to request consular notification as soon as possible after they are taken into custody. If aliens so request, notifications to consulates must occur within 24 to 72 hours of arrest. Typically, aliens who remain in ICE custody receive a copy of the detainee handbook which includes information regarding consular notification and telephone access and signs are posted next to all telephones with instructions for calling consular officials. Consular officials are given reasonably unlimited access to interview their nationals, and detainees and consular officials are regularly allowed to communicate telephonically with minimal restrictions. In some facilities, free and unrestricted access to telephones is provided for this purpose. In all facilities, calls to consular officials are at no cost to the detainee.

Guidance for federal prosecutors is routinely made available to U.S. Attorneys Offices. Foreign nationals charged with federal crimes eventually may benefit from a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure that would require federal courts to inform individuals at the time of

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their first appearance that if they are foreign nationals, they have the option to meet with a consular official. In addition, the Uniform Law Commission currently is considering whether to form a drafting committee for similar uniform state legislation.

Furthermore, for well over a decade, the Departments of State and Justice have worked closely with federal, state, and local officials to ensure that they are aware of their consular notification and access obligations and properly discharge them. The Department of State has distributed over one million sets of briefing materials on consular notification and regularly conducts training sessions all over the country. The Consular Notification and Access Manual is the centerpiece of these efforts, explaining the very simple and practical steps that should be taken to fulfill the obligations in real-world contexts. Last year, the Department distributed 6,000 manuals to law enforcement officials. The Department also distributes tens of thousands of small pocket cards each year (70,000 last year) and training videos for law enforcement personnel, maintains updated information on consular notification on its website, www.travel.state.gov/consularnotification, and has a Twitter feed, @ConsularNotify, followed by over 1,200 organizations and individuals, where it provides tips on consular notification practice.

Question 4:

Does the Department of Defense support the Consular Notification Compliance Act of 2011? Why is it relevant for members of the U.S. Armed Forces?

Answer:

The Department of Defense supports the Consular Notification Compliance Act of 2011, and intends to send a letter to the Committee directly expressing its views on the relevance of the legislation for members of the Armed Forces.

Attachments:

Tab 1 – Examples of the importance of consular access to U.S. citizens

Tab 2 – Letters submitted to the Governor of Texas prior to the execution of Humberto Leal García, by a number of Latin American countries, Switzerland, and the European Union emphasizing the consular violation in that case.

Tab 3 – June 14, 2011 letter from the Mexican Ambassador to the Secretary of State expressing his concern about the execution of Mexican nationals in violation of U.S. consular notification and access treaty obligations

Tab 4 – American citizens visited by consular officers while detained abroad, by state of residence or state of birth, 2006-2011

Tab 1 – Examples of the importance of consular access to U.S. citizens

Minors:

- **U.S. Citizen Lost in Prison System:** A U.S. citizen minor was arrested in Panama in May 2010, but consular staff did not learn of his incarceration at the Minors' Prison until two other minor inmates were arrested in January 2011. In his case, the Government of Panama informed us in a timely manner that a U.S. citizen had been arrested, but then it could not locate him in any of its prisons because the Minors' Prison is operated separately. Prior to our visit to him in January, he had only one visit from his father throughout his detention. He was almost completely reliant on the kindness of the prison director for basic necessities because he had no identification, without which he could not cash checks from his employment pay at the prison. Also, once we knew about his sentencing and location, we were able to intervene when he became of age and have him transferred to the best-run prison in Panama.

Mentally impaired individuals:

- **Notification Delayed, U.S. Citizen Commits Suicide in Prison:** A U.S. citizen was arrested in Panama on November 3, 2010, for drug possession. Consular staff learned of the possible arrest on November 30 through the mother of another U.S. citizen who was incarcerated in the same prison. The Embassy contacted prison officials at the public jail, but were told there was no such prisoner. The Embassy only officially learned of the arrest on December 2, when it received the monthly report from the Penitentiary System, in which his name and nationality were noted.

  When contacted, the prison authorities explained to the Embassy that the subject had attempted suicide on December 5, but was apprehended before he managed to succeed. However, before Consular officers could visit him, and despite having been placed in a special holding cell, the subject was able to access the roof of the three-story prison the next day and succeeded in jumping to his death. Embassy officials subsequently learned the subject had first tried to take his own life in early November.

- **U.S. Citizen Veteran with Mental Illness Arrested:** In 2011, the liaison officer for the Tijuana Municipal Police informed the U.S. Consulate that a 35-year-old veteran with severe mental illness had been arrested for auto

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theft, assault, and attempted murder. Thanks to timely consular notification, a consular official was able to visit him the same day and begin working with his family and Veterans' Affairs to get him the psychiatric attention he needed. Consular staff has been following this case closely since its inception, and was able to secure a transfer to the psychiatric ward of the prison shortly after the prisoner arrived. Without such swift notification by the Mexican officials, there could have been a significant delay in getting this veteran necessary medical care.

Consular Notification Provided; Harm or Future Harm Averted:

- **U.S. Citizen sent to Mexico Federal Penitentiary "for his Protection":** Prompt consular notification gave consular staff the opportunity to quickly respond to the arrest of a suspected drug cartel member and request he be transferred to a federal penitentiary, rather than the state prison, where he feared reprisals from a rival gang. The quick notification gave post the greatest opportunity to intervene on the U.S. citizen's behalf and possibly impact the outcome for this U.S. citizen.

- **Swift Consular Action Prevents Extended Jail Time**: A U.S. citizen was arrested for overstaying his visa and immediately detained at one of the worst prisons in Zimbabwe. Through contacts at Zimbabwe's Immigration and Remand Prison, the Embassy quickly heard about the case and facilitated his return to the United States within 48 hours. Two weeks later, the Embassy received a diplomatic note from the Ministry of Foreign Affairs notifying the Embassy of the arrest. Without good Embassy contacts and effective work by the Consular Section, this U.S. citizen could have spent considerable time in terrible conditions.

Consular Notification Delayed or Not Provided:

- **U.S. Citizen Forced to Give Espionage Confession:** In April 2011, a U.S. citizen was detained and forced to confess to espionage on Syrian television. Consular notification had not been made; U.S. Embassy staff only learned of the arrest through the public broadcast. Embassy Damascus objected to the lack of notification or access, and flatly refuted the MFA's claim that the Ministry had not known of the arrest, given the television broadcast. The Embassy received no official notification prior to the U.S. citizen's release.

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- **Two Weeks in Jail over Landlord Dispute:** A U.S. citizen was arrested in Brazil on dubious charges (theft of water) in a landlord/tenant dispute. Post received no consular notification and only learned of the incident when a friend reported the incident two weeks after the arrest. The news of the imprisonment came late on a Friday afternoon and, after our consular visit, the citizen was released the following Monday. Had post received timely consular notification, he probably would not have languished in jail for two weeks.

- **U.S. Student Released After Lack of Notification was Raised:** In April 2011, a U.S. student was detained by Syrian authorities near the site of a demonstration. The Embassy was not notified and his parents were frantic because their son had disappeared. The Embassy was informed of the disappearance by a friend of the detained student. Consular officials in Washington summoned the Syrian Ambassador to complain about lack of notification and access. Pressure from the Embassy, Congress, the Department, and the student's family raised the prominence of the case, and ultimately persuaded the Syrian government to release the student to the Embassy.

- **U.S. Citizen Beaten for Five Days for Allegedly Stealing Furniture:** On May, 22, 2011, the mother of a U.S. citizen informed Consular staff that her son had been detained by Cyprus authorities on May 17. On May 23, 2011, Consular staff visited the incarcerated individual and learned that he had suffered daily beatings until he signed a confession admitting to stealing furniture in his home, some of which he had purchased in the United States. The subject's father was also arrested and held overnight in jail for attending the subject's court hearings. The Embassy registered a complaint for lack of notification and mistreatment of the U.S. citizen. The U.S. citizen was released on bail but remains in Northern Cyprus. At our request, local officials performed a cursory investigation of the abuse allegations but questioned their veracity. The U.S. citizen's parents continue to raise mistreatment allegations with local elected official and the press.

- **Withholding Consular Notification and Denying Access:** Not only does Zimbabwe have some of the poorest prison conditions in the world, but Zimbabwe has a history of denying consular access. While the U.S. Embassy in Harare often hears about arrested U.S. citizens in a timely fashion from other individuals who witness the arrest, Zimbabwe officials

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rarely provide consular notification in a timely manner or even confirmation of arrests the Embassy is already aware of. Zimbabwe officials also have a history of relocating arrested U.S. citizens to other prisons without notification. On more than one occasion, our Consular officers have arrived at scheduled prison visits only to discover the arrestee is no longer there. In many instances, it is only after we have gained access that the Government of Zimbabwe initiates the judicial process or simply releases/deports the arrested party without charge.

- **Treatment Improves following Consular Access:** A U.S. citizen was arrested for immigration violations in Ethiopia, but the Consular Section was not notified of his arrest. He was held in jail for 72 hours and interrogated for two full days, yet he was given just one meal during that entire time. Once the Consular Section learned of the arrest, two members of the staff were able to attend a preliminary hearing and have the detainee released on bail pending his trial in immigration court. The Embassy is certain that Consular staff presence was influential in letting the court know that the U.S. government was interested in the citizen's equitable treatment. In addition, the Embassy believes that if there had been prompt notification, the detainee would not have been interrogated without being fed for two days.

71110.027

EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

Washington, 13 June 2011
PSD/LV/BW/ip D(2011) 1775

The Honorable
Rick Perry
Governor, State of Texas
207 Statehouse
Springfield, Illinois 62706

Fax: 217 524-4049

Dear Governor,

The European Union is writing to make an urgent appeal on behalf of Mr. Humberto Leal, whom we understand has received a date for execution of July 7, 2011.

The European Union recognizes that a terrible crime lies at the heart of this case and extends its sympathy to the family and survivors of the victim.

The European Union urges a reprieve be granted to Mr. Leal pending legislative action to bring the United States into compliance with its treaty obligations.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Article 36 of the Vienna Convention on Consular Relations and held that Mr. Leal is entitled to review and reconsideration of his sentence to determine whether, and how, he was prejudiced by the violation of his consular rights. The European Union acknowledges that the United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in Medellin v. Texas, the United States Supreme Court held that Congress must pass legislation implementing the Avena judgment before it can be enforced by U.S. courts.

All Member States of the European Union are party to the Vienna Convention on Consular Relations and to the United Nations Charter. The EU considers the respect for reciprocal treaty obligations based rights to be of vital importance to all aspects of the transatlantic relationship. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36.

2175 K Street NW, Washington, DC 20037-1831 Telephone: (202) 862.9500. Telefax: (202) 429.1766.
E-Mail Address: delegation-washington@eeas.europa.eu

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European Union Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate a foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention.

The European Union is concerned that if Mr. Leal is executed before receiving the remedy to which he is entitled under the Avena Judgment, an undisputed international obligation will be breached. Such a breach would undermine the international rule of law and could potentially impede the ability of consular officials around the world to carry out their duties.

Therefore, the European Union respectfully urges you to grant Mr. Leal a reprieve, thus allowing time for Congress or the Texas legislature to pass legislation implementing the ICJ's Avena Judgment.

Sincerely,

João Vale de Almeida
Ambassador

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71110.029

Embassy of Chile
Office of the Ambassador

Washington, DC. June 22, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal Garcia

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal Garcia, a Mexican national who is facing execution in Texas on July 7, 2011. I urge you to grant Mr. Leal a reprieve based on humanitarian considerations and factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had breached the obligations concerning Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to comply with the *Avena* Judgment.

My Government is concerned that Mr. Leal be executed before receiving the remedy which is entitled under the *Avena* Judgment and the United States is committed to

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comply. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Arturo Fernandois
Ambassador of Chile

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EMBASSY OF EL SALVADOR
1400 16TH ST. N.W., SUITE 100
WASHINGTON, DC 20036

June 20th, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428
By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711
By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7th, 2011. I urge you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

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My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Francisco Altschul
Ambassador of El Salvador

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EMBAJADA DE HONDURAS

WASHINGTON, D.C.

THE AMBASSADOR

June 13, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7, 2011, in order to request you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

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My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

The ICJ's sentence must be applied in favor of Mr. Leal and our Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Please accept the assurances of my distinguished consideration.

Sincerely,

Jorge Ramón Hernández-Alcerro

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Confédération suisse
Confederazione Svizzera
Confederaziun svizra

America

Fax

Date	07.06.2011
Fax number	(512) 463 18 49
Recipient	The Honorable Rick Perry Governor of Texas Office of the Governor P.O. Box 12428 Austin TX 78711-2428
Number of pages	2

Information
Our reference: 417.02-HVO
Phone: (202) 745 7900
Fax: (202) 387 2564

Re: Execution of Mr. Humberto Leal

Dear Governor Perry

It has been brought to my attention that in the case of Mr. Humberto Leal an execution date has been scheduled for July 7, 2011, in view of which I wish to make an urgent humanitarian appeal on behalf of the Swiss Government.

The Government of Switzerland is opposed to the use of capital punishment under all circumstances and works with the international community towards its universal abolition. We consider the use of this punishment to be cruel and inhuman and emphasize that any judicial error in its application is irreversible. Furthermore, there is no consistent evidence to support that this punishment acts as a deterrent against serious crime any more than life imprisonment.

The Swiss Government notes that, at the time of his arrest and during his trial, Mr. Leal, a Mexican citizen, was denied the right to ask for the assistance of the Mexican Consulate, as provided for in Article 36 of the Vienna Convention on Consular Relations (VCCR). In 2004, the International Court of Justice (ICJ) ruled, in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, that the United States had violated Article 36 of the VCCR, holding that Mr. Leal is entitled to review and reconsideration of his sentence to determine whether, and how, he was prejudiced by the violation of his consular rights. The US Supreme Court later confirmed, in *Medellín v. Texas*, that the United States had an international legal obligation to comply with the ICJ ruling of the *Avena* case, through a congressional act.

2900 Cathedral Ave. NW
Washington, D.C. 20008-3499
Phone: (202) 745 7900, Fax: (202) 387 2564
was.vertretung@eda.admin.ch, www.swissemb.org

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Switzerland considers consular access to be of critical importance and believes that enforcement of treaty obligations depends on reciprocal compliance by all parties to the Convention.

Taking account of this information, Switzerland respectfully urges you to grant Mr. Leal a reprieve to allow time for Congress or the Texas legislature to pass legislation implementing the ICJ's *Avena* Judgment.

Sincerely

The Ambassador of Switzerland

Manuel Sager

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71110.037

Embassy of Uruguay
Washington, D.C

Washington, DC June, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal Garcia

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal Garcia, a Mexican national who is facing execution in Texas on July 7, 2011. I urge you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment.

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However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

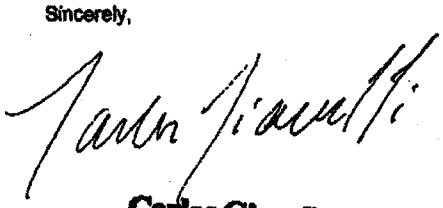
My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,



Carlos Gianelli
Ambassador

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71110.039

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 1, 2011

The Honorable Rick Perry
Governor of Texas
P.O. Box 12428
Austin, Texas 78711-2428

Re: *In re Humberto Leal García*

Dear Governor Perry:

I write you urgently regarding the case of Humberto Leal García, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States' obligations under the Vienna Convention on Consular Relations. His execution on July 7 would violate the United States' obligations under the ICJ judgment, which required the United States to provide judicial "review and reconsideration" to determine whether Leal's conviction or sentence was actually prejudiced by the consular violation.

As you know, President Bush sought to secure U.S. compliance with the *Avena* judgment by directing the state courts to provide the requisite review and reconsideration. In *Medellin v. Texas*, 552 U.S. 491 (2008), the U.S. Supreme Court found this effort legally insufficient and recognized *Avena* as imposing a binding international legal obligation, but indicated that Congress could ensure compliance through legislation.

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On June 14, 2011, Senator Patrick Leahy introduced S. 1194, the Consular Notification Compliance Act of 2011 (CNCA) (attached), which, if enacted, will bring the United States into compliance with our *Avena* obligations by providing for post-conviction review of Vienna Convention violations for Mr. Leal and other foreign nationals currently on death row. This legislation was developed in close consultation with the Administration, and as the attached letter of June 28 from the Secretary of State and the Attorney General indicates, the Administration strongly supports it. However, enactment of this legislation necessarily will take some time. I therefore respectfully request that you secure a continuance or modification of Leal's execution date at this time to afford a reasonable opportunity for Congress and the President to achieve compliance with the United States' international obligations.

This request is not a comment on either the conviction or sentence in this case, or on whether Mr. Leal or any other individual would be able to demonstrate actual prejudice. Rather it is simply a request that Texas authorities help us take the steps that both the Supreme Court and the Texas Court of Criminal Appeals have recognized are necessary to bring the United States into compliance with outstanding international law obligations. As the Supreme Court in *Medellin* made clear, Texas itself could satisfy the United States' international legal obligations in this matter, by providing Mr. Leal with a hearing that would give appropriate judicial review and reconsideration of his conviction and sentence under circumstances in which the reviewing court had legal authority to award any appropriate relief. Just this week, three judges of the Texas Court of Criminal Appeals recognized the undisputed, binding obligations the *Avena* judgment creates for the United States and the State of Texas, and called for Texas officials to take action to secure Mr. Leal a stay during the pendency of federal legislation.

A temporary delay of Mr. Leal's execution date would not prejudice Texas's important and legitimate law enforcement interests, and it would protect compelling long-term interests of both the United States and the State of Texas. Ensuring compliance with our international consular obligations here at home is essential to ensuring that American citizens from Texas and other states can benefit from U.S. consular assistance if they are detained abroad. Like all Americans, Texans who travel and are detained overseas rely upon precisely the kind of consular notification that was not given here. Mexico has also made clear that Mr. Leal's execution in breach of our international obligations would seriously jeopardize the ability of the Mexican Government to continue cooperating with the United States on cross-border law enforcement and security and other issues of critical importance to the State of Texas. In the one prior case in which Texas

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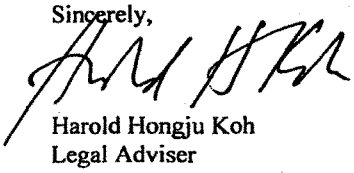
executed a Mexican national subject to the *Avena* judgment – that of Jose Ernesto Medellín in 2008 – Mexico brought a second suit against the United States in the ICJ, which found that the execution constituted another violation. We are concerned that the execution of Mr. Leal, without his receiving the review and reconsideration to which he is entitled under *Avena*, would simply trigger another round of international litigation damaging to our foreign policy interests.

For these reasons, the United States has a compelling interest in ensuring that this case does not result in a breach of U.S. international law obligations. I therefore ask you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation, so that we can avoid the significant damage to United States interests that would result from an execution in violation of our international obligations. Identical copies of this letter are being sent to the Texas Attorney General, the Texas Board of Pardons and Paroles, and the Bexar County District Attorney.

Please let me know if there is any support that we might give you in securing this outcome. As you can understand, time is of the essence. Given the urgency of the situation, we ask that you take that action at the earliest possible instance. I am happy to speak with you if you have any questions regarding this letter. My cell phone number is (202) 262-8295 and my email is KohHH@state.gov. Please feel free to call or contact me at any time, including over the July 4th holiday weekend if necessary.

Sincerely,



Harold Hongju Koh
Legal Adviser

Attachments as stated

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71110.042

Questions for the Record Submitted to
Under Secretary Patrick Kennedy
Senator Amy Klobuchar (#1 - #2)
Senate Committee on the Judiciary
July 27, 2011

Question #1

Have there been occasions on which the U.S. has urged other countries to change their consular notification policies or decisions, or address shortcomings, either on a general basis or in response to particular cases?

Answer:

Occasions frequently arise in which U.S. authorities urge other countries to improve their consular notification and access practices. In so doing, U.S. authorities emphasize the United States' commitment to these obligations and point to U.S. State Department guidance relating to consular notification and access as best practices to help guide the behavior of foreign governments. Such efforts to secure timely and consistent consular notification and access for U.S. citizen detainees, and to improve foreign government practices across the board, and in specific cases, are obviously undermined if the United States is perceived as not taking these obligations seriously and honoring them with integrity.

The international law obligation to provide consular notification and access is longstanding and virtually universal in scope. Most countries of the world – approximately 170 – are parties to the Vienna Convention on

71110.043

Consular Relations ("Vienna Convention"), a treaty concluded in 1963. Many of these countries, as well as Vienna Convention nonparties such as Ethiopia and Israel, are parties to bilateral agreements with the United States addressing consular notification and access. Some of the bilateral agreements predate the Vienna Convention. For example, agreements with Mexico and the Philippines entered into force in 1943 and 1948, respectively, and the U.S.-UK consular convention, to which the United Kingdom and 31 of its former colonies are parties, entered into force in 1952.

Occasions often arise in which the United States urges other countries either to comply with consular notification and access obligations in particular cases for the benefit of individual U.S. citizens, to improve their consular notification practices in general, or both. The Department of State has a number of diplomatic tools at its disposal to address these issues. For example, when a U.S. Embassy or Consulate learns that a U.S. citizen has been detained by a foreign government, it typically requests an immediate visit, reminding the authorities of their obligation to allow consular access. If local authorities are recalcitrant or unresponsive, the consulate may send a diplomatic note to the country's Ministry of Foreign Affairs complaining of the failure to provide notification and access, again citing international treaty

obligations in the Vienna Convention or relevant bilateral agreement, and demanding access or an explanation for why access has not yet been granted.

In some serious cases, or where the country has repeatedly failed to comply with the relevant obligations, high-level U.S. officials, such as the ambassador in country, may request a meeting with high-level officials in the foreign government to personally, formally complain and request remedial action. Such a meeting may also occur between State Department principals in Washington and the country's Embassy officials, on occasion at the Ambassador level.

In our dialogues with other countries about consular notification and access compliance, the State Department often shares best practices, while at the same time emphasizing the reciprocal importance of these protections for the country's own nationals. In so doing, the Department cites practices developed over decades in the United States as ways in which the country's authorities can discharge their treaty obligations. The Department has incorporated most of these practices in its Consular Notification and Access Manual, available at www.travel.state.gov/consularnotification, now in its Third Edition. The Department frequently provides foreign governments or their consular staff in the United States with copies of the materials it uses to train law enforcement and other officials in the United States, including the

Manual and pocket cards succinctly setting forth the basic notification and access obligations.[1] (See Tab 1 for a sample card).

The Department also devotes a chapter of the Foreign Affairs Manual, 7 FAM 400, to consular notification and access in U.S. citizen arrest cases, and provides a roadmap for consular officials overseas to use in complaining about adverse treatment of U.S. citizens. Department procedures direct consular officers to seek access to U.S. citizens as soon as they learn of a detention, through notification by foreign authorities or otherwise, and our embassies regularly send demarches or diplomatic notes complaining of failures to notify or denials of access. These communications cite the Vienna Convention or an applicable bilateral agreement, and reaffirm the U.S. commitment to these instruments and the seriousness with which the United States regards notification and access obligations.

The FAM specifically instructs consular officers at U.S. embassies and consulates abroad to use the Consular Notification and Access Manual as a guide for how the treaty obligations may be discharged in actual cases

[1] In order to ensure ongoing compliance with U.S. obligations under the Vienna Convention, the Bureau of Consular Affairs (CA) manages an outreach program that provides materials, training, and guidance to local, state, and federal law enforcement and criminal justice officials. Last year, CA distributed 6,000 manuals and 70,000 pocket cards to law enforcement officials. Countless more individuals access this information via the internet. CA conducted training sessions in seven states, and made presentations at four law enforcement conferences to highlight the importance of consular notification with high-ranking police officials who are often in a position to ensure that these responsibilities are discharged properly.

71110.046

in the countries where they are posted, and to share the Manual with foreign law enforcement and encourage them to adapt their practices as appropriate. Consular officers also use the advice set forth in the Manual when interacting with foreign authorities who have arrested or detained a U.S. citizen, or with the country's government.

For example, consular officers are expected to inform foreign law enforcement or others in the country's government that the Vienna Convention's "without delay" standard requires notification promptly after law enforcement determines that a detained individual is a U.S. citizen.[2] They inform foreign law enforcement that simply giving the U.S. citizen detainee access to a telephone, and leaving it up to him or her to call the consulate, is not sufficient to discharge the treaty obligation; instead, the authorities must themselves notify the consulate. Consular officers explain that consular access must be allowed through a face-to-face meeting. Consular officers are also instructed to refer to the Manual for information on specific rules contained in some bilateral agreements—for example, different time limits for notification or, for some countries, rules on when consular officers may meet privately with their national in detention.

[2] The Manual recommends that U.S. law enforcement routinely ask every person arrested or detained whether they are a foreign national.

71110.047

Department of State officials regularly stress the importance of notification and access generally during bilateral discussions with foreign governments on consular issues. The Department also frequently engages multilaterally with other governments experiencing the same problems with a particular country. Diplomatic complaints and demarches in particular cases generally result in the relevant foreign law enforcement officials allowing U.S. consular officers access to the detained U.S. citizen. They also sometimes lead to a more general dialogue with the country on how to address shortcomings.

The Department has used many of these tools with one particularly recalcitrant country whose law enforcement and prison officials routinely fail to inform U.S. citizens that they may seek the assistance of the U.S. consulate, and deny or fail to respond to the consulate's requests for access. Engagement with that country's officials at high levels, both in Washington and in the country's capital, has begun to produce positive results. In another highly publicized case, three U.S. citizens allegedly crossed an unmarked border in Iran and were taken into custody, consular notification was not forthcoming, and the Department emphasized publicly that "Iran has obligations under the Vienna Convention" and demanded prompt consular access. When Iran granted access to our Swiss Protecting Power, the

Department welcomed "the fact that Iran is meeting . . . its obligations under the Vienna Convention," but since that time we have repeatedly protested the lack of regular access.

U.S. citizens travel around the world – taking 60 million trips last year – for business, tourism, and other reasons, including to some potentially inhospitable destinations. Experiences in Iran, North Korea, Burma, Cuba, Pakistan, and elsewhere demonstrate that even unsympathetic governments can find it difficult to resist demands for consular access when presented with clear legal obligations backed up by the moral force of the requestor. For example, following U.S. government demands, Pakistan provided consular access to U.S. Embassy employee Raymond Davis who was detained in Lahore by Pakistani law enforcement officials in connection with the fatal shooting of two Pakistani nationals. In engaging with foreign government regarding such cases, it is essential that the United States be able to point to an impeccable record of providing consular notification and access to foreign nationals.

71110.049

Question #2

Please describe how the consular notification issue could impact public opinion in other countries and how such foreign public opinion can impact U.S. interests and U.S. citizens abroad.

Answer:

The fact that the United States has not fulfilled its international legal obligations related to consular notification and access has had a negative impact on public opinion in foreign countries, as documented by foreign press reports, and has provoked increasingly numerous and vociferous complaints from foreign governments about U.S. non-compliance with its international law obligations. This reputational harm adversely affects U.S. citizens as well other U.S. interests. It weakens our image as a world leader on the rule of law; makes it more difficult for the United States to credibly demand that other countries follow their international law obligations; diminishes our leverage to persuade other countries to improve consular notification and access compliance for the benefit of U.S. citizens; and interferes with other countries' willingness and ability to cooperate with us on a range of important U.S. interests, including law enforcement, counterterrorism, and border security.

Since 1998, the United States has been sued in the International Court of Justice (ICJ) in three separate cases for its failure to provide consular

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notification and access to foreign nationals, first by Paraguay, then by Germany, and finally by Mexico. The ICJ ruled against the United States in each of these cases.[3] Thus far, the United States has executed five individuals in the face of contrary ICJ orders and judgments, including at least two individuals in direct violation of that Court's judgments. This occurred despite the fact that the United States had a binding treaty obligation to comply with the rulings of the ICJ as a party to the Vienna Convention's Optional Protocol on the Compulsory Settlement of Disputes[4]

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[3] Specifically, on April 9, 1998, the ICJ issued provisional measures directing the United States to suspend the execution pending resolution on the merits of the Vienna Convention claim of Angel Francisco Breard, a Paraguayan national who was on death row in Virginia, and again on March 3, 1999, in the case of Karl and Walter LaGrand, two German nationals convicted of armed robbery and murder in Arizona whom Germany complained were deprived of their right to consular notification. Both cases were brought to the Court on the eve of the scheduled executions, and the individuals were executed notwithstanding the unanimous orders issued by the Court. In June 2001, in the *LaGrand Case (Germany v. U.S.)*, the Court held that in cases involving German nationals sentenced to severe penalties without having been advised of their right to consular notification, the United States "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation" of consular notification rights set forth in the Vienna Convention. *LaGrand (Germany v. United States),* 2001 I.C.J. 466, at 516 (June 27).

In February 2003, the ICJ issued provisional measures with respect to three Mexican nationals in the *Avena* case (*Mexico v. U.S.)*, directing the United States to take all necessary measures not to execute them pending resolution of the *Avena* case on the merits. On March 31, 2004, the ICJ issued its ruling in *Avena*, holding that the United States had violated the Vienna Convention and directing the United States to provide judicial review and reconsideration of the convictions and sentences of these and other Mexican nationals sentenced to severe penalties. *Avena (Mexico v. United States)*, 2004 I.C.J. 12 (March 31). Mexico subsequently requested and received provisional measures with respect to Texas's imminent execution of one of the *Avena* defendants, José Ernesto Medellín. Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2008 I.C.J. 311 (July 16). Texas proceeded to execute Medellin in August 2008, and executed another of the 51 named defendants in the *Avena* group, Humberto Leal García, in July 2011.

[4] In 2005, the United States withdrew from the Optional Protocol. See Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005), http://www.state.gov/documents/organization/87288.pdf.

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– a legal obligation which all members of the Supreme Court recognized and found compelling in *Medellín v. Texas*, 552 U.S. 491, 522–24 (2008). ("[T]he ICJ's judgment in *Avena* creates an international law obligation on the part of the United States . . . . In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.").

The United States' repeated failure to comply with *Avena* and other judgments of the ICJ under the Vienna Convention has generated a significant amount of negative press and has impacted public opinion against the United States. Relations with Mexico have been particularly affected. The Mexican government has lodged numerous complaints on this issue, which poses a persistent obstacle to constructive U.S.-Mexican relations. (See Tab 4). In the wake of the Merida Initiative, U.S.-Mexican relations are enjoying an unprecedented level of cooperation but there are also sensitivities. As the Mexican Ambassador explained in a June 2011 letter to the Secretary of State, the United States' "continued non-compliance with the ICJ's decision has already placed great strain on [the] relationship" between the United States and Mexico. "[A] second execution in violation

of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States" on important law-enforcement initiatives, "including extraditions, mutual judicial assistance, and our efforts to strengthen our common border." Letter from Arturo Sarukhan, Ambassador of Mexico, to Hillary Clinton, Secretary of State (Jun. 14, 2011) (See Tab 2). Significantly, Ambassador Sarukhan warned:

> another execution of a Mexican national in direct violation of international law will undoubtedly affect public opinion in Mexico. Under these circumstances, in addition to the likely impact on dialogue and cooperation, my government would face significant pressure from Mexico's Congress to revise our cooperation and to re-examine our commitment to other bilateral programs. It serves neither the United States nor the Mexico-US relationship if the U.S. cannot live up to its treaty obligations. *Id.*

As Secretary Clinton and Attorney General Holder have confirmed, "[c]ontinued non-compliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives" between the United States and Mexico. Letter from Attorney General Eric H. Holder, Jr., and Secretary of State Hillary Rodham Clinton to Senator Patrick Leahy (June 28, 2011) (See Tab 3).

The foreign and international media has extensively covered the United States' failure to comply with the *Avena* judgment and other consular notification and access obligations – coverage which offers an important

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window into foreign public opinion on this issue. For example, when Humberto Leal García was executed in July 2011 without being afforded the review and reconsideration of his conviction and sentence required by the ICJ, Mexican newspapers published over 1,000 articles on the event, most of them strongly critical of the United States' noncompliance.[5] The story was also carried by international press services such as CNN International,[6] Al Jazeera,[7] the BBC,[8] Agence France-Presse,[9] and Radio Netherlands

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[5] *See, e.g.*, *Mexican National Executed Despite Protests*, GUADALAJARA REPORTER, July 9, 2011, *available at* http://www.guadalajarareporter.com/news-mainmenu-82/national-mainmenu-86/29238-mexican-national-executed-despite-protests.html (describing the case as a "fruitless" effort "to force Texas to adhere to international law"). The Mexican press also widely reported the statements of the Mexican Ministry of Foreign Affairs regarding the case, see Press Release, Mexican Ministry of Foreign Affairs, Mexico Defends Consular Notification Rights per International Law, July 6, 2011, *available at* http://www.mexidata.info/id3069.html; Press Release, Mexico Condemns Execution of Mr. Humberto Leal García, July 7, 2011, available at http://embamex.sre.gob.mx/eua/index.php/en/comunicados2011/519.

[6] Bill Mears and Nick Valencia, *One Mexican's death row case spills far beyond borders of Texas,* CNN INTERNATIONAL, July 7, 2011, *available at* http://edition.cnn.com/2011/CRIME/07/03/texas.death.row/ (discussing Leal's failure to receive consular notification as well as the ICJ judgment and the pending Consular Notification Compliance Act).

[7] *Defiant Texas executes Mexican man*, ALJAZEERA , July 8, 2011, *available at* http://english.aljazeera.net/video/americas/2011/07/201178755136414 80.html (citing reports that Leal Garcia was not informed of his consular rights at the time of his arrest); *Obama Seeks Delay In Execution of Mexican*, ALJAZEERA, July 7, 2011, *available at* http://english.aljazeera.net/news/americas/2011/07/201176232251365358.html (discussing the importance of reciprocal consular protections for U.S. citizens).

[8] *Texas execution 'violated international law', UN says*, BBC NEWS, July 8, 2011, *available at* http://www.bbc.co.uk/news/world-us-canada-14089246 (quoting UN High Commissioner for Human Rights that Texas' execution of Leal without honoring US obligations under the Vienna Convention placed "the US in breach of international law").

[9] *Mexico in push to stop execution in US*, AGENCE FRANCE-PRESSE, July 5, 2011, *available at* http://www.google.com/hostednews/afp/article/ALeqM5iWujRAYBJgvHTBiT3tlYRmloidTg?docId=CNG.4a21d5c02922f58d59a33b03ef8a2b83.11 (citing Mexican statement that Leal was not given consular access in a violation of the Vienna Convention).

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Worldwide;[10] by other regional press in Latin America,[11] Europe,[12] and Africa;[13] and by various national press outlets in the United Kingdom,[14] Russia,[15] Turkey,[16] and Iran,[17] among many other countries. The reporting was consistently critical of the United States' failure to provide Leal with consular notification or comply with the ICJ judgment. For example, the *Latin American Herald Tribune* indicated that the United States had

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[10] *Texas executes Mexican despite protests*, RADIO NETHERLANDS WORLDWIDE, July 8, 2011, available at *http://www.rnw.nl/international-justice/bulletin/texas-executes-mexican-despite-protests*.

[11] Duncan Tucker, *Texas Executes Mexican National*, LATIN AMERICAN HERALD TRIBUNE, *available at* http://www.laht.com/article.asp?ArticleId=405127&CategoryId=12395.

[12] *US Executes Mexican Murderer,* EURONEWS, July 8, 2011, *available at* http://partenaire.euronews.net/2011/07/08/us-executes-mexican-murderer/.

[13] *US urges Supreme Court to halt Mexican's execution,* STARAFRICA, July 1, 2011, *available at* http://www.starafrica.com/en/news/detail-news/view/un-agency-urges-texas-to-halt-execution-175122.html.

[14] *See, e.g., U.S. was in Breach of International Law by Executing Mexican Murderer and Rapist, says U.N. Official*, THE DAILY MAIL, July 8, 2011, *available at* http://www.dailymail.co.uk/news/article-2011712/Mexican-murderer-rapist-Humberto-Leal-Garcia-death-Texas.html#ixzz1VTj8gRJd (stating that, "Had Leal been given access to the Mexican consulate it would have been likely to have arranged a lawyer who would have advised the accused man to limit his statements to the police. As it was, the Mexican authorities were never informed of his arrest."); *USA 'Breached International Law' Executing Mexican Convict*, THE TELEGRAPH, July 8, 2011, *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8626663/USA-breached-international-law-executing-Mexican-convict.html; *Humberto Leal's execution, Rick Perry's ambition,* THE GUARDIAN, July 8, 2011; *Why the Obama administration opposed Mexican man's execution*, THE TELEGRAPH, July 8, 2011, *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8624674/Why-the-Obama-administration-opposed-Mexican-mans-execution.html.

[15] *The Voice of Russia*, THE VOICE OF RUSSIA, July 9, 2011, *available at* http://english.ruvr.ru/2011/07/09/52982713.html (discussing the Leal execution as a violation of international law).

[16] *Obama Administration Calls for Halt to Texas Execution*, J. TURKISH WEEKLY, July 2, 2011, *available at* http://www.turkishweekly.net/news/118039/obama-administration-calls-for-halt-to-texas-execution.html.

[17] *UN condemns U.S. for Executing Mexican*, PRESS TV IRAN, July 10, 2011, *available at* http://www.presstv.ir/detail/188491.html (reporting UN High Commissioner for Human Right's comment that Leal was not granted consular access under the Vienna Convention on Consular Relations and that Leal's execution placed U.S. officials in breach of international law).

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"stumbled in its commitment to the rule of law," and noted that the pending Consular Notification Compliance Act bill would establish a judicial process to determine whether lack of consular access affected a foreign national's capital trial.[18] The Mexican Ministry of Foreign Affairs' public statement, which was picked up in a number of foreign and international press pieces on Leal's execution, also emphasized that the case was about "the right of every individual, based on the Vienna Convention, to have the support of their home state when facing criminal prosecution abroad."[19]

The 2008 execution of José Ernesto Medellín likewise was covered in foreign press across Europe, in Australia and in China, among other countries, with extensive focus on the United States' lack of compliance with its consular notification obligations.[20] Asia One Press, for example,

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[18] *Texas Executes Mexican National*, LATIN AMERICAN HERALD TRIBUNE, *available at* http://www.laht.com/article.asp?ArticleId=405127&CategoryId=12395.

[19] Press Release, Mexican Ministry of Foreign Affairs, Mexico Defends Consular Notification Rights per International Law, July 6, 2011, *available at* http://www.mexidata.info/id3069.html.

[20] *See , e.g., Mexican Jose Medellin Executed in Texas after 11th-Hour Delay*, THE AUSTRALIAN, Aug. 6, 2008, *available at* http://www.theaustralian.com.au/news/mexican-executed-after-11th-hour-delay/story-e6frg6tf-1111117122340 (discussing Medellin's claim that he was denied his consular notification rights); *U.S. Execution Breached International Law: World Court*, REUTERS, Jan. 19, 2009, *available at* http://www.fadp.org/news/2009020402/, (discussing the *Avena* decision and the execution of Medellín as a violation of international law due to Medellín's lack of consular notification); *Texas Executes Mexican Murderer*, BBC NEWS, Aug. 6, 2008, *available at* http://news.bbc.co.uk/2/hi/7542794.stm ("The ICJ had ordered that [Medellin's] case and those of 50 other Mexicans on death row be reviewed because they had not been informed of their right to consular assistance at the time of their arrest - a right under the 1963 Vienna Convention."); *Medellin Execution Highlights Flaw in International Law,* ASIAONE NEWS, Aug. 8, 2008, *available at* http://news.asiaone.com/News/AsiaOne%2BNews/World/Story/A1Story20080808-81376.html.

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highlighted "[t]he execution of a Mexican citizen by the United States against the orders of the UN's highest court."[21]

In addition to Mexico, U.S. noncompliance has received particular public attention in another close U.S. ally, the United Kingdom. The United Kingdom has at least five nationals on death row in the United States, including Linda Carty, sentenced in Texas state court, Kenneth Gay, Pravin Govin, and Virendra Govin, all sentenced in California state court, and Michael Lane, sentenced in Nevada state court, all of whom have indicated they did not receive consular notification and access in violation of both the Vienna Convention and the U.S.-UK bilateral convention. Much UK media coverage has focused on the failure of the United States to abide by its consular notification and access obligations . For example, on the Carty case, *The Sunday Times* reported:

> Martin Longden, a spokesman for the British Embassy in Washington, said the right to consular notification when British citizens were arrested in the U.S. was "a point of principle for us" and "part of an individual's right to a fair trial." He emphasised that US citizens arrested in Britain were guaranteed the same rights.[22]

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[21] *Id.*

[22] Giles Whittell, *Death-row Inmate Linda Carty Launches Last-chance Appeal to US Supreme Court*, THE SUNDAY TIMES, February 27, 2010, *available at* http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7043309.ece. *See also* Giles Whittell, *Death-row Inmate Linda Carty Launches Last-chance Appeal to US Supreme Court*, THE SUNDAY TIMES, Feb. 27, 2010, *available at* http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7043309.ece (noting the British government's protests over the fact that Texan authorities failed to inform British officials of her arrest in contravention of consular treaty law); *Death Row Briton Linda Carty Pleas to US*

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UK officials raise the need for a solution to such consular notification violations frequently with the State and Justice Departments, and at very high levels. (See Tab 4).

The extensive and repeated foreign media coverage of the ICJ rulings, executions, and other events relating to U.S. consular notification and access compliance indicates that members of the public and government officials around the world are continually receiving the message that the United States has failed to comply with its consular notification and access obligations. These concerns in turn are voiced by foreign governments, which have increasingly called upon the United States to fulfill these obligations, including the *Avena* judgment. Foreign governments have raised these issues repeatedly in bilateral communications and in regional and multilateral fora, as documented in Tab 4. For example, since the *Avena* judgment, the European Union has sent persistent overtures to the United States about this issue. And prior to Texas's execution of Leal on July 7, 2011, the European Union, Chile, El Salvador, Honduras, Switzerland, and

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Supreme Court, BBC NEWS Feb. 26, 2010, *available at* http://news.bbc.co.uk/2/hi/uk_news/8538790.stm (noting that Carty's and the UK government's legal appeals are "based around claims she was given an inadequate defence lawyer during the original trial and that the UK government was blocked from providing support."). *See also* Bianca Jagger, *A Case for the Supreme Court*, THE HUFFINGTON POST, Apr. 27, 2010, *available at* http://www.huffingtonpost.com/bianca-jagger/a-case-for-the-supreme-co_b_553310.html ("Paul Lynch, the British Consul-General in Houston, has called the Carty conviction 'a terrible failure of the system.' He states that if the British Consulate had been made aware of Linda's situation, the circumstances would have been very different.").

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Uruguay all wrote the Governor of Texas to urge him to grant Leal a reprieve to allow time for passage of legislation to address the United States' outstanding obligations under *Avena*. (See letters at Tab 5).

Most importantly, the international perception that the United States does not provide consular notification and access to foreign nationals facing the most serious charges, and does not remedy those violations, makes it much harder for U.S. officials to persuade foreign officials to provide consular notification to U.S. citizens detained abroad and to remedy any failure to do so, thereby directly impeding the ability of the U.S. government to protect this vulnerable population. As the Attorney General and Secretary of State have explained, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." State/Justice Letter (See Tab 3). In each of the past five years, over one thousand U.S. citizens remained in custody abroad, and the State Department regularly calls upon foreign nations to live up to their legal obligations by allowing our consular officials to visit those U.S. citizens, ensure that they are not being mistreated, secure necessary food and medicine, help them communicate with their families, and assist them in finding legal counsel or otherwise navigating an unfamiliar judicial system. In Fiscal Year 2010 alone, U.S. consular officials assisted more than 3,500 U.S. citizens who

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were arrested abroad and conducted more than 9,500 prison visits. Consular assistance has proven essential to affording needed assistance in several sensitive recent cases involving U.S. citizens detained in Egypt, Libya, Syria, Iran, and Pakistan, among other countries.

Respecting international rules for consular notification is a matter of paramount importance for U.S. citizens detained overseas, as foreign nationals detained in the United States usually have a constitutional right to counsel, whereas U.S. citizens detained in many foreign countries do not. In these ongoing efforts, the State Department relies on the cooperation of foreign officials, and points to U.S. compliance as an example. Compliance with our consular notification and access obligations is therefore essential for ensuring that U.S. citizens detained overseas can receive critical consular assistance. We simply cannot afford for the foreign officials whom we call upon to respect the law to perceive the United States as lax about its own compliance.

The consequences of foreign public opinion are much broader than our ability to ensure reciprocal protections for U.S. nationals abroad, however. The perception of the United States as a country that does not live up to its international legal obligations influences the actions of foreign governments and negatively impacts U.S. interests in many other areas,

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especially in terms of international cooperation on law enforcement and security matters.

The United States relies on close cooperation with foreign officials to disrupt transnational criminal networks, prevent terrorist attacks, intercept shipments of illicit weapons and narcotics, stop human trafficking, and bring dangerous criminals to justice. In this regard, our cooperation with Mexico—the country with the most citizens currently on death row in the United States whose cases involve Vienna Convention violations—has been especially close and important. The issue of continued U.S. noncompliance with consular notification and access obligations is one that Mexican counterparts raise regularly in the bilateral dialogue on cross-border law enforcement cooperation, and as noted, the Mexican government has warned that domestic public pressure on this issue, including from the Mexican Congress, could make it more difficult to maintain the robust levels of cooperation that we currently enjoy. The pervasive perception among foreign officials and citizens that the United States has failed to live up to its international legal obligations negatively impacts our ability to secure foreign governments' cooperation in vital areas. This development could, in turn, make all U.S. citizens less safe—not simply those who travel abroad.

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Responses of David B. Rivkin, Jr., to
Questions for the Record from Senator Charles E. Grassley

Question No. 1: Mr. Rivkin, as you know, the Administration contends that unless the United States reciprocates compliance with the ICJ ruling, Americans are in danger of losing their consular access rights abroad. It also says that various other forms of foreign cooperation with the United States are threatened.

Can you elaborate on the empirical evidence that the United States or its citizens have been caused any harm by virtue of our 7 years of non-compliance with the ICJ decision?

What basis is there to believe that any of the nightmare scenarios that the Administration and others fear will come to pass?

I am aware of no empirical evidence that suggests that the United States or its citizens have been caused any harm by virtue of the post-*Avena* U.S. behavior. Even more importantly, the State Department, which is in the best position to assess this matter, has proffered no evidence of any *Avena*-related harm inflicted on the United States or its citizens. In this regard, while it has proffered some information about certain States'[1] failure to fully comply with the 1963 Vienna Convention, this non-compliant behavior has not been linked in any way to *Avena*-related issues.

Indeed, in most instances, non-compliance with the Vienna Convention has been anchored in a broader pattern of violations of domestic and international legal obligations by certain States, exacerbated at times by their tense, ambiguous, or even outright confrontational relations with the United States. For example, Ms. Gillis's treatment by the Libyan authorities falls into such a category. Obviously, non-compliance of this nature cannot and will not be cured by the enactment of the S. 1194 or, for that matter, by the passage of any other U.S. domestic statute.

Overall, I do not believe that there is any credible basis to state that the nightmare scenarios that the Administration and other supporters of S. 1194 speculate may occur due to the failure to enact S. 1194 will come to pass. At the same time, I am troubled by their speculations. Having senior U.S. government officials plead, in dramatic tones, that other countries *should* be so concerned about our post-*Avena* record as to stop complying with the 1963 Vienna Convention may well prompt one or more countries to do so.

In this regard, it is also unfortunate that the S. 1194 proponents are reluctant to acknowledge that, despite the inability of the United States to implement fully the *Avena* decision, our overall compliance with the 1963 Vienna Convention is second to none. Two points are worth emphasizing. First, I am aware of no instance where any person who has explicitly requested consular access pursuant to the provisions of Article 36 ever had this request unmet. Yet it is to deal precisely with these types of the requests that Article 36 was drafted. Second, the U.S., in its written submissions and oral arguments before the ICJ, has consistently asserted that the United States' overall record of Vienna Convention compliance was superb and, in fact, superior to that of many other signatory parties. I find it troubling that the current Administration has not seen fit to rearticulate these points, even while pressing for the passage of S. 1194.

[1] In this response, I use "States" to mean foreign states, and not the U.S. states.

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Question No. 2: Mr. Rivkin, the Administration witnesses described the bill before us as "narrowly tailored," "carefully crafted," and "very limited." Would you agree with that characterization? Can you give examples of the bill's far-reaching effects?

I would not describe S. 1194 as "narrowly tailored", "carefully crafted," or "very limited." My prepared statement provides numerous examples of how this legislation imposes mandatory requirements on state government officials, literally conscripting them to carry out the duties arising out of Article 36. Aside from these "going forward"-related obligations, S. 1194 upends the entire framework of federal habeas review of state legal proceedings, eviscerates well-established judicial doctrines, and may well allow some individuals—who have been found guilty of the most heinous offenses through the world's best, most due process-laden proceedings—to go free or have their well-deserved sentences substantially altered. The fact that a relatively small number of individuals may be affected by these provisions does not make them any more palatable.

In my view, however, what is most objectionable about S. 1194 are not these practical concerns, but the abrogation of our system of federalism. The *degree* of the burden imposed on state officials is irrelevant. Recall that the burdens imposed on state legislative and executive branch officials at issue in *New York v. United States* and *Printz v. United States* were quite limited. And yet, the statutes at issue in those cases were struck down by the Supreme Court. What mattered the most was not the extent of actual burdens imposed on state officials, but rather the fact that those burdens violated state sovereignty by conscripting and commandeering state officials. This is the same problem that is clearly present in S. 1194. I am confident that if S. 1194 were ever enacted, it would also be struck down by the Supreme Court.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 21, 2011

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Bruce Swartz, Deputy Assistant Attorney General of the Criminal Division, at a hearing before the Committee on July 27, 2011, entitled "Fulfilling Our Treaty Obligations and Protecting Americans Abroad." We hope this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

Questions for the Record
Following the Senate Judiciary Committee Hearing:
"Fulfilling Our Treaty Obligations and Protecting Americans Abroad"
Held on July 27, 2011

Responses from the Department of Justice

Question from Senator Amy Klobuchar:

1. **How would you expect S. 1194 to affect law enforcement practices and judicial proceedings? Do you think it would impose any undue burdens on states?**

Answer:

We expect that Sections 3 – which is intended to facilitate compliance with U.S. obligations under Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention") and related bilateral agreements – and 4(b) – which ensures consular notification and access and, if necessary, a limited remedy of continuance, for future capital defendants – of S. 1194 would have a minimal impact on law enforcement practices and judicial proceedings, and will not impose any undue burdens on states. The actions needed for these sections are straightforward. Indeed, the obligations for consular notification and access already exist, and have long been met as a matter of course through actions taken by federal, state, and local law enforcement based on training and guidance provided by the State Department, including through the comprehensive manual entitled, *Consular Notification and Access*, available at www.travel.state.gov/consularnotification. Section 3 of S. 1194 provides that federal, state, and local authorities shall inform an arrested or detained foreign national without delay of his or her option to have the consulate notified and thus creates no obligations beyond our existing treaty requirements under the Vienna Convention and related bilateral consular notification treaties. Section 3 further makes clear that such notification should occur no later than the time of a foreign national's first appearance in court in a criminal proceeding, that federal, state, and local authorities must reasonably ensure that a foreign national in their custody is able to communicate freely with and be visited by his or her consulate, and also that the section does not create any judicially or administratively enforceable right. In sum, Section 3 merely facilitates compliance with current obligations of the United States under the Vienna Convention, and does not add to them.

In Section 4(b), S. 1194 also provides a limited, and non-burdensome, means for ensuring that foreign nationals who are facing federal or state capital charges are afforded consular notification and access when consular notification has not yet taken place. Where a failure to provide consular notice and access is timely raised and substantiated, the foreign national's consulate shall be notified immediately and the individual shall be afforded consular access in accordance with U.S. legal obligations. Upon a showing of necessity, the court shall postpone proceedings to the extent necessary to allow adequate opportunity for consular access and assistance. Such a remedy – a continuance – is already available to a judge; S. 1194 merely

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makes clear that such a remedy is available under these limited circumstances, when someone faces federal or state capital charges. Any disruption to judicial proceedings should be minimal – the length of the continuance necessary to afford notification and assistance. This provision is thus consistent with the Supreme Court's observation in *Sanchez-Llamas v. Oregon*, that, if a defendant "raises an Article 36 violation at trial [i.e., that consular notification was not provided, as required by Article 36 of the Vienna Convention], a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance." 548 U.S. 331, 350 (2006). Moreover, by ensuring that consular access is made available at this stage of the proceedings, S. 1194 helps ensure that federal and state courts will not face the burden of litigating the failure to provide access in post-trial proceedings. Notably, again, Section 4(b) makes clear that it does not create any other additional judicial or administratively enforceable remedies.

Section 4(a) – the carefully circumscribed retrospective remedy that is designed to meet the treaty obligation of the United States identified by the Supreme Court in the *Medellín* decision – will not impose an undue burden on states or federal courts. Section 4(a) of S. 1194 addresses retrospective Vienna Convention claims of those foreign nationals sentenced to death at the time of enactment of S. 1194. Currently there are approximately 130 foreign nationals under sentence of death in the United States, only some of whom allege they did not receive timely consular notification and access. Section 4(a) provides a carefully tailored, time-limited opportunity for judicial review and reconsideration on federal post-conviction review of the capital conviction and sentence for foreign nationals who were previously sentenced to death at the time of enactment, and who did not receive timely consular notification. While procedural default rules would not bar this opportunity, relief would be available only where a petitioner shows actual prejudice – a high burden which our courts are familiar administering – to his or her conviction or sentence based on the lack of consular notification or access. It should also be noted that Section 4(a) would eliminate the current burden faced by the states and by federal courts in dealing with *Avena* challenges to these convictions. Thus, for this and the foregoing reasons, we do not believe that a substantial additional burden would be imposed by Section 4(a). *See Medellín v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (noting that in *Medellín* "[t]he cost to Texas of complying with *Avena* would be minimal ...."); State of Texas, Br. In Opp., Pet'n for Writ of Certiorari in *Medellín v. Texas*, Nos. 08-5573, 08A98, U.S. Sup. Ct., at 17 (August 4, 2008) (Texas "acknowledge[d]" the "international sensitivities presented by the *Avena* ruling" and that "[t]he cost to Texas of complying with *Avena* would be minimal[,]" quoting Justice Stevens).

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Questions from Senator Charles E. Grassley:

1. **Mr. Swartz, you say that the bill contains a limited ability for foreign murderers on death row to challenge their sentences. You stress the time limit on their ability to file petitions. But the bill clearly will impose lengthy new delays on resolution of these cases.**

   Is it not true that the bill does not require courts to apply current habeas rules that put deadlines on the courts to decide cases and that make them defer to the rulings of the state courts in many instances? Under the bill, would it not be the case that foreign nationals on death row who filed for relief would automatically obtain a stay? Won't these provisions result in lengthy delays in imposing the death penalty?

Answer: S. 1194 would not create lengthy delays. A petition may only be filed once and must be filed within a year of enactment of the bill, or within a year of certain procedural events, and thus should not unduly extend proceedings. In addition, many of the claims brought under Section 4(a) would be part of a first federal habeas petition. Indeed, related claims are already being raised on federal habeas in the form of ineffective assistance of counsel or similar claims. The review allowed under Section 4(a) would therefore not add appreciably, if at all, to the time needed to dispose of a habeas petition. Section 4(a)(2) also does not provide for an "automatic stay" for foreign nationals on death row who file for relief. The bill language provides that a court "shall grant a stay of execution *if necessary* to allow the court to review a petition . . . ." [emphasis added] The stay, therefore, would not be automatic.

2. **You believe that the bill's requirements that state and local officials provide foreign nationals who are arrested of their rights under the Convention will solve this problem once and for all. But we heard testimony that the bill may be inconsistent with the Supreme Court's 10th Amendment decisions that prohibit the federal government from "commandeering" state and local officials to enforce federal law.**

   If the bill's provisions requiring state and local law enforcement to enforce the Convention are unconstitutional, will that not prevent us from solving this problem once and for all? Even if we became compliant with the ICJ decision, wouldn't there still be frictions with other countries over these issues? Can you provide the Department's legal analysis that S. 1194 is constitutional?

Answer: The Department is firmly of the view that the bill is constitutional and consistent with the Supreme Court's Tenth Amendment decisions. In the first place, this legislation responds directly to the invitation of the Supreme Court in *Medellín.* In *Medellín*, Chief Justice Roberts, for the Supreme Court, observed that "[t]he responsibility" for implementing the United States' treaty obligation to comply with *Avena* "falls to Congress," and that Congress could meet that obligation "through implementing legislation." *Medellín v. Texas,* 552 U.S. 491, 525-26, 520 (2008). Nor does this bill present any 10th Amendment concerns. As an initial matter, S. 1194 does not impose additional consular notification obligations upon state and local officials. The bill simply facilitates compliance with federal, state and local officials' existing obligations under the Vienna Convention and related bilateral agreements, obligations those officials have already had for more than forty years, as a result of the United States having become party to the

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Vienna Convention and related bilateral agreements. The Supreme Court has long recognized Congress's authority to pass legislation like this bill, which facilitates implementation of our Vienna Convention treaty obligations. *See, e.g.*, *Medellín v. Texas*, 552 U.S. at 525-26 (citing cases).

But in any event, reliance on "commandeering" cases here is entirely misplaced. S. 1194 does not "compel the States to enact or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997), as S. 1194 establishes no "regulatory program." *See Reno v. Condon*, 528 U.S. 141 (2000). It instead simply facilitates state and local officials' compliance with their already existing obligations. *See id.* at 150-51 (upholding a federal obligation placed upon state officials because it "does not require the States in their sovereign capacity to regulate their own citizens[,] . . . require the [State] Legislature to enact any laws or regulations, [or] require state officials to assist in the enforcement of federal statutes regulating private individuals.").

With regard to potential "frictions with other countries" over consular notification and access, the Department believes that compliance with the *Avena* decision and our consular notification and access obligations under the Vienna Convention and bilateral consular notification agreements – compliance which S. 1194 facilitates – will significantly reduce frictions with other countries stemming from oversights of such obligations. Indeed, as Chief Justice Roberts noted for the Supreme Court in *Medellín*, the United States has "plainly compelling" interests in complying with our treaty obligations here: "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." *Medellín*, 552 U.S. at 524.

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Questions from Senator Patrick Leahy:

1. **It has been asserted that there is no evidence that the United States' failure to comply with its treaty obligations under the Vienna Convention on Consular Relations has or will cause other countries to deny consular access to Americans arrested overseas, and as a result there is no need for legislation such as the Consular Notification Compliance Act of 2011. Is that assessment accurate?**

Answer: No, as discussed in detail in Under Secretary Kennedy's response to this question, failure to pass S.1194 would undercut the ability of U.S. consulate officers to provide consular assistance to American nationals detained abroad. As Attorney General Holder and Secretary of State Clinton stated in their letter to this Committee dated June 28, 2011, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." U.S. citizens have had the benefit of consular notification and access in North Korea, Iran, Burma, Syria, Libya, Pakistan and elsewhere. But if we expect other nations to honor their consular notification obligations to detained U.S. nationals, we must honor our obligations to those foreign nationals detained here in the United States. Thus, as the Supreme Court noted in *Medellín*, it is a "plainly compelling" interest "to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention." 552 U.S. at 524.

Failure to pass S. 1194 would also weaken our international law enforcement and counter-terrorism partnerships and our ability to insist that other nations follow the rule of law. The partnerships that the Department of Justice forms with its overseas counterparts are critical to the protection of U.S. citizens. But those partnerships are put directly at risk by the continuing non-compliance of the United States with the *Avena* judgment. For instance, in recent years the Government of Mexico has been extraordinarily cooperative with the Department of Justice in matters of special importance to the United States, such as the recent investigation of the murder of an ICE agent in Mexico. At the same time, however, the United States has failed to act on one of the key priorities of Mexico: compliance with the *Avena* judgment.

Beyond Mexico, a number of other nations with which we maintain strong law enforcement working relationships on organized crime, drug trafficking, and counter-terrorism currently have nationals in the U.S. who have been sentenced in capital cases, including Germany, Serbia, Spain, Honduras, El Salvador, Canada, France, and the United Kingdom, among others. Each of these countries would be in a position to make protests similar to those of Mexico in situations where their nationals had not received consular notification and access. Notably, Germany and the United Kingdom have lodged protests in the past regarding their nationals. We would like to eliminate the need for any such protests, as these are precisely the countries we rely on to further our own investigative priorities.

Our citizens will also be made less safe if it is perceived that – by failing to comply with our "international legal obligation" under *Avena* – the United States is not fully committed to the international rule of law. The Supreme Court in *Medellín* recognized this as a "plainly compelling" interest in complying with *Avena*: "demonstrating commitment to the role of international law." *Id.* at 524.

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2. What obligations regarding consular notification currently apply to the states and why? How would the Consular Notification Compliance Act of 2011 affect those obligations? Would it create new burdens on state law enforcement practices and judicial proceedings?

Answer: As discussed in detail in Under Secretary Kennedy's response to this question, the obligations of state and local officials to provide consular notification and access already exist. Indeed, they have existed for more than 40 years, since 1969 when the Vienna Convention and its protocol came into force, as well as under bilateral agreements. These obligations are regularly met through actions taken by law enforcement or detention officials based on the training and guidance provided by the State Department, including in publication *Consular Notification and Access*, as noted above. Section 3 of S. 1194 facilitates compliance with current obligations of the United States, and does not add to them.

3. What review has the Department of Justice provided the Consular Notification Compliance Act of 2011? How does the Department respond to the Federalism concerns regarding the constitutionality of the legislation identified in David Rivkin's testimony?

Answer: The Department is confident, based on an analysis of the issue by the Office of Legal Counsel, that the Consular Notification Compliance Act of 2011 is constitutional and raises none of the "commandeering" concerns raised by Mr. Rivkin. As noted above in our answer to questions from Senator Grassley, the Supreme Court invited this legislation in *Medellín*, and has long recognized Congress's authority to pass legislation like this bill, which facilitates implementation of our Vienna Convention treaty obligations. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 525-26 (2008). Reliance on the Tenth Amendment-based limitations articulated in the Supreme Court's "commandeering" cases, and invoked by Mr. Rivkin, is entirely misplaced. S. 1194 does not "compel the States to enact or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997), as S. 1194 establishes no "regulatory program." *See Reno v. Condon*, 528 U.S. 141 (2000). It instead simply facilitates state and local officials' compliance with already existing obligations. *See id.* at 150-51 (upholding a federal obligation placed upon state officials because it "does not require the States in their sovereign capacity to regulate their own citizens[,] . . . require the [State] Legislature to enact any laws or regulations, [or] require state officials to assist in the enforcement of federal statutes regulating private individuals.").

4. What impact will the Consular Notification Compliance Act of 2011 have on state and federal courts and habeas corpus proceedings?

Answer: The Department expects that Sections 3 and 4(b) of S. 1194 would have a minimal impact on law enforcement practices and judicial proceedings, and will not impose any undue burdens on states. Section 3 facilitates compliance with current obligations of the United States, and does not add to them. Moreover, Section 3 is designed to ensure that failure to afford consular notification – the issue that led to the *Avena* case – becomes a thing of the past.

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Section 4(b) of S. 1194 simply seeks to ensure that consular notification and access is afforded to foreign nationals who are facing federal or state capital charges when consular notification has not yet taken place. Upon an appropriate showing, the section provides that the court shall postpone proceedings to the extent necessary to allow adequate opportunity for consular access and assistance. Such a remedy – a continuance – is already available to a judge; S. 1194 merely makes clear that such a remedy is available under these limited circumstances. Any disruption to judicial proceedings should be minimal – the length of the continuance to afford notification and assistance. Notably, Section 4(b) makes clear that it does not create any additional judicially or administratively enforceable remedies.

As noted above in our answer to questions from Senator Klobuchar, we also believe that Section 4(a) – a retrospective remedy, designed to address the *Avena* decision – would not result in a substantial increased burden on the states or the federal government.

SUBMISSIONS FOR THE RECORD

July 27, 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, the undersigned, write to urge prompt consideration and passage of the Consular Notification Compliance Act, S.1194, legislation that would provide for review in capital cases involving foreign nationals who did not receive consular access while in U.S. law enforcement custody as required by the Vienna Convention on Consular Relations (VCCR). This legislation would ensure the reliable and accurate functioning of our domestic criminal justice system; give assurance and leadership to the international community regarding the commitment of the United States to the rule of law, thus protecting the interests and safety of our own citizens abroad; and bring the United States into compliance with its undisputed legal obligations pursuant to the International Court of Justice's (ICJ) decision in *Avena and Other Mexican Nationals.*

As you are well aware, millions of Americans rely on their right to consular assistance when traveling, serving in the military, working, and studying abroad. When needed, consular access helps guide Americans through foreign and, often times, complicated legal systems, safeguards our fundamental human and civil rights, and ensures overall protection for our citizens. For the U.S. to request compliance with the VCCR agreement from other countries, we must offer the same rights afforded to foreign nationals detained here in the United States.

Both at home and abroad, prompt access to consular assistance safeguards the fundamental human and legal rights of foreigners who are arrested and imprisoned. For that reason alone, it is essential that the United States lead by example and provide meaningful remedies for VCCR violations, especially in the most serious of cases. In addition, any further delay in compliance with *Avena* will leave the international community with the perception that the United States ignores its binding legal commitments. This is dangerous on many levels: it erodes our reputation as a reliable treaty partner; undermines the effectiveness of international mechanisms for the peaceful settlement of disputes; and, as mentioned above, could have a harmful impact on the millions of U.S. citizens who travel, live, or work abroad. As the State Department conceded more than a decade ago in an apology to Paraguay for the U.S.'s failure to comply with the VCCR in a case that resulted in the execution of a Paraguayan national, the United States "must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard."

The U.S.'s inaction on implementing the judgment of the ICJ endangers our citizens, harms the U.S.'s standing in the international community and clashes with our fundamental civil rights and values as a nation. We trust that this Congress will take this issue under serious advisement, and

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we urge you to pass S.1194 promptly in order to implement our obligation as soon as possible. The longer we wait to comply with this important agreement, the more danger we pose for our citizens living and traveling abroad and for the integrity of our own justice system. We thank you for your time and attention to this important matter, and we look forward to working with you in the near future.

Sincerely,

American Civil Liberties Union

Amnesty International USA

Human Rights Defense Center

Human Rights First

Human Rights Watch

Justice Now

Leadership Conference on Civil and Human Rights

National Association of Criminal Defense Lawyers

Safe Streets Arts Foundation

The Advocates for Human Rights

The Constitution Project

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Sunday, February 10, 2008

American Pastor being held in Russia for 60 days

Smuggling, trafficking charges brought against him

ANS NEWS STORY

By Dan Wooding
Founder of ASSIST Ministries

MOSCOW, RUSSIA (ANS) -- A South Carolina pastor detained in Russia early this week after bringing hunting bullets into the country while on a mission trip will be held in a prison there for 60 days while prosecutors investigate smuggling and trafficking charges against him.

A story written by Robert Morris of The Sun News, Myrtle Beach, South Carolina (www.myrtlebeachonline.com) said that after a formal hearing Friday in Moscow, Pastor Phillip Miles of Christ Community Church in Conway, South Carolina, will be moved from a temporary airport detainment facility to a prison for the investigation, according to David Aylor, Miles' nephew and a Charleston attorney.

Pastor Phillip Miles
(Photo from
www.myrtlebeachonline.com)

Two Russian attorneys are representing the pastor and the U.S. Embassy is monitoring the situation, but the case is essentially in the Russian prosecutors' hands for two months, Aylor said.

"He's at the mercy of the Russian justice system," Aylor said. "It's basically at a standstill at this point."

Morris said that if the case goes forward and Miles is convicted, he faces three to seven years in prison for the smuggling-ammunition charge or up to four years for trafficking in ammunition, said Nicole Thompson, a U.S. State Department spokeswoman.

He went on to say, "Miles' imprisonment began earlier this week as he prepared to return from a mission trip to the city of Perm, at the foot of a mountain range that borders Siberia. On his way into the country in late January, Russian authorities confiscated a box of hunting-rifle bullets, but allowed him to continue his trip."

"It was a something that was brought as a gift to the Siberian preacher," Aylor said. "It was something you or I could get from any local ammunition carrier in the United States."

On his way back through the Moscow airport this week, however, Miles was prevented from returning to the United States as Russian authorities questioned him further. Even after the newly imposed 60 days are up, prosecutors can ask for more time to investigate, Aylor said.

"While the church is disappointed with this temporary setback, we are encouraged that Pastor

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Miles' reputation of integrity and character will ultimately lead to his freedom," read a statement posted on the church's Web site. "Friends in Russia have told the church that his spirits remain high and that those around him have been very impressed with his attitude and demeanor during this difficult time."

The story said that there has been no indication that Miles' arrest is related to his missionary work, Aylor said. The Russian Orthodox Church is the dominant religion in Russia, and the State Department's 2007 report on International Religious Freedom describes a slight decline in some groups' right to worship in the country, but no particular pattern of harassment against foreign missionaries or evangelical groups was reported.

Because the U.S. Embassy is closely involved in the case, family members are not concerned that any harm will come to Miles in the prison, Aylor said. The pastor, who has a wife and three grown children in Horry County and other close family members throughout the state, has been able to call home since his arrest.

"Considering, he's in good spirits," Aylor said. "He's a man of faith. He knows the Lord will lead him through this."

Morris wrote, "Miles' arrest made the front page of the English-language daily Moscow Times, a 35,000-circulation newspaper read by expatriates in the city. The newspaper cites several other international smuggling cases - including those of Soviet-era medals, rare Soviet posters and a turn-of-the-century crucifix - none of which led to prison time."

"We all come up with crazy ideas for a gift," wrote Justin Miles, the pastor's son, in a letter to the Russian newspaper. "Please forgive my father for his mistake."

An updated posted on the church web site on Friday, February 8, 2008, at www.christcommunitychurchonline.com says:

"A formal hearing was held in Pastor Miles' case in Moscow on February 8th.

"At the hearing, the State requested that it be given an additional 60 days to complete its investigation of this case. The request was granted by the court. As a result, Pastor Miles will be held in jail in Moscow during the course of the investigation. While the church is disappointed with this temporary setback, we are encouraged that Pastor Miles' reputation of integrity and character will ultimately lead to his freedom.

"The United States Embassy in Moscow is monitoring this situation and has sent representatives to visit with Pastor Miles. They assure us that he is being treated well and remains in good physical condition. Friends in Russia have told the church that his spirits remain high and that those around him have been very impressed with his attitude and demeanor during this difficult time.

"This website will be updated any time we receive official news about the status of this case. If you hear or read anything about this case that contradicts information on this website, please disregard it.

"The church asks that you continue to remember Phillip and Lynn, their children and extended family, and the church body, in your thoughts and prayers."

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Dan Wooding, 67, is an award winning British journalist now living in Southern California with his wife Norma of 44 years. He is the founder and international director of ASSIST (Aid to Special Saints in Strategic Times) and the ASSIST News Service (ANS). He was, for ten years, a commentator, on the UPI Radio Network in Washington, DC. Wooding is the author of some 42 books, the latest of which is his autobiography, "From Tabloid to Truth", which is published by Theatron Books. To order a copy, go to www.fromtabloidtotruth.com. danjuma1@aol.com.

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Testimony of John B. Bellinger III
Partner, Arnold & Porter LLP
and Adjunct Senior Fellow in International and National Security Law,
Council on Foreign Relations

United States Senate Committee on the Judiciary
July 27, 2011

Mr. Chairman, Ranking Member Grassley, thank you for inviting me to appear before you today to address Senate Bill 1194, entitled the "Consular Notification Compliance Act of 2011."

I strongly support enactment of this important legislation. It will help protect Americans who travel around the world and are arrested in foreign countries. It will also enable the U.S. to comply with a treaty obligation that the U.S. Supreme Court unanimously recognized is legally binding.

I have been deeply involved for many years in the issues that are the subject of this legislation. I served as The Legal Adviser for Department of State from 2005-2009 in the second term of the Bush Administration and as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005 in the first term of the Bush Administration. I had previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice, so I also bring a criminal justice perspective to this discussion.

I will begin by reviewing the history of the international dispute that has led to this proposed legislation. I believe the context is important and instructive, and the legislation before the Committee needs to be considered in light of this history. I will then explain the very practical benefits that enactment of this bill will have for Americans who are detained and imprisoned by other countries.

The Administration of President George W. Bush has never been accused of an irrational exuberance for international law and international courts. Nonetheless, in 2004, after the International Court of Justice (ICJ) ruled against the United States in the *Case Concerning Avena and Other Mexican Nationals*, the Bush Administration took notice and took a series of steps spanning the next four years to ensure that the U.S. Government complied with the decision.

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In *Avena*, the ICJ ruled that the U.S. must review the convictions and sentences of 51 Mexican nationals who had been convicted of capital murder in Texas and several other states, but who had not been notified by state law enforcement officials of their right under the Vienna Convention on Consular Relations (VCCR), a treaty to which the United States is a party, to have a Mexican consular official notified of their arrest.[1] The Bush Administration worked hard to comply with the *Avena* decision, not because of any special desire to please our Mexican neighbor or a lofty commitment to international tribunals or vague principles of international law, but because it is a binding legal obligation and complying with it is important to protect Americans who travel in other countries.

The Vienna Convention on Consular Relations is one of the most important international treaties to which the United States is a party. [2] The U.S. Senate unanimously approved the Convention in 1969 upon the strong recommendation of then President Richard Nixon. Among other things, the VCCR provides legal rules for countries to help their citizens and nationals who travel or conduct business in foreign countries. In particular, Article 36(1)(b) of the VCCR requires a party to the treaty that detains or arrests a national of another party to the treaty to promptly inform that national of his or her right to meet with a consular official of his or her own state. [3]

This right of consular notification and access is vitally important for Americans, several thousand of whom are arrested in foreign countries each year, sometimes on trumped -up charges. If requested, State Department officials visit these individuals in prison, help them retain lawyers, and relay information to their families.

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[1] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 64 (March 31) ("[T]he appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals.").

[2] Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, *entered into force* March 19, 1967.

[3] Article 36(1)(b) provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

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The VCCR is important not just for American tourists but also for American multinational businesses, which have a very large number of U.S. national employees who travel and live abroad, including in countries with poor rule of law records and abusive governments. For these businesses, the VCCR provides critical protections for their employees should they be arrested or detained. Every constituent of every member of this Committee benefits from having the international legal right of consular notification.

The United States has long recognized the importance of seeking to ensure U.S. compliance with VCCR in order to strengthen our position when Americans are detained in foreign countries. The Department of State, which helps Americans overseas, tries extremely hard to ensure that all federal, state, and local law enforcement authorities are aware of the U.S. obligation to inform any foreign nationals they arrest of their right to meet with a relevant consular official. Despite these efforts, in our large country with a federal system, it has proved impossible for the federal government to ensure that every state official with custody of a foreign national remembers to ask arrested persons if they are foreign nationals and similarly doesn't always inform them of their right to consulate with a consular officer from their country. This is what happened in the cases of the 51Mexican nationals covered by the *Avena* decision.

When I moved from the White House to the State Department with Secretary of State Condoleezza Rice in late January 2005, one of the first international legal challenges we confronted was how to comply with the *Avena* decision, given that the Mexican nationals covered by the decision were barred by state law from pursuing more appeals. We also recognized then, and I recognize now, that these Mexican nationals had been tried and convicted for horrific murders, and that the families of the victims had waited many years for closure.

The United States disagreed with the decision of the ICJ, which had interpreted the Vienna Convention and interfered in our domestic criminal justice system in ways we had not anticipated in 1969 when the U.S. became party to the treaty. Nevertheless, once the ruling was issued, it was absolutely clear to the Bush Administration that as a matter of treaty law the U.S. was required to comply with the ICJ's ruling. Under Article 94(1) of the U.N. Charter, which was approved by the U.S. Senate in July 1945 by a vote of 89-2, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case in

which it is a party."[4] With the consent of the Senate, the United States had given our legally binding commitment to other countries that we would comply with the rulings of the ICJ.

Contrary to some public perceptions that it was not committed to international law and held international courts in disdain, the Bush Administration took the U.S. obligation to comply with the ICJ's decision very seriously. In particular, Secretary Rice, as the Executive branch official responsible for the diplomatic protection of Americans when they travel outside the United States, believed that it was vitally important for the United States to make every effort to vindicate the right of consular notice required by the Vienna Convention in order to ensure that Americans who are detained or arrested in foreign countries are notified of their consular rights.

Bush Administration officials engaged in extensive internal discussions about options to comply. The Administration considered asking Congress to pass legislation to give federal courts jurisdiction to hear claims by the Mexican nationals that they had been prejudiced by the lack of consular notification. But, at the time, the Administration concluded that, even with Administration support, Congress would be unlikely to pass legislation before Texas executed the first Mexican, Jose Medellin.

President Bush decided, therefore, that the most effective way for the United States to comply with the decision of the ICJ would be for him to issue an order directing state courts to do so. This decision was based on the need to comply with our international obligations and our concern for the safety of Americans abroad.

This decision cannot have been an easy one for President Bush, especially since 15 of the Mexican nationals had committed murders in his home state of Texas. President Bush was a former governor of Texas, a staunch believer in states' rights, and a supporter of the death penalty. Most Texans strongly opposed giving any further appeals to Mexicans who had been convicted of grisly murders. Jose Medellin, in particular, had been convicted of raping and murdering two teenage girls and strangling one of them with her own shoelaces.

Nevertheless, on February 28, 2005, President Bush sent a memorandum to the Attorney General providing:

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[4] U.N. Charter art. 94, para 1.

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> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[5]

At the same time, President Bush decided that the United States should withdraw from the Optional Protocol to the VCCR, which gave the United States and other countries the right to bring cases to the ICJ relating to breaches of the Convention. The President made this decision in order to protect the U.S. against future ICJ judgments that might similarly interpret the VCCR in ways that might interfere with the U.S. criminal justice system. Accordingly, on March 7, 2005, Secretary Rice notified U.N. Secretary General Kofi Anan that the U.S. was withdrawing from the Protocol.

Unfortunately, Texas refused to comply with President Bush's order, claiming that he had acted unconstitutionally. In 2006, the Texas Court of Criminal Appeals ruled that the President's memorandum did not constitute "binding federal law."[6] The Supreme Court granted certiorari and invited the U.S. Government to submit its views. The Bush Administration staunchly defended the constitutionality of the President's decision in a brief that I helped to write.

In March 2008, the Supreme Court affirmed the decision of the Texas Court of Criminal Appeals. The Court held that neither the ICJ's *Avena* decision nor President Bush's memorandum constituted directly enforceable federal law that pre-empted state law limitations on successive habeas petitions. [7]

Although the Court held that the *Avena* decision is not directly enforceable under U.S. domestic law, it is important to emphasize that the Supreme Court *unanimously* concluded that the *Avena* decision constitutes a binding international law obligation on the United States. In his opinion for the Court, Chief Justice

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[5] President's determination (Feb. 28, 2005) regarding U.S. response to the Avena decision in the ICJ, *available at* http://www.state.gov/s/l/2005/87181.htm.

[6] *Ex parte Medellin*, 223 S.W. 3d 315, 352 (Tex. Crim App. 2006).

[7] *Medellin v. Texas*, 552 U.S. 491, at 498-99 (2008).

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Roberts specifically stated: "No one disputes that the *Avena* decision...constitutes an *international* law obligation on the part of the United States."[8] Moreover, the Court acknowledged that President Bush had sought "to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" and concluded that "that these interests are plainly compelling.[9]

In short, although the Supreme Court held that President Bush lacked authority under the Constitution to order state courts to comply with the ICJ's *Avena* ruling, the Court recognized that the ICJ's decision was a binding international legal obligation on the United States and that the U.S. has a "plainly compelling" interest in complying with the ICJ's decision in order to ensure "reciprocal observance of the Vienna Convention."

Even after the Supreme Court's decision, the Bush Administration did not cease its high-level efforts to comply with the ICJ's decision. On June 17, 2008, Secretary Rice and Attorney General Mukasey wrote a letter to Texas Governor Rick Perry asking that Texas provide review and reconsideration of the convictions and sentences of the Mexican nationals on death row in Texas covered by the *Avena* decision. Governor Perry responded in a letter dated July 18, 2008 that if any individual covered by *Avena* "has not previously received a judicial determination of his claim of prejudice under the Vienna Convention and seeks such review in a future federal habeas proceeding, the State of Texas will ask the reviewing court to address the claim of prejudice on the merits."[10] State Department officials flew to Texas to urge Texas officials to comply with the *Avena* decision. I personally wrote to the Presiding Officer of the Texas Board of Pardons and Parole to ask that the Board consider whether the lack of consular notification had prejudiced Jose Medellin's legal defense.

On June 5, 2008, Mexico commenced a new legal action against the United States in the International Court of Justice, claiming that the U.S. had misinterpreted the ICJ's original *Avena* decision to impose an "obligation of

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[8] *Id.* at 504.

[9] *Id.* at 524.

[10] Letter from Rick Perry, Governor of the state of Texas, to Condoleezza Rice, United States Secretary of State, and Michael Mukasey, United States Attorney General (July 18, 2008), *available at* http://www.state.gov/documents/organization/138804.pdf.

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means" but not " an obligation of result" because the federal government had tried but failed to prevent Texas from moving ahead with the execution of Jose Medellin.[11] The United States told the ICJ that it did not dispute Mexico's argument that *Avena* imposed an obligation of "result" on the U.S., and that the federal government was continuing to work tirelessly to achieve this result.[12] I personally argued the case for the United States before the ICJ in the Hague. On July 16, 2008, the Court issued a "provisional measures" order -- the equivalent of an injunction -- directing the United States to ensure that Jose Medellin, Humberto Leal, and three other Mexican nationals were not executed unless their convictions and sentences were subject to the review and reconsideration mandated by the *Avena* decision.[13]

Despite the request of Secretary Rice and Attorney General Mukasey and the ICJ's provisional measures order, Texas executed Jose Medellin on August 5, 2008 without providing additional review and reconsideration of his conviction and sentence.

On January 19, 2009, the day before President Obama's inauguration and my last full day as State Department Legal Adviser, the ICJ issued its final decision in Mexico's new claim against the United States. I was present at the Court for the reading of the judgment.[14] The Court agreed with the United States that there was no disputed interpretation of the *Avena* judgment and therefore rejected Mexico's request for an interpretation of that judgment. However, the Court found that the United States had violated the Court's provisional measures order because Texas had executed Medellin.[15]

In sum, the Bush Administration worked diligently -- and at high-levels, starting with President Bush himself -- for all four years of its second term to comply with the ICJ's *Avena* decision, even though doing so was domestically

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[11] Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 ,(Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (Jun. 5, 2008).

[12] *See* Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (Aug. 29, 2008)

[13] Order, Request for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (July 16, 2008)

[14] *See* "An International Treaty Congress Should Support," *Washington Post*, March 4, 2011 (copy attached)

[15] Request for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. 3 (Jan. 19)

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unpopular. I was surprised that the Obama Administration did not make compliance with this international obligation a higher priority during its first two years, but it is right to support the proposed legislation now.

I strongly support passage of Senate Bill 1194, the "Consular Notification Compliance Act of 2011."[16] This legislation would enable the United States to comply with the *Avena* decision with respect to the remaining Mexican nationals covered by the decision and still on death row in Texas and other states. As a nation founded on and committed to the rule of law, our government should take its international law obligations seriously. Under Article VI of the Constitution, "all Treaties made... under the Authority of the United States, shall be the supreme Law of the Land." This does not mean that the United States should become party to every treaty or adhere to every principle that other countries or scholars claim is "customary international law." As the former Legal Adviser of the State Department, I fully understand that there are many principles that others claim to constitute "international law" that the U.S. does not accept. But the *Avena* decision does not fall into that category. The U.S. has a clear treaty-based legal obligation to comply with the *Avena* decision, even if the decision surprised us and we do not agree with it. The Senate accepted this obligation when it gave its advice and consent to the U.N. Charter.

Complying with the *Avena* decision is especially important because it involves the vital right of consular notification and access required by the Vienna Convention on Consular Relations. This right is not a gracious favor that we give to foreigners because we believe in liberal principles of international law and world government. This right is critical for Americans who travel to foreign countries for business or pleasure and who may be arrested or detained. It is a matter of survival for many who are imprisoned in far-off lands without anyone to help them but a U.S. consular officer.

Mr. Chairman and members of the Committee, if a constituent of any member of Congress is arrested or detained in a foreign country (whether it is in Mexico or Syria or Sudan), I am sure that member would want that constituent to be told of his or her right to have a State Department official notified and visit. And if a foreign country fails to provide notice and access, Congress will expect the State Department to complain vigorously to the foreign government for violating its treaty obligations. I am sure that if a Texan is arrested in Mexico or

[16] I have some technical suggestions that I can communicate separately to the Committee.

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some other country, Texas officials would want that individual to be told of his right to consular notification. I simply do not see how we can reasonably expect other countries to comply with their treaty obligations to us, if we do not comply with our treaty obligations to them.

I am sometimes asked if there will be any real practical effect if the United States does not comply with the *Avena* decision. I cannot tell you with certainty that Mexico or any other country is likely to stop giving consular notice to Americans starting tomorrow. But I can say with confidence that when the United States does not comply with our treaty obligations to provide consular notice (or to provide a remedy when we have failed to do so), it makes it much harder for the State Department to complain if Mexico or any other country fails to give consular notice and access to our nationals.

Earlier this year, Pakistan arrested CIA official Raymond Davis and refused to release him even though he had diplomatic immunity under the Vienna Convention on Diplomatic Relations, another vital international treaty to which the U.S. is a party.[17] Some members of Congress wanted to cut off foreign assistance to Pakistan unless Pakistan released Mr. Davis. Although a different treaty was involved, the principle of reciprocity is the same: it is difficult to insist that other countries honor their treaty obligations to our nationals, if we do not comply with our obligations to them.

Mr. Chairman, I applaud your efforts and those by other supporters of this legislation. The protection of American citizens abroad is and will always be a major issue for the United States.

In closing, let me re-iterate that the Bush Administration worked extremely hard to comply with the U.S. international law obligation under the *Avena* decision, even though it was politically unpopular to do so. We did so in order to uphold a legal obligation unanimously recognized by our Supreme Court and to ensure reciprocal protections for Americans under the Vienna Convention -- a rationale that the Supreme Court found to be "plainly compelling."

For the same reasons, I urge this Committee to approve, and the Senate and Congress to pass, the Consular Notification Compliance Act.

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[17] Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, Apr. 18, 1961, *entered into force* Apr. 24, 1964.

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Attachment:

"An International Treaty Congress Should Support," *Washington Post*, March 4, 2011

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The Washington Post

An international treaty Congress should support

By John B. Bellinger III
Friday, March 4, 2011;

About two years ago, while many Americans were watching President Obama's inauguration and my former colleagues in the Bush administration were cleaning out their offices, I was flying home from The Hague, where the International Court of Justice had just ruled against the United States in a case I had argued. The 15-judge court said that the United States had violated international law by allowing Texas to execute Jose Medellin, a Mexican national who had been convicted of the grisly rape and murder of two young girls, but who had not been given access to the Mexican Embassy at the time of his arrest. It ordered the United States to review the capital murder convictions of 50 other Mexicans.

Although many conservatives have criticized the World Court for infringing on American sovereignty, all Americans should want President Obama and the 112th Congress to comply with the court's decision, to help ensure that Americans arrested abroad are given access to State Department officials.

The court's 2009 ruling involved 51 Mexican nationals, all of whom had been convicted and sentenced to death for heinous crimes in this country. None of them had been told at the time of their arrests about their right to meet with a Mexican Embassy official, as required by the Vienna Convention on Consular Relations.

The Vienna Convention, one of the most important international agreements to which the United States is party, was unanimously approved by the Senate in 1969 on the recommendation of then-President Richard Nixon. The convention provides legal rules for countries to help their companies or citizens who travel to or conduct business in foreign countries. A key provision requires parties to the treaty to promptly inform, upon arrest, nationals of other parties to the treaty that they have the right to meet with a consular official. Several thousand Americans are arrested in foreign countries every year, sometimes on trumped-up charges; this provision helps them alert their families, retain lawyers and receive help from the U.S. government.

In this instance, Mexico had brought a legal action before the International Court of Justice in 2003, claiming that the United States had violated the Vienna Convention. In 2004, the court ordered Washington to review the convictions of the 51 Mexicans to determine whether their lack of consular access had prejudiced their legal defenses. Under the U.N. Charter, which the Senate overwhelmingly approved in 1945, the United States is obligated to comply with the decisions of the World Court.

In 2005, to the surprise of liberals and conservatives, President George W. Bush directed state courts to review all of the Mexican convictions to comply with the U.N. Charter and ensure that Americans detained abroad receive reciprocal protections of the Vienna Convention.

The state of Texas challenged Bush's order, claiming that its former governor had exceeded his constitutional authority. In 2008, the U.S. Supreme Court agreed with Texas. In an opinion by Chief Justice John Roberts, while the court unanimously held that the United States has both an obligation under international law to comply with the World Court's decision and acknowledged a "plainly compelling" interest in ensuring reciprocal observance of the Vienna Convention, the court concluded that the U.S. Constitution does not give the president power to order state courts to review criminal convictions, even in an effort to comply with U.S. treaty obligations. Congress, the justices said, must give the president specific statutory authority to do so.

After the Supreme Court's decision, Texas promptly executed Jose Medellin, which led to the World Court decision in January 2009 that the United States had violated the World Court's previous order.

In contrast to the Bush administration, the Obama administration has made less visible efforts to comply with the World Court rulings. The White House has not asked Congress for legislation authorizing the president to order review of the convictions of the remaining Mexican nationals, presumably because it is not popular to side with an international tribunal in favor of a group of convicted murderers. The next execution is scheduled for July.

Although Republicans might not be eager to cooperate with President Obama, legislators should craft a narrow law authorizing the president to comply with the World Court ruling. Even if they are skeptical of vague principles of international law, House Republicans should recognize that U.S. compliance with the Vienna Convention is vital. Members of Congress condemn other countries who fail to comply with their treaty obligations to the United States in cases of consular access and diplomatic immunity. But lawmakers cannot expect other countries to comply with their treaty obligations to us unless the United States observes its treaty obligations to them. Congress and the president must ensure that the United States observes the Vienna Convention not as a favor to foreigners but because it serves a "plainly compelling" national interest in protecting Americans who travel and American companies that operate in foreign countries.

The writer is a partner at Arnold & Porter LLP and an adjunct senior fellow in international and national security law at the Council on Foreign Relations. He served as legal adviser for the State Department from 2005 to 2009.

THE SECRETARY OF STATE
WASHINGTON

JUL 27 2011

The Honorable Lindsey Graham
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Graham:

I write to urge your strong support for the Consular Notification Compliance Act, S. 1194, a bill that was carefully crafted in consultation with the Departments of State and Justice, and is fully supported by this Administration. The bill's enactment is crucial to the preservation of our international law enforcement, security, and other critical bilateral and multilateral interests, but I want to underscore how vital the bill is to the ability of the United States to protect American citizens who find themselves in the custody of a foreign government.

The State Department has no greater responsibility than the protection of the millions of U.S. citizens who live and travel overseas, whether for business or pleasure, to study, or to serve in our Armed Forces. Through the international system of consular assistance—a system that has evolved over centuries and is reflected today in numerous binding U.S. treaties—foreign governments are obligated to allow U.S. consular officers access to our citizens when they are detained for immigration reasons, imprisoned on criminal charges, or otherwise fall in foreign custody. Last year alone, our consular officers conducted more than 9,500 consular visits, and assisted more than 3,500 Americans detained abroad, helping them receive food and medical assistance, communicating with their families, and providing them with information regarding foreign legal systems and how to access legal counsel.

In return for such essential access, the United States has committed by treaty—the Vienna Convention on Consular Relations and other bilateral consular conventions—to permit foreign officials to provide the same assistance to their own citizens who are arrested here. This protective system of consular assistance depends on mutual compliance by the United States and our treaty partners. If the United States fails to honor our legal obligations toward foreign nationals in our custody, the fabric of this protective system erodes, and ultimately it is your constituents who will be harmed.

A recent case illustrates that, even in the most challenging of circumstances, where it is imperative that we secure consular access, our treaty relationships have preserved the United States' ability to access and protect our citizens. In that case, an employee of the U.S. Embassy in Pakistan was arrested and detained on criminal charges by Pakistani authorities. The United States insisted on securing access, as required under the Vienna Convention, and ultimately our consular officials were able to access the individual and he was released.

In another recent case, a U.S. citizen was arrested for overstaying his visa and immediately detained at one of the worst prisons in Zimbabwe. Through contacts in the country's prison system, the Embassy quickly heard about the case and facilitated his return to the United States within 48 hours. Two weeks later, the Embassy also received a diplomatic note from the Ministry of Foreign Affairs notifying the Embassy of the arrest. Without good foreign government contacts and effective work by the Consular Section, this American citizen would have spent considerable time in terrible conditions.

In a globalized world, your own constituents travel and live overseas in ever increasing numbers, and many have found themselves in need of consular assistance—sometimes in a country with few rights or due process protections. In the past five years alone, our consular officers have visited at least 33 individuals from your state in foreign custody, and provided other forms of assistance to many more.

We cannot fully protect our citizens, including your constituents, unless we do our part to ensure that our treaty partners in turn can provide their citizens with consular assistance. The subject of today's hearing—the Consular Notification Compliance Act—is a carefully crafted piece of legislation designed for that purpose. The bill outlines practical steps for federal, state and local authorities to comply with consular notification rules, creates limited backstops to ensure that consular notification and access are provided in a timely fashion, and in a very small number of past cases, gives foreign nationals the chance to prove to a court that they were actually prejudiced by not having been given the opportunity for consular assistance.

Swift enactment of this bill would serve our critical interests – also recognized by the prior Administration – in protecting American citizens, preserving our foreign policy relations, and abiding by vital treaties to which the Senate has advised and consented. For that reason, I join the Department of Justice

and the rest of the Administration in urgently calling on you to help enact this narrow and essential legislation.

Sincerely,

Hillary

Hillary Rodham Clinton

Testimony of Clare Gillis
Freelance Journalist
New Haven, CT

Senate Judiciary Committee
"Fulfilling Our Treaty Obligations and Protecting Americans Abroad."

I was working as a freelance journalist in eastern Libya, reporting for The Atlantic and USA Today, among other publications, when I learned what it was like to be a prisoner. On April 5, 2011, I was with three other journalists at the front line when we came under fire from Qaddafi's troops. One of our party, the South African Anton Hammerl, received what we believe were fatal wounds, and the rest of us were captured. The soldiers punched us and hit us with the butts of their rifles, tied our hands behind our backs and threw us in the back of their pickup truck. We were blindfolded and interrogated several times - one of my sessions lasted for six hours. We went before prosecutors and judges with only a translator to assist us. Our requests for a lawyer were not honored. Our captivity lasted for 44 days, when we were finally freed, with the stipulation that if we were to be caught again by Qaddafi's forces, we would have to spend a year in prison.

As we lay awake at night, we listened to NATO planes and the bombs they dropped, occasionally feeling the building shake with their impact. We knew that we were being detained in a military facility, and worried that the bombs could even be targeting our building. We wondered if anyone knew where we were, or even that we were alive. Our guilt at what we were putting our families through back home was tempered only by fear - we did not know if the Libyans were acknowledging that we were in their custody, and especially since we had witnessed the murder of a civilian, we assumed we were at the mercy of our captors.

We also wondered who could possibly secure our release. We were two US citizens and one Spanish. The US embassy in Tripoli closed up shop February 25th, the day that I had crossed the Egyptian border to enter the rebel-controlled eastern part of the country. Based on the example of the New York Times team which had been captured in circumstances very similar to ours a month earlier, and whose release was eventually secured by the Turkish embassy, since they were the protecting power for US citizens in Libya, it seemed that the Turkish embassy would be the ones to step in.

Indeed, when I was finally allowed a phone call, after being held for 16 days, my mother asked me if the Turks had visited me. I hadn't even known that they were trying, but it was tremendously reassuring to hear my mother tell me that the State Department was putting great efforts into my case even though they were no longer on the ground in Libya. I also learned that our media outlets were working more than full-time to publicize our case, which was especially gratifying because as a freelancer, I had assumed that I would be more or less on my own. When we were eventually transferred to a private guesthouse and had access to television, we watched with dismay as the news was broadcast that the Turkish embassy in Tripoli had also closed. Who is looking after our case now? we wondered.

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After 35 days we received a surprise visit: the Hungarian ambassador and consul, and the Spanish deputy ambassador. Upon the departure of the Turks, the US State Department enlisted the Hungarians as the protective power for US citizens in Libya. Within several days, they managed to secure access to visit us. Consular access is vital for people in our situation: they were able to get a sense of how we looked and acted, if we were being treated well, and we hoped, though we could not know for sure, that they would be able to inform NATO pilots of our location so that we would not suffer friendly fire.

When we went before the judge and got formally released, we still had no permission to be in the country: the charges that we were held on were illegal entry, since we had entered through the rebel-controlled eastern border and did not have Tripoli-issued visas, and reporting without permission from Tripoli. And we still had to get out.

The Hungarians managed to get our passports back from the Libyans, and they drove us through the dozen or so checkpoints to the Tunisian border. There they waited with us for three and a half hours as border officials struggled with paperwork to let us pass.

Without consular access, I do not know when we would have been released or who would have negotiated the delicate process of actually getting us to that border.

If the US continues to ignore its obligations under the Vienna Convention on Consular Relations, that makes it easier for foreign governments to ignore their obligations to imprisoned American citizens abroad. If we expect other nations to take our concern for human rights seriously, we should honor the terms of a treaty we have already signed.

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LINDSEY O. GRAHAM
SOUTH CAROLINA

290 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-6972

UNITED STATES SENATE

April 23, 2008

To Whom It May Concern:

As you may be aware, Pastor Phillip Miles of Conway, South Carolina was recently arrested in Moscow for bringing into the country 20 hunting rifle shells. As a result, he has been convicted of smuggling ammunition and sentenced to more than three years in prison. After a thorough review of the case, it is clear Pastor Miles has broken Russian law but I am concerned that the punishment is disproportionate to the crime. I am hopeful that you will consider my request to reexamine this case and find a more fitting manner in which to reprimand Pastor Miles.

Although the United States does not require special permission for storage and transportation of ammunition, Pastor Miles advised airport personnel in the U.S. that he was carrying hunting shells. At the time, he was unaware that he needed to declare the shells upon arrival in Russia. When stopped at customs in the Shermentyevo Airport, he readily admitted bringing the ammunition in his luggage, stating that they were intended as a gift for his friend, Pastor Eduard Grabovenko. It was immediately confirmed by officials at the airport that Pastor Grabovenko has a properly registered hunting rifle that is the same caliber as the shells that were brought by Pastor Miles. After confirming that the English language sign at customs did not list shells or bullets as items that needed to be declared separately, customs agents kept the shells, stamped Pastor Miles' passport and allowed him to continue on his trip to Perm, Siberia. Upon his return trip from Perm to Moscow on February 3rd, Pastor Miles was detained, arrested, and charged with smuggling ammunition and unlawful transportation of ammunition. He has remained in prison since that time.

Pastor Miles was convicted of both the smuggling and transportation of ammunition charges. The smuggling charge requires proof of intent of the party to knowingly violate Russian law by bringing illegal materials into the country, or by bringing otherwise legal materials into the country in an illegal manner. Pastor Miles was sentenced to three years in prison for this crime, despite the fact that not a single witness testified at trial that Miles had any knowledge of Russian law on this issue. The transportation conviction resulted in a two month sentence, which represents the time Pastor Miles served in prison while awaiting his trial. Pastor Miles never denied his possession of the shells and was ready to accept any sentence resulting from this charge. Pastor Miles and his attorneys are currently in the process of appealing the smuggling decision.

After twenty seven years of service to his community and the church, Pastor Miles has a history of physical disability, which has caused him significant pain during his imprisonment. He has had two major spine surgeries and has significant trouble with his back. Additionally, Pastor Miles has severe arthritis in his shoulder and hip and is completely deaf in his right ear as a result of surgery to remove a tumor. Since his imprisonment these health issues have become worse and taken a significant toll on his overall health.

Pastor Miles has an exceptional record of humanitarian efforts in the United States and Russia. Under Pastor Miles' leadership, Evangel Fellowship International has given over $11 million in medical equipment, supplies, and medicine to hospitals in Siberia since 1991. It's important to know that he is

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held in very high regard in South Carolina and while he is guilty of poor judgment, Pastor Miles never intended to break a Russian law, and certainly never intended to smuggle anything.

The Russian Criminal Code sets out factors to be considered in the sentencing of persons convicted of crimes. Among the factors to be considered are the history of the convicted, his physical health, his reputation, whether he has a family, and the threat he poses to society. Each of these factors strongly supports a reduction of his sentence and reconsideration of the smuggling conviction. Pastor Miles has already been imprisoned for over 80 days for the innocent mistake of failing to declare a single box of hunting shells. I hope the time served will be seen as an appropriate punishment for Pastor Miles actions.

I greatly appreciate your attention to this matter. Please don't hesitate to call me should you have any questions regarding Pastor Miles.

Sincerely,

Lindsey O. Graham
United States Senator

June 28, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future

violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the *Avena* problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

The Honorable Patrick J. Leahy
Page Three

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Hillary Rodham Clinton
Secretary of State

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Statement of Under Secretary Patrick F. Kennedy

U.S. Department of State

Before the

United States Senate

Regarding S. 1194, the Consular Notification Compliance Act Committee on the Judiciary

July 27, 2011

Good morning, Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee. I appreciate the opportunity to testify today on the proposed Consular Notification Compliance Act. We need swift enactment of this bill to ensure our ability to protect our own American citizens who are detained in a foreign country, to preserve vital international relationships, and to honor our binding treaty obligations.

Secretary Clinton has asked me to underscore that she vigorously supports this bill. She has submitted a statement, which you have before you, that is appended to my written testimony.

The protection of U.S. citizens abroad ranks among the Secretary's and the Department's absolute highest priorities. Senators, all of you have constituents who travel and live overseas. Your constituents are among the 4.5 million Americans who live abroad, the estimated 60 million who traveled abroad last year and the 103 million who hold passports – all of whom depend on consular protections, as much as they depend on passports and visas, to ensure their safe passage through foreign countries. To protect Americans in foreign custody, the Vienna Convention on Consular Relations – a binding U.S. treaty – mandates three simple rules: "ask, notify, and allow access." Arresting authorities must first *ask* detained foreign nationals if they want their country's consulate notified; if requested, must *notify* the consulate; and, must *allow access* if the consulate seeks to provide assistance. Thus, our ability to secure safe worldwide travel for the millions of Americans who live, work, study, and vacation abroad depends vitally

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on all countries granting mutual respect to the protective rules in the Vienna Convention.

Mr. Chairman, some have asked "why pass this bill, and why pass it now?" For three reasons: to preserve reciprocal treatment for U.S. citizens detained overseas, to protect our vital foreign policy interests, and to maintain our reputation as a country that values and respects the rule of law.

First, the Consular Notification Compliance Act is essential to ensuring that we will be able to protect American citizens. Without guaranteed consular assistance, Americans cannot travel the world freely, safely, and with peace of mind, whether for tourism, business, education, family matters, military service, or countless other activities. In 2010 alone, consular officers conducted more than 9,500 prison visits, and assisted more than 3,500 Americans who were arrested abroad. But the United States cannot ensure that it will be allowed consular access to our citizens abroad – to provide information on foreign legal systems, to facilitate communication with families, and to provide needed medical assistance – unless it ensures that foreign governments have the same access to their citizens detained here. We strive to ensure U.S. compliance with consular notification because of our strong interest in ensuring that other countries comply with their obligations with respect to our citizens.

Ensuring protection of citizens in foreign countries has been a time-honored component of government-to-government relations for centuries. Our consular notification and access obligations are part of a *system* that requires reciprocal compliance. We have vital interests in ensuring that other countries comply with their obligations when they arrest and imprison our citizens, and a reciprocal legal duty to ensure that we also comply. To ensure that mutual respect, securing protection for Americans through an international treaty system of consular assistance has been a high priority for both Republican and Democratic Administrations since the system's inception.

The Vienna Convention, an extraordinarily important treaty, was signed by a Democrat – President Kennedy – in 1963, and transmitted to the Senate by a Republican – President Nixon – in 1969. It was ratified the same year with this body's unanimous approval. When the Senate gave its advice and consent, the

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United States announced a view that continues today, that the treaty's consular notification regime is capable "of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[1] For over forty years, this treaty, which has been ratified by almost all the world's countries, has been the law of the land in the United States, imposing binding obligations across the board on all federal, state, and local authorities.[2]

In the United States, federal, state and local law enforcement officials have in most cases been upholding these obligations for decades, informing foreign nationals, notifying their country's consulates, and allowing them to make prison visits to their citizens in detention. Within the federal government, this has long been standard operating procedure for all relevant actors: including Homeland Security (U.S. Customs and Border Patrol and U.S. Immigration and Customs Enforcement), the FBI, federal prosecutors, Alcohol, Tobacco and Firearms, the Secret Service, the DEA, the U.S. Marshals Service, the IRS Criminal Investigation Division, and the U.S. Postal Inspection Service. State and local law enforcement also routinely provide consular notification and access, and for over a decade, the Departments of State and Justice have worked closely with federal, state and local authorities to ensure that they ask, notify, and allow access.[3]

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[1] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. EXEC. DOC. E, 91st Cong., 1st Sess., at 60 (1969).

[2] The United States also has concluded dozens of bilateral agreements that likewise guarantee the right of U.S. consular officers to assist Americans imprisoned abroad. These agreements are also binding domestic law, and federal, state, and local authorities are obligated to comply with them.

[3] The Department of State alone has distributed over a million sets of briefing materials on consular notification and regularly conducts training sessions all over the country. Our Consular Notification and Access Manual anchors our outreach efforts and has become a valued resource for federal, state and local law enforcement officers. That manual explains the very simple and practical steps that should be taken to fulfill consular notification and access requirements in real-world contexts. The manual provides comprehensive guidance to law enforcement officials, practitioners, and academics; includes sample consular notices in 21 different languages; and sets forth draft guidelines and standard operating procedures that federal, state, and local entities are encouraged to adopt and adapt. The Department also distributes pocket cards and training videos for law enforcement personnel on consular notification and access, maintains comprehensive and up-to-date information on consular notification on its publicly-available website, www.travel.state.gov/consularnotification, and even has a consular notification Twitter page – now followed by 1,217 organizations and individuals.

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Overseas, other countries likewise respect our citizens' consular rights. Our consular officers work unflaggingly to ensure the safety and welfare of U.S. citizens in foreign custody, performing thousands of prison visits annually on behalf of Americans from all over the United States. When foreign governments fail to provide us with notification or refuse our requests to visit and assist an imprisoned American, we remind them of their obligations under the Vienna Convention, and in most cases, this is enough to secure access.

We find these protections particularly critical for the men and women serving in our Armed Forces, and their overseas dependents. The Department of Defense considers consular access very important for U.S. service members and their families, and the Department expects its personnel who are detained abroad to be able to benefit from a range of assistance from our consulates. In addition, it is in the Defense Department's interests for foreign military personnel who may be arrested or otherwise detained in the U.S. to receive prompt access to their own consulates, in order to ensure that reciprocal protections are also afforded to U.S. personnel who may be detained abroad.

Senators, each of you has faced the traumatic experience of having a constituent detained overseas. In such circumstances, Americans often have nowhere to turn but the consular system. When a U.S. citizen finds him or herself in a foreign government's custody, a consular officer is often the best, and sometimes only, resource that citizen has as he or she navigates a foreign legal system. These consular services are extensive and indispensable. Consular officers provide basic information about a country's legal system and give valuable information on how to find a lawyer. Consular officers conduct regular visits and report back to Washington any mistreatment or poor conditions of detention. They monitor the mental and physical health of detained Americans, communicating concerns about an individual's well-being not just to the detaining authority but also at a diplomatic level. Consular officers are also frequently called upon by our citizens to convey messages to the detained American's family members, legal counsel, or congressional representatives back home. They work to ensure that our citizens have access to food, medicine, or religious items as needed. When an American is put on trial in a foreign country, consular officers often attend the trial and seek to ensure that the proceedings are being conducted in a manner that is fair, transparent, and understandable to the defendant. And through close

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monitoring by our consular officers of local proceedings involving U.S. citizens arrested overseas, the U.S. government may determine that detention is unjust or illegal, and may call on the detaining government to release the U.S. citizen.

We find these services especially critical in countries that do not respect due process of law and fundamental rights. In many countries a defendant has no protections equivalent to our own from government searches and seizures, no guarantees against cruel and unusual punishment, and no right to a lawyer. But in virtually every country in the world when Americans are imprisoned, the same treaties to which we are a party ensure that they have a right to see their consular officer.

Literally thousands of Americans benefit from these services annually. As the chart appended to this testimony attests, in the past five years, we have provided consular services to arrested Americans hailing from each of the 50 states. For example, our consular officers have visited at least 6 Americans from Vermont, 13 from Rhode Island, 13 from Delaware, 24 from Wisconsin, 25 from Iowa, 26 from Utah, 33 from South Carolina, 34 from Alabama, 34 from Connecticut, 35 from Oklahoma, 68 from Minnesota, 166 from Illinois, 325 from Arizona, 554 from New York, 822 from Texas, and over 2,300 from California. These statistics do not provide a complete picture of the number of consular visits we perform to U.S. citizens because, in many cases, we do not have information about the citizen's state of origin.

But numbers tell only part of the story. Americans who have recently been detained in such countries as North Korea, Iran, Syria, Pakistan and Libya can tell you from their own experience how indispensable consular notification and access is for the protection of U.S. citizens detained overseas. I understand that Ms. Clare Gillis is here today to tell her own harrowing tale of her detention in Libya and how she benefited from these consular protections through the international network of consular assistance. But these are only a small fraction of the many stories of consular officers providing invaluable assistance to Americans detained abroad.

Just to give a few examples that did not make the news:

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- In 2007, a member of the U.S. Armed Forces was detained at an African airport with a small souvenir letter opener that contained ivory. Local authorities arrested him and charged him with trafficking in a banned item, an offense that carried a mandatory decades-long sentence. U.S. consular officers were able promptly to visit the service member and help him to understand his options under local law. With the consulate's help, he obtained a local attorney, who worked with police to pursue the souvenir vendors. As a result of this cooperation, the court accepted a plea agreement and the service member was released.

- A U.S. citizen serving a foreign prison sentence had multiple physical and mental illnesses for which she required a variety of medications. U.S. consular officers saw that her condition was deteriorating in prison, and spoke with local prison officials who acknowledged that, even with medication, her condition would continue to deteriorate because the level of care in the penal system was insufficient for her needs. With assistance from the Embassy, the country granted her conditional release, and the Embassy assisted with the logistics of her return to the United States, where she was met and assisted by medical personnel whose presence was arranged for by the Bureau of Consular Affairs.

- A U.S. citizen minor in the Caribbean was arrested and placed in a jail for adult inmates. Because her parents could not afford an attorney, she entered a plea without a lawyer. Once informed of her arrest, U.S. consular officers visited and closely monitored the case. Their intervention led the foreign authorities to arrange for legal representation, and once she had access to proper legal counsel, the minor was ultimately granted bail.

- When a U.S. citizen member of the Armed Forces was detained at a foreign airport by local customs officials in Mexico for attempting to enter with his U.S.-registered firearm, consular officers were able to work closely with his attorney, the government's military, and the U.S. military to secure his rapid release.

- U.S. consular officers were able to arrange for nutritional care for a special-needs infant born to a U.S. citizen incarcerated overseas. The consulate was able to assist the family in arranging to have the child brought to the United States to live with family members there.

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Consular access can be particularly important in countries where we do not have diplomatic relations, as in North Korea where the Swedish Embassy represents the U.S. interests. In November 2010, U.S. citizen Eddie Jun was detained by North Korea. After North Korea finally identified Mr. Jun as a detainee, Swedish diplomats were able to visit Mr. Jun six times and inform the U.S. government that he was being well cared for. At U.S. request, Swedish diplomats continued to ask for regular consular access to Mr. Jun, until his release in May 2011.

In short, we strive to ensure domestic compliance with our consular obligations not from altruism, but from keen self-interest. If we fail to honor our consular obligations at home, we can expect your constituents to pay the price overseas.

Second, this legislation is not just vital for the protection of Americans abroad. Ensuring compliance with our legal obligations is essential to our foreign relations and close bilateral relationships. We demand consular notification and access from other countries and in return, we assure them that we will give it ourselves. In most cases, this system works remarkably well. But despite concerted efforts, our record has not been perfect. In certain cases, this system has broken down, and foreign nationals have proceeded through our legal system – at times facing serious charges – without being informed that they can receive the assistance of their consulate, in clear violation of our treaty obligations. The United States has been publicly called to account for these shortcomings in several high-profile cases, including the *Avena* case, in which the International Court of Justice ("ICJ") found the United States to have violated its Vienna Convention obligations with respect to 51 Mexican nationals who were convicted and sentenced for capital crimes without being informed that they could receive the assistance of their consulate, and ordered that the U.S. judicially review their cases to determine whether the individuals were prejudiced by the violation.[4]

The Bush Administration went to significant lengths to try to secure compliance with the *Avena* judgment. Our ongoing failure to comply has placed great strain on the U.S. relationship with Mexico; Secretary Clinton has stated that our relationship with Mexico is undoubtedly one of the most important bilateral

[4] *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

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relationships we have. Cooperation with the Government of Mexico on myriad, vital cross-border initiatives, including border security and law enforcement, which Deputy Assistant Attorney General Swartz will address in greater detail, is at an all-time high. This unprecedented level of cooperation has been accompanied by numerous tangible benefits for U.S. security and prosperity. For example, US-Mexico collaboration through the Merida Initiative has enabled greater cooperation between U.S. and Mexican law enforcement agencies, prosecutors and judges as they share best practices and expand bilateral cooperation in tracking criminals, drugs, arms and money. U.S., Mexican, and other law enforcement agencies in the region leverage opportunities to work together to investigate multinational law enforcement cases and share information.

Mexico has stressed on numerous occasions, however, that U.S. compliance with our consular treaty obligations is a priority issue on the bilateral agenda and a matter of significant concern to the Mexican public, and that our non-compliance could seriously jeopardize the ability of the Government of Mexico to continue working collaboratively in these areas.[5] We need swift enactment of the bill before you to resolve our outstanding obligations under the *Avena* judgment, to reaffirm our commitment to our consular notification treaty obligations, and to remove this longstanding obstacle in the bilateral relationship.

The foreign relations implications of this legislation, moreover, reach well beyond Mexico. Other essential U.S. partners, including the United Kingdom, the European Union, Brazil, Spain, and Switzerland, follow this issue closely and have repeatedly and forcefully called upon the United States to fulfill these obligations, often at high levels. As time has passed, calls for U.S. compliance have become more vociferous. As anyone who has worked in diplomacy understands, such objections can impair our ability to advance U.S. national interests in our bilateral and multilateral relationships in many concrete ways across a spectrum of law enforcement, security, economic, and other concerns. The benefits that will flow

[5] Among many other communications at high levels over the past two Administrations on these issues, Mexico sent diplomatic complaints to the State Department strongly protesting the executions of two Mexican nationals in Texas who were convicted and sentenced to death without being informed that they could receive the assistance of their consulate: José Ernesto Medellín in August 2008, and Humberto Leal García in July 2011. These individuals were covered by the *Avena* judgment, which obligated the United States to provide them review for any prejudice to their conviction or sentence resulting from the consular violation.

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from enactment of this legislation, and the continuing harm that will result if it is not passed, will not be limited to the consular sphere but will be felt across a range of issues that are critical to our national interest.

Third, enactment of this legislation is essential to our reputation as a nation that complies with the rule of law internationally. Our treaties are critical to protecting U.S. sovereign interests. U.S. treaties protect our diplomats and government officials overseas, allow us to secure extraditions for our own law enforcement purposes, prevent other states from proliferating nuclear, chemical and biological weapons and from trafficking in certain weapons, secure international cooperation to combat drug trafficking, and facilitate our businesses' international economic relationships. We are constantly negotiating new agreements to advance fundamental U.S. interests and insisting that other states comply with treaty commitments to us that they have already made.

In this increasingly interdependent world, the United States simply cannot afford to have our partners at the negotiating table or those nations whom we ask to fulfill their own legal obligations question our own commitment to the rule of law. When we do not comply with our obligations, we lose credibility in our insistence that other countries respect theirs. Enactment of the Consular Notification Compliance Act will send a strong message to valued international partners that the United States takes seriously its obligations under the Vienna Convention.

Our continued non-compliance with the *Avena* judgment directly impacts our reputation as a country committed to the rule of law -- a harm this narrowly tailored legislation would urgently address. Compliance with our consular obligations has never been a partisan issue –since President Kennedy signed the Vienna Convention and it was ratified by President Nixon, with the advice and consent of the Senate, Democratic and Republican Presidents across multiple administrations have consistently recognized that compliance with these obligations is indispensable to U.S. interests. The last Administration likewise recognized the critical importance of honoring our legal commitments relating to consular assistance to "securing reciprocal protection of Americans detained abroad," "the need to avoid harming relations with foreign governments, including

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Mexico," and "the interest in reinforcing the United States' commitment to the rule of law.[6]

After the *Avena* decision was handed down, recognizing the important consequences of the decision for the safety of Americans overseas, President Bush took the extraordinary step of directing state courts to give the ICJ judgment domestic legal effect. Although the U.S. Supreme Court determined in *Medellín v. Texas*, 552 U.S. 491 (2008), that this effort was constitutionally insufficient, Chief Justice Roberts' opinion for the Court recognized that judgment as a binding international legal obligation, and agreed that the United States' interests in observance of the Vienna Convention, in protecting relations with foreign governments, and in demonstrating commitment to the international rule of law through compliance with that judgment were "plainly compelling." *Medellín*, 552 U.S. at 524. He further explained that this compliance could be secured by means of legislation.

Picking up where the last Administration left off, this Administration has worked diligently to find the legislative solution the Court recommended. The Consular Notification Compliance Act was developed in close cooperation with the State and Justice Departments, in order to secure narrow, carefully crafted legislation that facilitates our compliance with our current and future consular notification and access obligations, but also takes into account important interests in facilitating normal law enforcement operations and criminal proceedings – a balance that my DOJ colleague, Deputy Assistant Attorney General Swartz, will discuss in more detail in his testimony.

We consider compliance with these obligations so vital, and the harm from noncompliance so irreparable, that the United States requested that the Supreme Court delay the execution of Humberto Leal García, a Mexican national who was subject to the *Avena* judgment and whose execution without affording him the hearing provided by this legislation would violate our legal obligations. In denying the request, the Supreme Court made clear that Congress is the appropriate body to take action to bring us back into compliance with our obligations. By so saying,

[6] Brief of the United States as Amicus Curiae Supporting Petitioner at 11, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

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the Court left no doubt that Congress can solve this lingering problem, once and for all, by passing this legislation now, before another execution of an individual covered by *Avena* takes place, and causes further damage to our reputation in this area.

Distinguished Senators, if the United States is to ensure the strongest possible protections for our citizens overseas and end this continuing thorn in our international relationships, the initiative is yours and the time to act is now.

On behalf of Secretary Clinton and the Department, I thank you for your consideration of this vital legislation. We consider this a matter of great urgency. Time has demonstrated that a solution is essential, and failure to act is not an option. I am happy to answer your questions and to continue to work with you towards expeditious enactment of this most important piece of legislation.

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STATEMENT OF SECRETARY OF STATE HILLARY RODHAM CLINTON

The State Department has no greater responsibility than the protection of U.S. citizens overseas – particularly when Americans find themselves in the custody of a foreign government, facing an unfamiliar, and at times unfair, legal system. Last year alone, our consular officers conducted over 9,500 consular visits with more than 3,500 Americans who were in the custody of foreign governments. Through the international system of consular assistance – a system that has evolved over centuries and today is reflected in binding U.S. treaties– we are able to reach our citizens in these vulnerable situations and help them receive food and medical assistance, communicate with their families, and provide them with information regarding foreign legal systems and how they can access legal counsel overseas. In return, the United States has committed to permit foreign officials to provide the same assistance to their own citizens who are arrested here.

This protective system of consular assistance depends on mutual compliance with these obligations by the United States and our treaty partners. If the United States fails to honor our legal obligations toward foreign nationals in our custody, the fabric of this protective system is torn, and ultimately it is Americans who are harmed. And although we work strenuously to honor these commitments, unfortunately at times our own compliance has broken down.

The bill that is before you—the Consular Notification Compliance Act—is a carefully crafted piece of legislation which seeks to ensure that the United States keeps these treaty promises. The bill provides practical steps for federal, state and local authorities to follow to comply with consular notification rules. It would also give foreign nationals in a small number of very serious cases the chance to prove that they were prejudiced by our own failure to provide them with the opportunity for consular assistance, consistent with our legal obligations.

Enactment of this legislation is also essential to our vital foreign relations interests. Our failure to act, and to act now, threatens our close partnership with Mexico, including in the fight against organized crime and drug trafficking and securing our border. Many other countries, including important U.S. allies, have pressed us to comply with these obligations with increasing urgency. Enacting this

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legislation will demonstrate to the world that we are a nation that keeps our promises. Failure to enact it invariably will harm our ability to secure U.S. interests across a range of law enforcement, security, and other goals.

To protect our citizens, we need to do our part to protect those of other countries. Because enactment of this bill serves our critical interests in protecting our citizens, preserving our foreign policy relations, and abiding by our promises under vital treaties we have ratified, I join the Department of Justice and the rest of the Administration in urgently calling on Congress to pass this narrow and carefully crafted legislation. Thank you very much.

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American Citizens Visited by Consular Officers while Detained Abroad, by State of Residence or State of Birth, 2006-2011[7]

July 22, 2011

State or territory of residence (or, where that information was not available, state of birth)	2006	2007	2008	2009	2010	2011 (July 2011)	Total number of U.S. citizens visited by consular officers while detained abroad, 2006-2011
Alabama (AL)	7	3	4	4	12	4	34
Alaska (AK)	0	6	3	2	3	4	18
Arizona (AZ)	51	94	55	51	48	26	325
Arkansas (AR)	5	2	2	1	6	1	17
California (CA)	530	473	483	351	359	192	2,388
Colorado (CO)	15	17	14	22	18	10	96
Connecticut (CT)	5	4	3	8	9	5	34
Delaware (DE)	5	0	1	6	1	0	13
District of Columbia (DC)	2	4	1	7	4	0	18
Florida (FL)	92	88	82	103	101	55	521
Georgia (GA)	22	19	24	18	30	20	133
Guam (GU)	0	0	0	1	0	0	1

[7] These statistics do not provide a complete picture of the number of consular visits we perform to U.S. citizens because, in many cases, we do not have information about the citizen's state of origin.

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State or territory of residence (or, where that information was not available, state of birth)	2006	2007	2008	2009	2010	2011 (July 2011)	Total number of U.S. citizens visited by consular officers while detained abroad, 2006-2011
Hawaii (HI)	5	8	7	10	5	2	37
Idaho (ID)	5	3	1	4	8	3	24
Illinois (IL)	24	27	31	34	36	14	166
Indiana (IN)	4	3	1	10	3	2	23
Iowa (IA)	2	7	4	3	4	5	25
Kansas (KS)	3	6	2	4	3	3	21
Kentucky (KY)	4	7	2	2	5	2	22
Louisiana (LA)	7	10	9	5	6	7	44
Maine (ME)	3	1	2	2	6	1	15
Maryland (MD)	19	18	20	16	21	9	103
Massachusetts (MA)	22	14	24	11	20	22	113
Michigan (MI)	17	8	13	26	13	13	90
Minnesota (MN)	10	11	13	11	17	6	68
Mississippi (MS)	2	4	2	5	6	2	21
Missouri (MO)	11	7	10	12	11	6	57
Montana (MT)	1	3	5	0	3	1	13
Nebraska (NE)	3	3	1	2	3	1	13
Nevada (NV)	11	15	14	15	17	11	83
New Hampshire (NH)	1	2	3	1	1	1	9
New Jersey (NJ)	18	29	32	35	32	17	163

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State or territory of residence (or, where that information was not available, state of birth)	2006	2007	2008	2009	2010	2011 (July 2011)	Total number of U.S. citizens visited by consular officers while detained abroad, 2006-2011
New Mexico (NM)	9	11	11	5	9	11	56
New York (NY)	97	111	87	95	112	52	554
North Carolina (NC)	14	11	20	15	10	6	76
North Dakota (ND)	0	1	3	2	1	0	7
Northern Mariana Islands (MP)	0	0	0	0	1	0	1
Ohio (OH)	17	12	13	16	10	11	79
Oklahoma (OK)	9	8	2	6	5	5	35
Oregon (OR)	11	14	14	11	20	5	75
Pennsylvania (PA)	21	25	23	16	23	13	121
Puerto Rico (PR)	0	2	2	0	0	0	4
Rhode Island (RI)	2	2	2	3	3	1	13
South Carolina (SC)	10	3	6	4	5	5	33
South Dakota (SD)	1	1	0	1	0	0	3
Tennessee (TN)	6	4	10	9	8	4	41
Texas (TX)	149	131	174	155	135	78	822
Utah (UT)	8	6	4	7	0	1	26
Vermont (VT)	0	2	1	1	1	1	6
Virgin Islands (VI)	5	0	0	2	1	0	8
Virginia (VA)	13	15	18	29	18	11	104

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State or territory of residence (or, where that information was not available, state of birth)	2006	2007	2008	2009	2010	2011 (July 2011)	Total number of U.S. citizens visited by consular officers while detained abroad, 2006-2011
Washington (WA)	13	27	0	0	29	9	78
West Virginia (WV)	0	1	0	0	0	0	1
Wisconsin (WI)	5	5	0	0	8	6	24
Wyoming (WY)	0	0	0	0	1	0	1
Total number of U.S. citizens visited by consular officers while detained abroad	1,296	1,288	1,258	1,159	1,211	664	6,876

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Committee On The Judiciary,
"Fulfilling Our Treaty Obligations And Protecting Americans Abroad"
July 27, 2011

Today we will hear testimony about legislation I introduced last month, with the support of the Department of Justice, the Department of State, and the Department of Homeland Security, to help bring the United States into compliance with its obligations under the Vienna Convention on Consular Relations. This is a treaty made under the authority of the United States, a treaty that carries the force of law in this country.

In an important way, we began our opening statements for this hearing a week ago when Senator Grassley raised the issue at an earlier hearing last Wednesday. We agreed on an important principle then – that treaties ratified by the United States are the law of the land and, like any law, must be honored. Indeed, Senator Grassley made reference to the supremacy clause contained in Article VI of the Constitution of the United States that provides for the Constitution, Federal laws and treaties to be treated as "the supreme Law of the Land." That is the central point of this hearing.

If we can remain focused on that shared principle, I am confident that we can find a solution to the problem that continues to plague us following the Bush administration's unsuccessful effort to comply with our legal obligations.

Each year, thousands of Americans – including from every state represented by the Members of this Committee – are arrested overseas while they study, travel, work, and serve in the military. Their well-being often depends on the ability of United States consular officials to meet with them, monitor their treatment, help them obtain legal assistance, and connect them to family back home.

That access is protected by the treaty ratified in 1969 after a bipartisan vote in the Senate. This treaty has been supported by every President, Republican or Democratic, ever since. The treaty is not "foreign law." It is American law and has been for more than 40 years. The United States joined the treaty and made it our law because it protects our citizens.

The value of that treaty has never been questioned. But, as with any treaty, with any law, it is only effective when enforced. And right now, in too many cases, the United States is not being faithful to this law. That failure puts Americans in other countries at risk.

This should not be a partisan issue. President George W. Bush tried to fix the problem through an executive memorandum but the Supreme Court rejected that approach. In a decision by Chief Justice Roberts, the Court agreed that reciprocal observance of the treaty was a "plainly compelling" American interest, but ruled that the solution had to be implemented by Congress and not the President. The legislation I introduced follows the approach taken by President Bush but does it, as Chief Justice Roberts insisted, by way of implementing legislation.

I recognize that solving this problem requires us to deal with cases involving heinous crimes. In no way do I want to minimize the seriousness of these offenses or the importance of seeing justice done for the victims of these crimes. As a former prosecutor, I feel as strongly as anyone about that. This bill is not about letting dangerous criminal go free. Criminals must be held accountable for their actions.

What the legislation does is offer a very narrowly crafted solution that will have the least impact possible on those cases and our courts, while maximizing protections for United States citizens. In order to bring the United States into compliance with its legal obligations, the bill merely provides the Federal courts with the opportunity to determine if the denial of consular access resulted in an unfair conviction or sentence in a limited number of cases.

Some have suggested that the bill is an attack on the death penalty or an effort to further delay the habeas corpus review process. Neither claim is true. That is not what I intend. The bill provides one-time review for a limited group of cases. It has no effect on habeas review for anyone else. It will not clog our courts, and it will not delay future cases. In fact, moving forward, the bill seeks to eliminate the need for future habeas claims regarding consular notification by ensuring that these claims are dealt with before trial.

Imagine the case of an American sentenced to death in a foreign country without any notification to the United States Government. Every one of us – Republican and Democrat – would be outraged. There are currently foreign nationals on death row in the United States, some of whom were never told of their right to contact their consulate, and their consulate was never informed of their arrest, trial, conviction, or sentence. That is not in compliance with our treaty obligation, which is American law.

I have heard from retired members of the U.S. military urging passage of the bill to protect servicemen and women and their families overseas. I have heard from former diplomats of both political parties who know that compliance with the treaty is critical for America's national security and commercial interests.

This bill is about three things only. It is about protecting Americans when they work, travel, and serve in the military in foreign countries. It is about fulfilling our obligations and upholding the rule of law. And it is about removing a significant impediment to full and complete cooperation with our international allies on national security and law enforcement efforts that keep Americans safe. We must bring the United States into compliance with our legal obligations. We cannot continue to ignore the treaty and expect other countries to honor it.

# # # # #

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 31 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your inquiry regarding Department of Defense (DoD) support for the Consular Notification Compliance Act of 2011, S. 1194, and for introducing this important legislation.

DoD fully supports the Consular Notification Compliance Act, and recognizes its importance for ensuring the protection of U.S. forces, DoD civilian employees, and DoD contractor employees should they be taken into the custody of foreign governments abroad. DoD has a strong interest in ensuring that foreign countries comply with their obligations toward U.S. nationals under the Vienna Convention on Consular Relations (Vienna Convention) and comparable bilateral consular agreements, as well as in ensuring that equivalent protections are provided to foreign military personnel when they travel to the United States. By communicating that the United States takes seriously its obligations to ensure consular protection to foreign military personnel and other foreign nationals in the United States, and by strengthening U.S. compliance with these obligations, we are best positioned to ensure that U.S. forces personnel and other members of the DoD family will benefit from these protections abroad.

DoD presently has tens of thousands of U.S. forces personnel stationed or deployed abroad, many with accompanying family members. In addition, thousands of U.S. citizen DoD civilian employees and DoD contractor employees, also with accompanying family members, are also stationed or deployed overseas in support of U.S. forces personnel. U.S. forces personnel travel even more broadly, whether to participate in training and capacity building programs, joint exercises, consultations, or government meetings, and for other non-operational activities. In many countries where DoD personnel are located, we have negotiated Status of Forces Agreements (SOFAs) that provide important protections for members of the Armed Forces, DoD civilian personnel, and their family members. These SOFAs vary in their substance and detail,

including in the scope of the protections provided. Nevertheless, the consular notificatior and access regime plays an important role in protecting all DoD personnel overseas, for several reasons.

First, the United States has not entered into SOFAs with a number of countries in which DoD personnel are assigned. In such countries, the Vienna Convention and comparable bilateral consular agreements provide the sole legal mechanism by which the U.S. Government can ensure that it is provided timely notification of the detention of U.S. nationals, including DoD personnel, and is thus able to provide them assistance and protection.

Second, even in countries with which we have entered into a SOFA, the Vienna Convention serves as an important complementary layer of protection for DoD personnel arrested or detained by the host country's authorities. Although many SOFAs provide DoD personnel immunity from criminal prosecution in the host country's courts, or for DoD custody of DoD personnel who may be subject to host nation jurisdiction, they do not always clarify the foreign government's obligation to notify the United States if a DoD employee is temporarily or mistakenly detained. In these cases, the United States may only learn of the detention through the consular notification process established in the Vienna Convention and comparable bilateral agreements. Even in countries where SOFAs require notification of military authorities upon detention by host nation officials of DoD personnel, DoD personnel in foreign custody are also entitled to consular notification and visitation, and U.S. State Department consular services are counted on to provide such visitation and other assistance. These services may be required to supplement the assistance of the military command, or if the detained individual simply wants consular assistance. Department of Defense Directive No. 5525.1 (Aug. 7, 1979), "Status of Forces Policy and Information," ¶ 4.10.3. Some services, such as helping to arrange transfers to U.S. custody through prisoner transfer agreements, would only be provided by the State Department as consular services.

Third, SOFAs do not necessarily extend to all DoD personnel present in a particular country. In most instances, the protections guaranteed under a SOFA extend only to DoD personnel who are in a particular country on official Department business. U.S. forces personnel who travel overseas for personal reasons—including U.S. forces on leave from active military duty—are not likely covered by a SOFA in such countries, and would rely exclusively on the protections guaranteed in the Vienna Convention and comparable bilateral agreements.

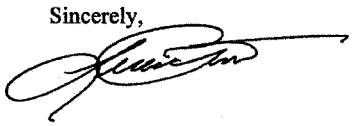
Fourth, the due process provisions for DoD personnel in SOFAs do not typically extend to DoD contractor employees and their family members. Currently, thousands of U.S. national contractor employees are providing important support services to DoD around the world. These individuals typically rely entirely on consular notification under the Vienna Convention and comparable bilateral consular agreements to ensure that their rights are protected if they are detained overseas.

Finally, DoD has a significant interest in ensuring that foreign military personnel, and their family members, receive timely consular notification and access if they are detained when they travel to the United States. Each year, thousands of uniformed members of foreign militaries, and their family members, come to the United States for conferences, training courses, to study at U.S. military institutions, to participate in joint exercises, and for many other purposes. Providing such foreign military personnel with prompt consular notification and access if they should be arrested or detained here in the United States is important to DoD's ability to secure reciprocal protections for U.S. forces personnel abroad, and to ensure that the benefits to our national security provided by bringing foreign military personnel to the United States can continue. The Consular Notification Compliance Act is critical to advancing those important goals.

U.S. service members do, in fact, benefit on a regular basis from the mutual obligations undertaken by the United States and other countries around the world. In the recent past, consular assistance has proved invaluable in helping secure fair treatment in cases involving service members on active duty, DoD contractor employees, and retired service members who were detained overseas. Under Secretary of State Patrick Kennedy provided some examples of this assistance in his testimony on S. 1194 in front of the Senate Judiciary Committee on July 27, 2011.

We must do all we can to ensure that service members, our civilian personnel, our contractor employees, and their dependents are afforded consular protection. Passage of the Consular Notification Compliance Act is a critical part of that effort, and we therefore support this important legislation.

Sincerely,



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

August 3, 2011

Elizabeth K. Hays
Republican Chief Counsel
Senator Tom Coburn, M.D.
U.S. Senate Judiciary Committee

via: Elizabeth_Hays@judiciary-rep.senate.gov

Dear Ms. Hays:

Thank you for the opportunity to comment regarding S. 1994 – the Consular Notification Compliance Act of 2011. The office of the Oklahoma Attorney General strongly opposes the passage of this bill as it improperly infringes upon the sovereignty of the States and has the potential to unnecessarily delay the imposition of death sentences that have withstood years of litigation.

The bill violates the basic principles of federalism. The bill gives foreign nationals the right to raise, in a federal habeas corpus proceeding, a claim under the Vienna Convention on Consular Rights ("VCCR") without ever presenting the issue in State court. Pursuant to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 ("AEDPA"), the general rule is that an inmate must exhaust his claims in State court prior to proceeding to federal court. The decision of the State court is then given great deference as the federal court must find that the State court decision was contrary to, or an unreasonable application of, United States Supreme Court law. The Supreme Court has discussed the importance of promoting comity, finality and federalism by giving State courts the first opportunity to review and, if necessary, correct any constitutional violation. By allowing a foreign national to disregard this rule the State courts would be denied the opportunity to rule on the issue and the review required by the AEDPA would be circumvented.

In addition, the bill allows a foreign national to delay, perhaps for years, the imposition of a just and proper sentence by merely raising a claim under the VCCR. The bill allows a foreign national to file a second or successive habeas corpus petition after his conviction and sentence has repeatedly been upheld by state and federal courts. The length of time for a capital inmate to complete a federal habeas corpus proceeding is already unnecessarily long and arguably infringes upon 18 U.S.C. § 3771(a)(7) of the Crime Victims' Rights Act which gives a

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Elizabeth K. Hays
August 3, 2011
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crime victim the "right to proceedings free from unreasonable delay". At the current time, the Tenth Circuit Court of Appeals is currently scheduling cases for the November, 2012 docket. While a normal opening appeal brief must be filed within 40 days, the attorneys in capital cases are currently receiving ten to fourteen months or more. Thus, cases that have often lingered in federal district court for numerous years will now sit in the circuit court for over a year before being heard. Such delays are already infringing upon the administration of justice. Further delay would clearly be an affront to crime victims, as well as to justice being served.

For these reasons, I would respectfully request that S. 1194 - the Consular Notification Compliance Act of 2011 be rejected.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

Written Statement

Regarding S. 1194, the Consular Notification Compliance Act of 2011

Hearing on

"Fulfilling Our Treaty Obligations and Protecting Americans Abroad"

Before the

Committee on the Judiciary,

United States Senate

David B. Rivkin, Jr., Partner
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

July 27, 2011

71110.121

Introduction

My name is David B. Rivkin, Jr.. I am an attorney specializing in matters of constitutional and international law at the firm of Baker Hostetler LLP and co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy. I was also for a number of years an expert member of the United Nations Subcommission on the Promotion and Protection of Human Rights. While at the Subcommission, I dealt extensively with international humanitarian and human rights law.

I have a particularly keen interest in the structural separation of powers and the interplay between the imperatives of public international law and U.S. constitutional law. I also have been involved professionally in a number of cases, both in and out of government, that have implicated these important issues. As the most recent example of my engagement with federalism matters, my colleagues at Baker Hostetler and I serve as outside counsel to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010.

I am testifying today on my own behalf and do not speak either on behalf of my law firm or any of our clients. While I want to commend the Senate Judiciary Committee, and Chairman Leahy and Ranking Member Grassley for holding this hearing, unfortunately, I am unable to support S. 1194, the Consular Notification Compliance Act of 2011. Indeed, this legislation, despite its laudatory goal of seeking to implement the 1963 Vienna Convention on Consular Affairs, raises significant constitutional concerns by improperly intruding in the sovereign domain of the States (entities that are the federal government's constitutional equals) and is, as a matter of policy, unnecessary and unwise. Accordingly, I believe that an entirely different legislative approach that is compliant with our Constitution is needed.

Background

The past two years have witnessed a profound resurgence in public interest in constitutional federalism. While a number of States have been involved in this undertaking, the State of Texas,

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through the bold efforts of Governor Rick Perry, Attorney General Greg Abbot, and former Solicitor Generals Ted Cruz and Jim Ho, has been at the forefront of this movement. Texas has led the Nation in enacting environmental policies that clean the air and water without imposing undue burdens on businesses and citizens. It has had a light touch in business regulation, and now leads the Nation in employment growth. And it has fought hard against crime and achieved an admirable record of public safety—a remarkable achievement for a State whose political borders separate it from a region of lawlessness and violence.

It is that effort—specifically, the pursuit of justice for the victims of two depraved foreign nationals—which is the evident impetus of S. 1194 and this hearing today. In 1993, José Ernesto Medellín, a Mexican national and gang member, raped and killed 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena. The rapes were part of his gang initiation, and the murders were intended to prevent the girls from identifying Medellín and his accomplices. Medellín was arrested, was given Miranda warnings, signed a written waiver, and gave a detailed written confession. But he was never informed of his Vienna Convention right to notify the Mexican consulate of his detention. On that basis, the George W. Bush Administration attempted to block his execution. In 2008, the Supreme Court properly rebuffed that attempt, holding that the Convention was not self-executing, that it had never been implemented by legislation, and that the President could not, acting unilaterally, give it legal effect. Medellín was executed.

In 1994, Humberto Leal Garcia ("Leal") raped and murdered 16-year-old Adrea Sauceda. After she was sexually assaulted by no fewer than eight men, Leal carried her to his truck, where he raped her. Police found her dead body on the side of a dirt road. Leal had bashed in her head with a 30- to 40-pound chunk of asphalt and left her to die. I will not describe the full extent of the brutalities done to Ms. Sauceda, but they are a matter of public record. Leal admitted a role in the killing before he was taken into custody—that is, before any Vienna rights would even attach. He was arrested, convicted, and sentenced to death. The Obama Administration sought to stay his execution so that Congress might consider the legislation proposed by the Chairman, S. 1194. The Supreme Court declined to grant the stay, and Leal was executed on July 7th of this year.

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Policy Issues Implicated by S. 1194

Today, more than seven years after the International Court of Justice found the United States in violation of its duties under the Vienna Convention in *Avena*, three years after the execution of Jose Ernesto Medellín, and a scant three weeks after the execution of Humberto Leal Garcia, the Senate Judiciary Committee considers legislation that would require state and federal officers to notify foreign nationals arrested for death-eligible offenses, upon their arrest or detention, that they may request that the consulate of their nation of citizenship be notified that they have been detained. This legislation would give foreign nationals arrested for murder (effectively the only death-eligible offense) an immediate and freestanding right to seek consular notification by filing a lawsuit in federal court.

It would also give foreign nationals who have been sentenced to death the right to raise, in a habeas corpus proceeding in federal court, the failure to inform them that they may request consular notification, whether or not that issue was raised in a state post-conviction proceeding. It would reopen the habeas proceedings of foreign nationals who have already been denied relief by state and federal courts and allow them to bring consular notification claims. This process will result in additional years of litigation, even where the foreign national has suffered no discernible prejudice as a result of any failure to notify consular officials, and will come at the tail-end of sometimes decades-long legal proceedings, in federal and state courts, intended to ensure that justice was done.

Let me also emphasize what S. 1194 does and does not do. It codifies, but does not change, the already existing policy and practice of consular notification following a request by a foreign national arrested or otherwise detained. It codifies, but does not change, the already existing policy and practice of allowing communications between consular officials and a foreign national. What it does do is place an additional burden on arresting officers: they must consistently inform certain foreign nationals[1], "without delay," of their right to request consular notification.

[1] Significantly, S 1194 does not address the important question of how arresting officers are supposed to discern who is and who is not a foreign national. This is a difficult problem in our uniquely diverse society, especially since, in a variety of other contexts, questions about national origin or immigration status are disfavored or may even result in discrimination claims. Nor does it resolve the important question, mentioned only in passing in

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This burden, albeit minor in most instances, is accompanied by an elaborate framework of legal procedures to enforce what this bill would make a right. As we have seen in the *Miranda* context, this framework will result in extended litigation, obstructionism, and unjustifiable delays in the administration of justice. And, if it works as intended, it would even stymie justice in some cases, an unacceptable result in a country that already guarantees and provides an unsurpassed level of due process to criminal defendants, regardless of their nationality or immigration status. This is an undue cost that most Americans would be unwilling to bear.[2]

What makes this cost particularly undue is that no one who is familiar with our criminal justice system seriously contends that, had notice of consular rights been given to Messrs. Medellín or Leal, it would have changed the outcome of either case. In this regard, both defendants were provided experienced, publicly-financed attorneys—as are all those accused of serious crimes. Both men enjoyed the full rights and protections of trial by jury, and had a full measure of appellate rights and post-conviction proceedings in the Texas courts, followed by habeas corpus proceedings in federal courts. Both were the subject of attention by the U.S. Supreme Court.

In neither case is guilt in doubt. And in neither case was a different sentence likely; anyone uncertain on this point need merely review the facts. In our justice system, such certainty—after trial, appeal, and post-conviction proceedings—is the norm. If determining guilt and innocence is the measure of a justice system, S. 1194 will make no difference in the United States—in these cases or in any others.

But what about the argument, advanced by the Obama Administration and adduced by a number of witnesses appearing before you today, that the failure to enact S. 1194 or substantially similar legislation risks that Americans traveling overseas may be denied their consular access rights? I agree, of course, with the statement of Attorney General Eric Holder and Secretary of State

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Avena, of whether the consular notification provisions of Article 36 of the Vienna Convention apply to dual nationals.

[2] Another legislative peculiarity of S. 1194 is that it would not actually encompass the vast majority of cases involving foreign nationals charged with criminal offenses in the United States. This is because S. 1194 applies only to those arrested or charged with death-eligible offenses—that is, murder or, far less likely, espionage. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008). It is unusual, to say the least, that Congress would consider legislation providing additional procedural rights to murderers alone, and only foreign ones at that.

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Hillary Clinton, expressed in a June 28 letter to the Chairman, that "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." And, as an American who has lived abroad, I agree that such assistance can be "essential . . . to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to sent messages to [] family, or to obtain needed food or medicine." These services are, as the Attorney General and Secretary state, "vital." And that is precisely why Americans who are detained abroad consistently *request* consular assistance on their own accord.

What I disagree with is the notion that a failure to enact S. 1194 would somehow lead other nations to impair the rights of Americans, by causing their requests for consular access to go unheeded. Foreign nations—despite the fact that their legal processes and protection of substantive and procedural rights rarely live up to our own—by and large honor those requests. While there have been some failures in this area, they have not been frequent and have been primarily perpetrated by repressive governments that habitually violate all manner of obligations under international law. These violations have been particularly likely to occur when the foreign government involved has embarked on a path of confrontation with the United States. In that extreme situation, it would be naïve and unrealistic to expect that the passage of any legislation in the United States, including S. 1194, would enhance foreign compliance with the Vienna Convention or any other requirement of international law.

I will also add that, as a factual matter, the Department of State has not identified a single American citizen abroad whose rights have been in any manner affected by the ICJ's decision in *Avena* or by *Medellín* or *Leal*. This risk is not just hypothetical; it is non-existent. There is also no indication, public or private, that any country intends to reverse its Vienna Convention compliance policy as a result of U.S. law currently in force, which provides no judicial remedy for failure to inform a foreign national of his or her consular rights. Nor should they; to do so would be an extreme response to what is, at most, a minor violation of our treaty obligations. The principle of proportionality rules out such a course, as do prudence and comity.

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If the Administration has information that Americans' rights abroad will be abrogated as a result of U.S. policies, it has a duty to explain precisely how, so that Congress may legislate accordingly. But the Administration speaks only in generalities and possibilities. That is no basis upon which to make law. I am concerned, though, that by acting as if the status quo is an intolerable affront to other nations, and by claiming that a failure to enact S. 1194 is a major breach by the U.S. of its international law obligations, we may increase the prospect that foreign nations hostile to the U.S. may use this issue as an excuse to stop complying with their Vienna Convention obligations as they apply to American citizens. This would be, to put it mildly, a most unfortunate outcome.

Constitutional Concerns Presented by S. 1194

Although I am not prepared to say that S. 1194 is unconstitutional in its entirety, it raises serious constitutional concerns that weigh heavily against its enactment.[3] In our federalist system, the federal government is limited to certain enumerated powers, while the States retain plenary police powers. Federal law is supreme in its proper constitutional domain, and state law in all others. This dual sovereignty system is the key feature of our constitutional architecture and the key element in protecting individual liberty. It has been recognized as such in centuries of case law.

The treaty power should not, and cannot be, an exception to the fundamental constitutional principles of dual sovereignty and separation of powers. It is true that the Supreme Court implied otherwise, although to an uncertain extent, in *Missouri v. Holland*, 252 U.S. 416 (1920), which concerned a treaty on migratory birds. There is, however, a growing scholarly consensus that the case was wrongly decided[4] and that the treaty power no more authorizes the abrogation of state sovereignty than do Article I's enumerated powers. In both instances, there must be a meaningful, judicially enforceable principle that demarcates state and federal sovereign spheres.

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[3] My constitutional concerns are limited to S. 1194's application to states and state officials. Its application to federal officials does not raise any particular constitutional concern.

[4] *Holland* lies "in deep tension with the fundamental constitutional principle of enumerated legislative powers" and federalism that the Court has subsequently embraced. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005).

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To the extent that *Holland* authorizes enactments like S. 1194—which is not at all clear—it is inconsistent with the constitutional structure and should be overruled.[5]

Significantly, combating crime and meting out punishment lie at the very core of the States' police power and the absolute periphery of the federal government's proper domain. Moreover, given the fact that modern international treaties cover a multitude of subjects far removed from the core issues of war and peace that dominated public international law at the time of the Founding, if a statute like S. 1194 can be constitutionally enacted and upheld, there would be no remaining domain—be it education, family law, inheritance or licensing issues—in which the States would retain their autonomy. I certainly can identify no limiting principle. In a very real, and not just rhetorical, sense, States would cease to exist as sovereign entities. This would change our great country in a most regrettable way.

With these concerns in mind, I am hopeful that one day the Supreme Court will revisit the matters left unresolved by *Missouri v. Holland* and will clarify the limits on the exercise of the treaty power. Indeed, this may well happen in the near future. *See Bond v. United States*, Slip op. at 14 (S.Ct. 2011). But until that day comes, or even if it never does, Congress, as a matter of constitutional comity, must take it upon itself to honor constitutional federalism.

S. 1194 is plagued by constitutional infirmities. It would impose yet another federal directive on States and state officials. A State that violates S. 1194's directive—for whatever reason, good or bad—can be hauled into federal court and commanded to take remedial action.

It would also apply *Avena* retroactively to upset the settled judgments of state courts: foreign nationals convicted of murder and sentenced to death may seek to have their executions called off. In every instance, they would be entitled—not just eligible, but *entitled*—to a stay of a scheduled execution. This provision, unlike the usual federal habeas process, would give foreign nationals—and foreign nationals alone—a right to bring successive challenges to their

[5] *See id.* at 1938; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich. L. Rev. 98, 100 (2000).

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convictions and sentences, a right which U.S. convicts lack.[6] The result would be gaming of the system, as foreign nationals sentenced to death wait until the last minute to raise consular notice claims for the first time. This problem is of a constitutional dimension: state courts would be denied the opportunity to consider and rule on federal constitutional issues before they are heard in a federal habeas proceeding; the properly deferential standard of review of the Antiterrorism and Effective Death Penalty Act would be bypassed[7]; and even meritless claims would delay States from carrying out their criminal judgments, perhaps for years.

More than that, the bill purports to press into service state officials and, through them, carry out federal imperatives. When a State arrests a foreign national for a death-eligible offense, a state officer would be required to inform the foreign national of his consular rights. A state officer would be required to notify the consulate if the foreign national chooses to exercise his rights. A state officer would be required to ensure that consular staff may visit and communicate with the foreign national. All of these are good and worthwhile things, but they are beyond the power of the federal government to accomplish by commandeering state officials. These limitations are plain and well-described in the case law of the Supreme Court:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935 (1997).

It is plain that S. 1194 runs afoul of these limitations, in at least two provisions.[8] Section 3 contains the requirements described above, and section 4(b) provides for a freestanding cause of action for those arrested for a death-eligible crime, but not yet sentenced, to compel a state

[6] Another jarring consequence of S. 1194's approach is that it would give illegal immigrants a statutory right of access for relatively trivial consular notification claims that American citizens lack for breaches of even the most sacrosanct of our constitutional rights, such as the protections of the Fifth and Sixth Amendments.
[7] *See* 28 U.S.C. § 2254(d)(1).
[8] It may be, however, that section 4(a), which provides for habeas relief, does not run afoul of the prohibition on commandeering of state officials, if it is severable from the rest of the bill. This is not to say, however, that it is in any manner consistent with the principles of constitutional federalism. It is not.

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official to provide consular notification. These provisions are intended, the bill expressly states, to carry out a federal objective, advancing compliance with the Vienna Convention on Consular Relations. The federal government may request that the States aid it in carrying out its objectives. It may pay them to do so or otherwise encourage them. But it has no authority to command and commandeer its co-equal sovereigns.

Supporters of S. 1194 may point to *Miranda* as an analogous requirement, but it is inapposite. *Miranda*, as propounded by the Supreme Court, is a constitutional requirement that applies directly to the States and their officers, not a mandate imposed by Congress under one or another of its enumerated powers. So *Miranda* is not subject to the limitations of the 10th Amendment and the Constitution's other protections of structural federalism. Any law passed by Congress, however, is—a point made clear in both *Printz* and *New York v. United States*, 505 U.S. 144 (1992). Put simply, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156.

Bending these rules of federalism is not just a bad policy decision, but would compromise the liberty of all Americans. Dual sovereignty itself is a guarantor of freedom, and its breach endangers our liberties, a point made with particular vigor and eloquence by the Supreme Court, speaking unanimously, in its just-concluded term:

> The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one. The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived . . . .
>
> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

Bond v. United States, Slip op. at 8-9 (S.Ct. 2011) (internal quotation marks and citations omitted). A federal government that may command the States, and commandeer their officials,

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to carry out its own prerogatives is one that is unchecked by dual sovereignty. Bestowing these additional rights on foreign nationals, when done in a manner inconsistent with federalism, reflects and reinforces the gradual erosion of the liberties of all Americans.

This disregard of constitutional structure and limitations is unfortunately part and parcel with how the Executive Branch under both Republican and Democratic administrations has handled the issue of consular notification. After the *Avena* decision, the Bush Administration issued a "Presidential Memorandum" purporting to convert the terms of a non-self-executing treaty into one directly binding on the States, despite the lack of any implementing legislation. The Supreme Court, in *Medellín*, denied that this memorandum had any particular legal effect; legislation, it explained, must be passed by Congress.

Just last month, in *Leal*, the present Administration argued that the Supreme Court should stay an execution due to the *introduction* of S. 1194. I agree with the Court's conclusion that "[t]his argument is meritless." But I am also shocked by its audacity. The Executive Branch argued, in effect, that the courts should defer to bills that have not become law. This is also another affront to the States: under this view, their laws can be overridden by mere legislative proposals, so long as they are made in the federal Congress. And it is an affront to the power of the judicial branch, which has no more an obligation to defer to bills than to aspirational self-help books.

But most of all, the Administration's position is an affront to this body, the United States Congress. It is this body that holds the legislative power, and whether to legislate is its prerogative. By promising the Supreme Court that the Congress would act, and ascribing to that promise legal significance, the Executive Branch reached beyond its proper domain and into that of the Legislative Branch, effectively claiming the power to legislate a stay of execution. This is offensive because Congress already had acted. After seven years of activism, and two high-profile cases, this body made the considered judgment to leave the law as it was. The Executive Branch should have honored that decision. And as a matter of law, it had no other choice.

The decision that Congress has made so far—to eschew legislation like S. 1194—is the right one. S. 1194 is bad policy, is unnecessary to protect Americans abroad, upsets the basic

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principles of federalism, and raises serious constitutional concerns. On the merits, it should be rejected.

Thank you. I would be pleased to address any questions the Committee may have.

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August 1, 2011

Senator Patrick J. Leahy
Chairman
Senate Judiciary Committee
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

Senator Charles E. Grassley
Ranking Member
Senate Judiciary Committee
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley,

I write to communicate my concerns regarding S.1194, the Consular Notification Compliance Act. While Alabama's law enforcement officials work to ensure compliance with the Vienna Convention on Consular Relations treaty, S.1194 has far-reaching implications beyond the treaty itself that would interfere with enforcement of Alabama law.

First, this legislation applies retroactively, meaning that certain foreign nationals currently on death row in Alabama would be permitted yet another avenue to stay their executions by asserting a violation of this treaty, possibly leading to a new trial. Not only would these individuals be given the right to an evidentiary hearing, but the legislation also provides a right of appeal from a district court decision finding that no violation exists or that no prejudice arose from the violation. This legislation would directly and negatively impact our congested State and local criminal justice systems, and particularly in capital cases already plagued by lengthy and expensive appeals.

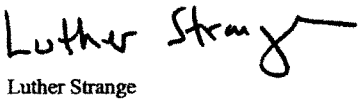
Furthermore, as the Eighth Circuit stated in *United States v. Ortiz*, 315 F.3 873 (8th Cir. 2002), the treaty itself is not logically related to the death penalty nor does it say that the death penalty should be excluded if the treaty is violated. The death penalty is provided for by Alabama law and is imposed only after a defendant is convicted of a capital offense. All defendants who enter the Alabama criminal justice system are afforded Constitutional due

process, both substantive and procedural. It is difficult to envision a case where an individual who has proceeded through our fair court system, duly convicted of a capital offense, and sentenced to death would be so prejudiced by a lack of consular access as to warrant a stay of execution or even a new trial.

In 2008, Iranian national Mohammed Sharifi was convicted of murdering his ex-wife, Sarah, and her houseguest in Huntsville, Alabama. Both bodies were found on the banks of the Tennessee River wrapped in plastic bags and tied with an electrical cord. They had been shot in the head. Law enforcement were able to identify a handgun purchased by Sharifi only days before the murder, which forensic testing determined was the murder weapon. Sharifi fled to California in an attempt to avoid prosecution and the driver's licenses of both victims were found on his person. Following a jury trial, Sharifi was convicted of murder and sentenced to death. Although the issue of consular access was not raised in his original trial, Sharifi raised the issue before the Alabama Court of Criminal Appeals, which affirmed the lower court's judgment. If S.1194 were to become law, murderers like Sharifi would be entitled to a stay of a scheduled execution in order for a federal court to review even a meritless claim of a treaty violation and would have the right to appeal from a dissatisfactory determination by that court.

For these reasons, I respectfully urge that Congress not pass S.1194.

Sincerely,



Luther Strange
Attorney General

LS:KT:smm

Department of Justice

STATEMENT OF

BRUCE C. SWARTZ
DEPUTY ASSISTANT ATTORNEY GENERAL
AND
COUNSELOR FOR INTERNATIONAL AFFAIRS

BEFORE THE

JUDICIARY COMMITTEE
UNITED STATES SENATE

ENTITLED

"MEETING THE UNITED STATES' INTERNATIONAL LAW OBLIGATIONS THROUGH THE CONSULAR NOTIFICATION COMPLIANCE ACT OF 2011"

PRESENTED

JULY 27, 2011

Statement of
Bruce C. Swartz
Deputy Assistant Attorney General
and
Counselor for International Affairs

Before the
Judiciary Committee
United States Senate

Entitled
"Meeting the United States' International Law Obligations Through the Consular Notification Compliance Act of 2011"

Presented
July 27, 2011

Good morning, Mr. Chairman, Senator Grassley and Members of the Committee. As the Deputy Assistant Attorney General responsible for international affairs, I am grateful for this opportunity to express the Department of Justice's strong support for the Consular Notification Compliance Act of 2011 ("CNCA"). Passage of this bill is critical to the law enforcement interests of the United States, and thus to the safety of American citizens, both abroad and at home.

As a preliminary matter, it is important to recall the events that have led to this bill. First and foremost, since the United States ratified the Vienna Convention on Consular Relations in 1969, it has had an obligation to provide consular notification and access to foreign nationals arrested or detained in the United States. That treaty is binding domestic law and it applies to every Federal, State and local law enforcement authority in this country.

There is no question that the United States has this obligation. It is not a position specific to this Administration or to the Executive Branch. More than three years ago, in *Medellín v. Texas*, 552 U.S. 491, 522 (2008), the United States Supreme Court held that the United States

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had an "international law obligation" to comply with the judgment of the International Court of Justice ("ICJ") in the *Avena* case. *Case Concerning Avena & Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). In *Avena*, the ICJ found the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations ("VCCR") by not informing certain Mexican nationals, who had been convicted and sentenced to death, that they could have received the assistance of their consul after arrest. The ICJ determined that the appropriate remedy for those violations was for the United States to provide, "by means of its own choosing," judicial review and reconsideration of the defendants' convictions and sentences, notwithstanding U.S. procedural default rules.

In *Medellín*, the United States Supreme Court, in a majority opinion written by Chief Justice Roberts, found not only that "the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States," 552 U.S. at 522, but that the United States had "plainly compelling" interests in complying with that judgment, to wit, "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." *Medellín*, 552 U.S. at 524. The Supreme Court held, however, that the ICJ's judgment was neither automatically enforceable in the courts of the United States, nor enforceable through the action of the President, as President George W. Bush had sought to do by issuing a February 28, 2005 Memorandum that stated that the "'the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity ....'" *Id.* at 503.

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Thus, as made clear by *Medellín*, and by the Supreme Court's subsequent decision in *Leal v. Texas*, No. 11-5001 (July 7, 2011), it is through passage of implementing legislation by Congress that the United States could, and *should*, meet its "international law obligation" to abide by the ICJ's judgment in *Avena* and fulfill our responsibilities under the Vienna Convention. In *Medellín*, the Supreme Court "agree[d]" that under Article 94 of the U.N. Charter, there is "'a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.'" *Id.* at 508 (quoting Brief for the United States; emphasis in original). The *Medellín* Court further noted that this provision of the U.N. Charter "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Id.* at 508-09 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). Thus, through the action of Congress the United States can meet its "international law obligation," and in doing so satisfy both its "interest" and its "honor."

This is precisely what is accomplished by the Consular Notification Compliance Act ("CNCA") that is before the Committee today. The CNCA addresses three areas of concern:

First, Section 3 of the bill simply restates and clarifies the existing obligations of the United States (as they pertain to Federal, State and local officials) under the VCCR and a number of bilateral agreements to provide consular notification and access to non-U.S. nationals arrested or detained in the United States. Despite the fact that these obligations already exist, instances in which notification is not provided continue to occur. By reiterating the existing consular notification and access obligations, the section makes clear that these obligations apply to Federal, State and local governments as a matter of domestic law. It provides that Federal, State, and local authorities shall inform an arrested or detained foreign national, without delay, that he

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or she may have his or her consulate notified of the arrest or detention. Where the foreign national requests such notification, or where otherwise required by treaty, these authorities must inform the foreign national's consulate without delay, and the consulate must be provided access.

This section makes clear that such notification should occur no later than the time of a foreign national's first appearance in court in a criminal proceeding (normally within 48 hours of arrest). This is intended to be a backstop or safeguard to ensure notification occurs by that time, if not already provided. This provision is consistent with the Justice Department's proposed amendments to Rule 5 of the Federal Rules of Criminal Procedure, which would require Federal courts to inform a defendant held in custody at the initial appearance that if the defendant is not a United States national, he or she may have his or her consulate notified of the arrest. Section 3 makes clear that this subsection does not create any judicially or administratively enforceable rights or causes of action. Importantly, however, Section 3 is designed to ensure that failure to afford consular notification – the issue that led to the *Avena* case – becomes a thing of the past.

Second, Section 4(a) directly addresses the judgment of the ICJ in *Avena*, and would bring the United States into compliance with *Avena* through a very limited and narrowly tailored retrospective remedy. This remedy affords an opportunity for judicial review and reconsideration on Federal habeas of the capital conviction and sentence of foreign nationals who have been sentenced to death at the time of enactment of the bill and who did not receive timely consular notification. While procedural default rules will not bar this opportunity, time limitations are set out regarding the filing of a petition under this section, as well as regarding appeal. Consistent with our domestic criminal practice, the petitioner must make a showing of

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actual prejudice to the criminal conviction or sentence – a very high burden of proof with which our courts are familiar If a petitioner can show actual prejudice to his or her conviction or sentence, the court shall order a new trial or sentencing proceeding. This subsection will bring the United States into compliance with regard to the Mexican *Avena* defendants, and it will also apply to other similarly situated foreign nationals – including defendants from the United Kingdom and other countries who currently have been sentenced to death but who did not receive consular notification, in violation of the Vienna Convention or our bilateral agreements.

Third, Section 4(b) ensures that if foreign nationals facing capital charges in the future for some reason do not receive timely consular notification, they may raise this objection during the pretrial or trial proceedings and consular access must be allowed at that time. The section provides that where a failure to provide consular notice and access is timely raised and substantiated before a court with jurisdiction over the charge, the court shall postpone proceedings to the extent the court determines necessary to allow for consular access and assistance. This subsection is intended to apply only before and during trial, and does not provide a defendant with any right to appellate, post-conviction, habeas corpus, or Federal collateral review of a claimed consular notification violation. The sole purpose is to ensure that our consular notification obligations are fully honored in this context, and the only remedy for a failure of consular notification is to allow access and assistance, as already required, and the possibility of a temporary continuance of the proceedings as may be necessary to facilitate that access and assistance. This is consistent with the Supreme Court's observation in *Sanchez-Llamas v. Oregon*, that, if a defendant "raises an Article 36 violation at trial, a court can make

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appropriate accommodations to ensure, to the extent possible, the benefits of consular assistance." 548 U.S. 331, 350 (2006).

Section 4 also makes clear that it shall not be construed to create any additional remedy, other than possible postponement to allow an opportunity for consular notification and assistance. This limitation on possible remedies is consistent with the Supreme Court holding in *Sanchez-Llamas,* that suppression of evidence is not available as a remedy for a consular notification violation, as the Vienna Convention itself does not mandate suppression and as the exclusionary rule is primarily reserved to deter constitutional violations, not applicable in this circumstance. *Id.* at 343-350. Nothing in the CNCA, however, is intended to foreclose a defendant from raising an Article 36 violation as part of a broader constitutional claim, such as a challenge to the voluntariness of a confession or a claim that defense counsel performed deficiently in investigating and preparing the defense. To emphasize, this subsection simply makes clear that no criminal law remedy, other than continuance, may be imposed under this section to address a free-standing failure of consular notification claim.

In sum, then, the bill before you carefully balances our treaty obligations and our domestic concerns regarding the very serious nature of capital cases and the need for finality of convictions. By crafting a narrow legislative response to bring the United States into compliance with the *Avena* decision – limiting its scope only to those convicted and sentenced to death before enactment of this legislation, and setting the high standard of actual prejudice in order to obtain reconsideration of such conviction or sentence – the United States recognizes the seriousness of capital proceedings and the extensive criminal justice process they entail up to and including conviction and sentencing. Similarly, by articulating an extremely narrow remedy for

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any future lapses with regard to consular access and notification – namely continuance of the trial to allow for such access and notification – the United States again recognizes its treaty obligations but does not allow for excessive disruption of the trial process.

Thus, it is the judgment of the Department of Justice that this bill is fully consistent with, and will further, the law enforcement interests of the United States. In contrast, failure to pass this legislation will endanger the citizens of the United States in three distinct ways.

Failure to Pass the CNCA Will Endanger Our Citizens Seeking Consular Access Abroad: As Undersecretary Kennedy's testimony establishes at greater length, the continuing non-compliance of the United States with the requirements of the treaty threatens the ability of the United States to provide consular access to our citizens abroad. With more than 170 parties, the Vienna Convention has afforded many thousands of American citizens detained abroad the benefits of consular notice and access. As Attorney General Holder and Secretary of State Clinton stated in their letter to this Committee dated June 28, 2011, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." U.S. citizens have had the benefit of consular notification and access in North Korea, Iran, Burma, Syria, Libya, Pakistan and elsewhere. But if we expect other nations to honor their consular notification obligations to detained U.S. nationals, we must honor our obligations to those foreign nationals detained here in the United States. Thus, as the Supreme Court noted in *Medellín*, it is a "plainly compelling" interest "to vindicate United States interests ensuring the reciprocal observance of the Vienna Convention." 552 U.S. at 524.

Failure to Pass the CNCA Will Endanger Our Citizens by Weakening Our International Law Enforcement Partnerships: The partnerships that the Department of Justice

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forms with its overseas counterparts are critical to the protection of the citizens of the United States. But those partnerships are put directly at risk by the continuing non-compliance of the United States with the *Avena* judgment.

This is most readily apparent with regard to our law enforcement relationship with Mexico. The past ten years have seen the establishment of unprecedented cooperation with Mexican law enforcement, including joint capacity building under the Mérida Initiative, close operational coordination against narcotics cartels, and record numbers of extraditions of defendants from Mexico to face trial in the United States. At their October 22, 2007 meeting in Mérida, Mexico, President Calderón of Mexico, and President George W. Bush, pledged to take the cartels "head-on," and to do so shoulder-to-shoulder. That is precisely what the Government of Mexico has done under President Calderón, together with the United States.

The Government of Mexico also has been extraordinarily cooperative with the Department of Justice in matters of special importance to the United States, such as the recent investigation of the murder of an ICE agent in Mexico. At the same time, however, the United States has failed to act on one of the key priorities of Mexico: compliance with the *Avena* judgment. Indeed, earlier this month, Texas proceeded with the execution of Humberto Leal Garcia, one of the Mexican nationals covered by the *Avena* decision, despite unsuccessful efforts to seek a stay from the U.S. Supreme Court – supported by the Department of Justice – to allow a reasonable time for Congress to consider the Consular Notification Compliance Act.

In a letter urging a stay in *Leal* sent to Secretary Clinton on June 14, 2011, Mexico's Ambassador to the United States stated that the U.S.'s "continued non-compliance with the ICJ's

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decision has already placed great strain on our bilateral relationship." Mexico's Ambassador further stated:

> 'While our bilateral agenda is moving forward as a result of a joint commitment to deepen and widen cooperation and dialogue, as I wrote to your Legal Adviser dated July 7, 2010, a second execution in violation of the ICJ's judgment [after the execution of José Ernesto Medellín in August 2008] would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."

Far from being a threat of retaliation, the Ambassador's letter goes on to make clear that this is simply a reflection of reality: "another execution of a Mexican national in direct violation of international law will undoubtedly affect public opinion in Mexico. Under these circumstances, in addition to the likely impact on dialogue and cooperation, my government would face significant pressure from Mexico's Congress to revise our cooperation and to re-examine our commitment to other bilateral programs."

Nor is this an issue limited to our law enforcement relationship with Mexico. A number of nations with which we maintain strong law enforcement working relationships on such issues as organized crime, drug trafficking, and counter-terrorism, currently have nationals in the U.S. who have been sentenced in capital cases, including Germany, Serbia, Spain, Honduras, El Salvador, Canada, France, and the United Kingdom, among others. Each of these countries would be in a position to make protests similar to those of Mexico in situations in which their nationals had not received consular notification and access. It is vital to the protection of our

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citizens that these law enforcement relationships continue unimpeded by the *Avena* issue – as passage of the Consular Notification Compliance Act would permit. Indeed, in this regard as well, the Supreme Court in *Medellín* recognized that there was a "plainly compelling" interest in "protecting relations with foreign governments" by complying with *Avena*. 552 U.S. at 524.

Failure to Pass the CNCA Will Endanger Our Citizens by Weakening Our Ability to Rely on the Rule of Law: Our citizens also will be made less safe if it is perceived that – by failing to comply with our "international legal obligation" under *Avena* – the United States is not fully committed to the international rule of law. The Supreme Court in *Medellín* also recognized this as a "plainly compelling" interest in complying with *Avena*: "demonstrating commitment to the role of international law." *Id.* at 524.

It is important to be clear about what is meant in this regard. Abiding by the international rule of law does not mean – as the Supreme Court made clear in *Medellín* – that ICJ judgments are automatically and directly enforceable in U.S. courts. What it does mean, however, is that when the U.S. submits itself to the jurisdiction of the ICJ, it undertakes "a *commitment* … to take *future* action through … [its] political branches to comply with an ICJ decision.' " *Medellín*, 552 U.S. at 508.

Because the United States ratified the VCCR as well as the Optional Protocol, under which it had previously acceded to the ICJ's jurisdiction over disputes arising under the VCCR, the United States is, as *Medellín* recognized, under an "international law obligation" to comply with the *Avena* decision. (On March 7, 2005, the United States withdrew from the Optional Protocol. See Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, http://www.state.gov/documents/organization/87288.pdf.)

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Indeed, it is precisely by complying with an adverse judgment that the United States most clearly demonstrates its commitment to the rule of law. It is this lesson – willingness to abide by the rule of law, even when judicial rulings are unfavorable – that is the central foundation of the Department of Justice's law enforcement capacity-building efforts overseas. Those capacity-building efforts in turn are designed to protect U.S. citizens, by ensuring that we are helping to establish law enforcement partners who will not only have the ability to fight international crime, but to do so as partners we can trust to act pursuant to the rule of law. If we are to be credible in arguing for the rule of law overseas, we must be seen as abiding by it here as well. The security of our citizens demands nothing less.

Conclusion: I would like to express again the Department of Justice's gratitude for the Committee's work on this critical piece of legislation. We strongly urge passage of this bill because it protects American citizens abroad while preserving our interests in maintaining critical law enforcement cooperation with foreign allies and seeing justice done in capital cases. It is carefully drafted to minimize delay in finally resolving the cases of the limited number of defendants covered by *Avena* or those similarly situated, and we stand ready to work with the Committee to ensure that result. Importantly, it provides no additional post conviction remedies.

This is truly a bipartisan issue: the Committee is carrying forward work that was begun by President George W. Bush, and that has now stretched over two Administrations. Both the Bush and Obama Administrations have shared a single goal: to, in the words of the Supreme Court's decision in *Medellin,* meet our "international law obligation," and in so doing achieve our "plainly compelling" interests in "vindicat[ing] United States interests in ensuring the

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reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." 552 U.S. at 522, 524.

Thank you. I will be pleased to answer any questions.

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