Belmont University
Belmont Digital Repository

Law Faculty Scholarship | College of Law

Summer 2014

No Right at All: Putting Consular Notification in Its Rightful Place after Medellin

Alberto R. Gonzales
Belmont University - College of Law

Amy L. Moore
Belmont University - College of Law

Follow this and additional works at: https://repository.belmont.edu/lawfaculty

 Part of the Legal Writing and Research Commons

Recommended Citation
66 U. FLA. L. REV. Number 2 (2014)

This Article is brought to you for free and open access by the College of Law at Belmont Digital Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of Belmont Digital Repository. For more information, please contact repository@belmont.edu.

NO RIGHT AT ALL: PUTTING CONSULAR NOTIFICATION IN ITS RIGHTFUL PLACE AFTER *MEDELLÍN*

Alberto R. Gonzales[*] *& Amy L. Moore*[**]

Abstract

This Article covers the history of consular notification and presentation in the U.S. federal and state courts and in the International Court of Justice. Article 36 of the Vienna Convention on Consular Relations provides that nation-states should notify detained foreign nationals of their right to contact their consulate about their detention. This Article argues that the U.S. Supreme Court, as a matter of institutional responsibility and judicial economy, should have concluded that the Vienna Convention on Consular Relations does not contain an enforceable individual right. Moreover, no analog for this right has been found in American jurisprudence.

---

* Former Counsel to the President and United States Attorney General under the George W. Bush Administration. Before he joined the Bush Administration in Washington, he served as then-Governor George W. Bush's General Counsel, the Texas Secretary of State, and was later appointed to the Supreme Court of Texas. He is currently the Doyle Rogers Distinguished Chair of Law at Belmont University College of Law, and Counsel of the Nashville law firm of Waller Lansden Dortch & Davis, LLP. I would like to thank Shellie Handelsman (Juris Doctor Candidate, 2014, Belmont University College of Law) for her valuable assistance and acknowledges the contribution of Christine Oberholtzer (Juris Doctor Candidate, 2014, Belmont University College of Law).

** Associate Professor of Law at Belmont University College of Law. Special thanks to Sean Alexander, Emily Cole, and Daniel Patten (Juris Doctor Candidates, 2014, Belmont University College of Law) for all of their hard work and wonderful assistance on this project.

INTRODUCTION

Medellín v. Texas,[1] decided in 2008, was the last in a long line of U.S. Supreme Court cases that dealt with the issue of consular notification. After all of the litigation, a key question remains unanswered: whether foreign nationals detained in the United States have enforceable individual rights under Article 36 of the Vienna Convention on Consular Relations (the VCCR). Article 36 of the VCCR ostensibly requires countries that ratified the VCCR to provide certain notifications to foreign nationals that they detain or arrest within their borders and to the consulates of those foreign nationals.[2] Because the United States is a signatory nation, its failure to provide such notice in several instances has generated a number of lawsuits.[3] Foreign nationals have assumed that the VCCR provides enforceable individual rights and have asked courts to decide the scope of remedies available to them under domestic and international law.[4]

In *Medellín*, the U.S. Supreme Court assumed the VCCR provided an enforceable individual right when it concluded no remedy existed for criminal defendants deprived of their supposed right to consular notification.[5] Respectfully, as a matter of institutional responsibility and judicial economy, the U.S. Supreme Court should have decided both issues in the negative. This alternative, and perhaps more appropriate, holding would have been that the VCCR does not create an individual right nor does it require nation-states to recognize or create such rights. Moreover, the U.S. Supreme Court has refused to acknowledge a foothold for this right under the requirements of due process or under any existing federal or state law. By failing to definitively determine that the VCCR does not create an enforceable individual right to consular notification, the U.S.

1. 552 U.S. 491 (2008).

2. *See* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 262 [hereinafter Vienna Convention] (entered into force with respect to the United States of America on Dec. 24, 1969).

3. *See, e.g.*, *Medellín*, 552 U.S. 491; *see also* Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 799–823 (discussing cases).

4. *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

5. *Medellín*, 552 U.S. at 509, 513–14.

Supreme Court encourages foreign nationals to invoke this so-called right in litigation. Consequently, lower courts are compelled to explain how and why this "consular right" is not really a right, and then why courts may not enforce it in a particular context. The U.S. Supreme Court's apparent reluctance to recognize an individual right means advocates of such a right must rely on federal or state legislative action to create a statutory remedy or basis for this right.

Although the VCCR does not appear to create an enforceable individual right, the Treaty remains important to U.S. foreign policy. Due to the large number of Americans overseas, the United States has a vested interest both in honoring the VCCR consular notification requirements and in having other signatory nations honor this agreement with regard to American citizens. Additionally, undisputed international obligations upon the U.S. government are contained in the Treaty and should be observed. These obligations may be met through current State Department efforts to educate state and local law enforcement and lawyers about the VCCR.

Although the VCCR is a signed treaty, the scope of its enforceability remains unclear. To analyze this issue in depth, it is necessary first to examine the history of consular notification in the United States, particularly the interplay between the U.S. Supreme Court and the International Court of Justice (ICJ). As no international foundation exists for the right to consular notification, U.S. constitutional protections could be the only intrinsic, domestic source of such a right. Even without such a foothold, of course, federal and state legislatures are free to create remedies for Article 36 violations. However, as of the publication of this Article, neither Congress nor any state legislatures have created any remedies. The U.S. Supreme Court could have easily avoided these difficult decisions about presidential power, treaty interpretation, and the efficacy of the ICJ holdings—as well as promoted judicial economy—if it merely held in *Medellín* that an enforceable individual right to consular notification did not exist.

I. THE UNITED STATES AND THE VIENNA CONVENTION ON CONSULAR RELATIONS

There is a long history of litigation concerning consular notification under the VCCR. The issues in litigation often implicate individual U.S. state interests, and attempt to clarify the relationship and authority between the United States and the ICJ.

A. *The Vienna Convention on Consular Relations*

The story of consular notification litigation in the United States begins

with the VCCR itself.[6] By its terms, the VCCR appears to create privileges and immunities for nation-states to promote the maintenance of international peace and security. The VCCR was enacted "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective [nation-states]."[7] In 1969, the United States ratified the VCCR and the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention (the Optional Protocol).[8] Initially, forty-eight countries signed the VCCR; today, 176 countries are party to the VCCR.[9] Initially, twenty-nine countries signed the Optional Protocol, and today sixty-nine countries have agreed to be bound by it.[10]

Article 36 of the VCCR is most relevant to the issue of consular notification:

> It provides that if a person detained by a foreign country 'so requests, the competent authorities of the receiving [nation-state] shall, without delay, inform the consular post of the sending [nation-state]' of such detention, and 'inform the [detainee] of his righ[t]' to request assistance from the consul of his own state.[11]

In fact, the detainee must be informed of these rights "without delay."[12] To meet the United States' obligations, the U.S. Department of State recommends that authorities inform foreign nationals of these Article 36 provisions.[13] The United States entered into additional agreements with fifty-seven countries to make consular notification mandatory when the United States detains their nationals.[14]

---

6. The history of consular notification litigation in the United States and internationally through the ICJ is complex. Please refer to Appendix A for a timeline of important events.

7. Vienna Convention, *supra* note 2, 21 U.S.T. at 79, 596 U.N.T.S. at 262.

8. *Id.*; Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol] (entered into force with respect to the United States of America on Dec. 24, 1969).

9. VCCR Status as at January 15, 2014, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en.

10. Optional Protocol Status as at January 15, 2014, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&lang=en.

11. Medellín v. Texas, 552 U.S. 491, 499 (2008) (third and fourth alterations in original) (quoting Vienna Convention, *supra* note 2, 21 U.S.T. at 101, 596 U.N.T.S. at 292).

12. Vienna Convention, *supra* note 2, 21 U.S.T. at 101, 596 U.N.T.S. at 292.

13. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 7 (4d ed. 2014) [hereinafter DEP'T OF STATE MANUAL], *available at* http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf. However, as this Article argues, this exists as a nation's prerogative to create such agreements and is not a basis of individual enforcement. *See generally* 3 SHANE DIZON & NADINE K. WETTSTEIN, IMMIGRATION LAW SERVICE § 16:4 (2d ed. 2013) (explaining that although a majority of courts hold that Article 36 of VCCR does not confer rights enforceable by individuals, a minority hold otherwise).

14. DEP'T OF STATE MANUAL, *supra* note 13, at 4, 7.

The Optional Protocol provides that any dispute between members that arises out of the interpretation or application of the VCCR be brought before the ICJ.[15] But only nation-states have the ability to resolve disputes over a treaty via the ICJ; no individual has standing in that court.[16] The ICJ can gain jurisdiction over nation-states through special agreements, dispute settlement clauses in a treaty, use of the optional clause, or forum prorogatum.[17] However, unless a nation consents, the ICJ lacks jurisdiction to hear a case against that nation.[18] In the case of the VCCR, a dispute settlement clause in the Optional Protocol gives the ICJ jurisdiction.[19]

It is only after prosecution progresses to a point where state procedural default rules preclude a domestic court from hearing VCCR-related claims that many foreign nationals detained in the United States become aware of the option to contact their consulate.[20] The ICJ and other signatory nations

---

15. Optional Protocol, *supra* note 8, 21 U.S.T. at 326, 596 U.N.T.S. at 488.

16. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1055, 1059 [hereinafter ICJ Statute] ("Only states may be parties in cases before the Court."); *see also* Martin Scheinin, *The ICJ and the Individual*, 9 INT'L COMMUNITY L. REV. 123, 124 (2007) ("Procedurally, individuals do not have access to the Court, or standing before the Court.").

17. *See* ICJ Statute, *supra* note 16, art. 36, para. 1 (gaining jurisdiction through a special agreement); *id.* art. 37 (gaining jurisdiction through dispute settlement clauses in a treaty); *id.* art. 36, para. 2 (gaining jurisdiction through the use of the optional clause); BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 299, 301, 306, 318–19 (6th ed. 2011) [hereinafter INTERNATIONAL LAW]; *see also* Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179, 187 (2009) (explaining that parties must consent to the ICJ's jurisdiction for it to be effective, and detailing some ways in which they may do so). The optional clause refers to Article 36(2) of the ICJ Statute, which allows countries to consent in advance to compulsory jurisdiction for any international dispute that arises with another country that also opted in through the optional clause. ICJ Statute, *supra* note 16. Forum prorogatum is another doctrine by which the ICJ gains jurisdiction. *See* Sienho Yee, *Forum Prorogatum and the Advisory Proceedings of the International Court*, 95 AM. J. INT'L L. 381, 381 (2001). By that doctrine, a party may invite its adversary into court, even after proceedings have already been instituted, by submitting an application to the court. *See id.*

18. INTERNATIONAL LAW, *supra* note 17, at 301; Kolesnikov, *supra* note 17, at 187.

19. Optional Protocol, *supra* note 8, 21 U.S.T. at 326, 596 U.N.T.S. at 488. However, after the ICJ's decision in *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 153 (Mar. 31), which ruled against the United States, the United States withdrew from the Optional Protocol on March 7, 2005, and deprived the ICJ of its jurisdiction. Kolesnikov, *supra* note 17, at 188.

20. *Cf. Avena*, 2004 I.C.J. ¶¶ 113–14 (noting that "procedural default rule[s] may continue to prevent . . . Mexico, in a timely fashion, from . . . assisting in [the] defence [sic]" of certain nationals and that "moreover . . . in several of the cases cited in Mexico's final submissions the procedural default rules have already been applied, and . . . in others it could be applied at subsequent stages in the proceedings"). State procedural default rules require that defendants present claims to state courts before they present claims to a federal court. LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 23 (June 27). If a defendant attempts to raise a *new* issue in a habeas proceeding, the defendant may do so only if the defendant shows cause, obvious prejudice, and that some external impediment prevented him from raising the issue earlier. *Id.*

note these repeated notification lapses.[21] However, many of these failures can be attributed to confusion over implementation of the Treaty within the United States' federal and state governments and to disagreements between the United States and the international community.

B. *States and the VCCR Without Federal Guidance*

Following the ratification of the VCCR, a struggle ensued between the states and federal government over its implementation. Under principles of federalism, states were understandably reluctant to alter state procedural rules to conform to nebulous international expectations.[22] After the United States became a signatory to the VCCR, there was little direction from the federal government to the states on what role the states played in handling these federal obligations.[23] For example, in June 1986, the state of Texas convicted Irineo Tristan Montoya of capital murder and sentenced him to death.[24] Montoya, a Mexican national, petitioned then-Texas Governor George W. Bush for leniency and a stay of execution because of the failure of Texas authorities to notify the Mexican consulate of Montoya's

---

21. *See Report: U.S. Operates Double Standard when Mexicans are Arrested for Murder*, ABELINE REPORTER-NEWS (Sept. 29, 1997), http://www.texnews.com/texas97/execute092997.html [hereinafter *Double Standard*] (reporting Mexico formally complained to the State Department about repeated violations of Article 36 of the VCCR, alleging that "[i]n every capital punishment case, Mexican consulates were not notified until after their citizens had been convicted and sentenced to death"); *cf. Avena*, 2004 I.C.J. ¶¶ 113–14 (noting that the procedural default rule prevented Mexico from rendering legal assistance to certain nationals and could continue to do so); *LaGrand*, 2001 I.C.J. ¶ 91 (holding that the United States failed to timely comply with its obligation to inform the LaGrands of Germany's right, at their request, to render them legal assistance, and, because of the operation of the procedural default rule, nothing could be done to remedy such malfeasance); Linda E. Carter, *Lessons from* Avena*: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259, 270–71 (2005) (stating that the procedural default rule is the "primary restriction . . . that affects access to a hearing on the VCCR," in large part because "exceptions to procedural default are invoked sparingly").

22. *See, e.g.*, *Amnesty International: Violation of the Rights of Foreign Nationals Under Sentence of Death*, DEATH PENALTY INFORMATION CENTER (1998) [hereinafter *Amnesty International*], http://www.deathpenaltyinfo.org/node/802 (stating that, as of 1998, "most state and local authorities remain[ed] ignorant of their [responsibilities under Article 36 of the VCCR] . . . . [d]espite sporadic advisory notices from the State Department," and reporting that, in the criminal proceedings against Irineo Tristan Montoya, Texan officials told the State Department that Texas "refused to investigate [Texas's] violation [of Article 36 of the VCCR] or to assess its possible impact, on the grounds that Texas was not a signatory to the Vienna Convention").

23. *See* Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 230 (2000) (stating that, as of 2000, "American courts . . . continually found ways to keep from affording foreign nationals their rights under the Vienna Convention. The Supreme Court . . . refused to rule on the matter, leaving the lower federal and state courts confused and divided").

24. Montoya v. State, 810 S.W.2d 160, 161, 165–66 (Tex. Crim. App. 1989) (en banc), *rev'd in part sub nom.* Montoya v. Scott, 65 F.3d 405 (5th Cir. 1995).

detention, as required under Article 36 of the VCCR.[25]

The sentencing judge, the local district attorney, the Texas Attorney General's Office, and the Texas Board of Pardons and Paroles strongly opposed a reprieve.[26] Additionally, serious policy considerations influenced the Governor's decision. A grant of reprieve would raise sensitive and difficult questions regarding the validity of other types of state convictions.[27] If a treaty violation could be the basis for reversing or remanding a conviction for capital murder, then why not also one for DWI, assault, or robbery? At the time approximately eleven Mexican nationals resided on death row in Texas.[28] If Governor Bush granted a reprieve in the Montoya case, then he and future governors would be pressured to grant a reprieve in similar cases in which consular notifications had not been provided. The Governor did not want to establish such a precedent.[29]

Due to the wide publicity at the time, the Mexican government and the Mexican consul in Brownsville, Texas almost certainly knew of the arrest and trial.[30] Additionally, according to an affidavit from the Mexican consul in Brownsville, his government received official notice of Montoya's conviction.[31] Therefore, the Mexican government had sufficient opportunity to advise Montoya's lawyer about the United States' alleged treaty violation. If the Mexican government had advised Montoya's lawyer, then procedural default rules would not have barred Montoya from raising the VCCR violation on direct and habeas appeal.

Montoya was executed in June 1997.[32] Afterwards, the Mexican government launched a formal complaint with the U.S. federal government

---

25. Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 379–80 (2003).

26. *Cf.* Pauline Arrillaga, *Prison Board Rejects Request to Commute Montoya's Sentence*, ABILENE REPORTER-NEWS (June 18, 1997), http://www.texnews.com/texas97/reject061897.html (reporting that the state attorney general's office did not return the newspaper's calls, and the Texas Board of Pardons and Paroles stated that defendants "have to make a good case for swaying the board to recommend such changes," but Montoya's request for reprieve simply "was not strong enough").

27. Personal Account of Alberto R. Gonzales, former General Counsel to Texas Governor George W. Bush, 2005–2007.

28. *Double Standard*, *supra* note 21.

29. Personal Account of Alberto R. Gonzales, *supra* note 27.

30. *See* Fleishman, *supra* note 25, at 377–78 (reporting that Mexico began to take action on Montoya's behalf after his conviction in the lower court and before his habeas appeal); *see also* Sam Dillon, *Mexico Reacts Bitterly to Execution of One of Its Citizens in Texas*, N.Y. TIMES (June 20, 1997), http://www.nytimes.com/1997/06/20/world/mexico-reacts-bitterly-to-execution-of-one-of-its-citizens-in-texas.html (indicating that the trial generated wide publicity).

31. Personal Account of Alberto R. Gonzales, *supra* note 27.

32. *Texas Executes Mexican, Prompting More Protests*, N.Y. TIMES (June 19, 1997) [hereinafter *Texas Executes Mexican*], http://www.nytimes.com/1997/06/19/us/texas-executes-mexican-prompting-more-protests.html.

over his treatment. [33] The Department of State inquired several times into the matter and asked whether a violation of the VCCR occurred.[34] The state of Texas acknowledged that it appeared as though the state did not provide consular notification to Montoya at the time of his detention, but argued that it was not the state's role to confirm any violation of the VCCR.[35] From the state's perspective, Montoya committed a horrific crime in Texas and received a fair trial.[36] The state deferred to the federal government to deal with Mexico and the ramifications of a possible VCCR violation.

Following Montoya's execution, Texas and other states continued to stop, detain, and convict Mexican nationals without providing consular notification.[37] Over time, this practice led to greater tension with Mexico and the ICJ, setting the stage for additional litigation.

C. *The Supreme Court Starts the Dialogue*

In 1998, the state of Virginia prepared to execute Angel Francisco Breard, a citizen of Paraguay, for attempted rape and capital murder.[38] Breard raised for the first time in his habeas petition that his treatment in the state of Virginia violated the VCCR because the state never informed him of his consular rights.[39] Breard's claim was continually rebuffed in the courts; he procedurally defaulted because he failed to raise the issue in

---

33. Dillon, *supra* note 30.

34. Personal Account of Alberto R. Gonzales, *supra* note 27; Fleishman, *supra* note 25, at 379; *Amnesty International*, *supra* note 22.

35. Personal Account of Alberto R. Gonzales, *supra* note 27. As stated in a 1997 letter to the Department of State:

> Since the State of Texas is not a signatory to the Vienna Convention . . ., we believe it is inappropriate to ask Texas to determine whether a breach of Article 36 . . . occurred . . . . [Additionally,] I felt it would be inappropriate for the Governor's Office to give an opinion regarding the consequences and materiality of any breach of the treaty . . . .

Letter from Alberto Gonzales, Gen. Counsel to Governor of Tex., to Michael J. Matheson, Acting Legal Advisor, U.S. Dep't of State (June 16, 1997), *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 498–99 (2d ed. 2005) (second alteration in original).

36. Personal Account of Alberto R. Gonzales, *supra* note 27; *see also* Brief of Respondent, Respondent's Brief in Opposition, Montoya v. Johnson, 517 U.S. 1133 (1996) (No. 95-1003), 1996 WL 33467927 (arguing on behalf of Texas that the Petitioner's conviction was fair and legally sound despite alleged defects); *Texas Executes Mexican*, *supra* note 32 ("Gov. George W. Bush refused to grant him [Montoya] a 30-day reprieve, saying he had received a fair trial.").

37. *See, e.g.*, United Mexican States v. Woods, 126 F.3d 1220, 1222–23 (9th Cir. 1997); Murphy v. Netherland, 116 F.3d 97, 99–101 (4th Cir. 1997); State v. Loza, No. CA96-10-214, 1997 WL 634348, at *1–2 (Ohio Ct. App. Oct. 13, 1997).

38. Breard v. Greene, 523 U.S. 371, 372–73 (1998).

39. *Id.* at 373.

state court.[40] Breard argued that the VCCR should trump the procedural default doctrine.[41] The U.S. Supreme Court disagreed and reminded him that the provisional rights of the Constitution had to conform to procedural default rules, and so too, did treaties.[42] Beyond the scope of domestic law, the Court held "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum [nation-state] govern the implementation of the treaty in that [nation-state]."[43]

In other words, it was up to the United States and individual states to make rules to govern the implementation of the VCCR with respect to procedural default rules. Even the VCCR itself noted that the Convention "shall be exercised in conformity with the laws and regulations of the receiving [nation-state], provided that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."[44] As long as domestic laws do not interfere or inhibit the rights granted by the VCCR, states should give full effect to domestic laws. The notion that international obligations should not override domestic laws where possible is meant to encourage greater nation-state support and participation in the VCCR.

In addition to its affirmance of the principle that the VCCR was subject to state procedural default rules, *Breard* is perhaps best known for its confirmation, in this context, of the "last-in-time rule."[45] Even if the VCCR was not itself subject to rules of procedural default, there was another basis for the courts to deny Breard relief. The Court reasoned that because the Constitution recognizes treaties as the supreme law of the land, if a treaty and federal statute conflict, then the most recently effectuated

---

40. *Id.*

41. *Id.* at 375. Paraguay later argued to the ICJ that the United States violated Paraguay's rights as a nation-state through the U.S. officials' failure to notify Breard of his ability to contact his consulate and through the subsequent nullification of this ability through procedural default rules. Application of the Republic of Paraguay (Para. v. U.S.), ¶¶ 24(a)–(e) (Apr. 3 1998), *available at* http://www.icj-cij.org/docket/files/99/7183.pdf. Breard's execution rendered the case moot, though it was still in process in the ICJ at that time. Christopher E. van der Waerden, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631, 1639 (1999) (citing Request for the Indication of Provisional Measures (Para. v. U.S.), ¶ 37 (Apr. 9 1998), *available at* http://iilj.org/courses/documents/CaseConcerningtheVienna ConventiononConsularRelations-Paraguayv.USA.pdf).

42. *Breard*, 523 U.S. at 376 ("Although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply.").

43. *Id.* at 375.

44. *Id.* (citing Vienna Convention, *supra* note 2, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 262).

45. *See* Emily S. Bremer, *The Dynamic Last-in-Time Rule*, 22 IND. INT'L & COMP. L. REV. 27, 36 (2012); Charles B. Radlauer, *A Clash of Power and Jurisdiction: The United States Supreme Court v. The International Court of Justice*, 11 ST. THOMAS L. REV. 489, 503–04 (1999).

treaty or federal statute—the one last-in-time—will control.[46] As noted earlier, the VCCR has been in effect since 1969. More recently, in 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act, which provides that a habeas petitioner who alleges violations of treaties cannot receive an evidentiary hearing if he fails to develop in state court proceedings the factual basis of the claim.[47] Because this Act was last-in-time in relation to the VCCR, the most recent law controlled and extinguished Breard's claim.[48]

D. *The International Court of Justice Responds*

Three years after the U.S. Supreme Court's holding in *Breard*, the ICJ ruled on a similar case that involved foreign nationals detained in the United States.[49] Karl and Walter LaGrand were citizens of Germany but were arrested in Arizona in the course of an attempted bank robbery that took the life of the bank manager and seriously injured another bank employee.[50] The trial court sentenced them to death, and they filed a habeas petition with the U.S. District Court of Arizona, claiming a violation of their rights under the VCCR.[51] The court rejected that claim under procedural default rules.[52] During the proceedings, Germany filed an action against the United States with the ICJ.[53] Germany obtained jurisdiction based on the Optional Protocol both countries had signed.[54] The United States conceded during the course of the ICJ's investigation that the responsible Arizona authorities failed to inform the LaGrands of their right to consular notification, even after the Arizona authorities became aware of their German nationality.[55] Therefore, the ICJ concluded that the United States "violated its obligations under . . . the Vienna Convention."[56] The ICJ issued a provisional order in an attempt to stay the executions pending a final decision on the merits.[57]

Germany argued that the procedural default rules created the tension

46. *Breard*, 523 U.S. at 376 (citing Reid v. Covert, 354 U.S. 1, 18 (1957) and Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

47. *Id.* at 376; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, 1219.

48. As the Act did not allow Breard to have an evidentiary hearing, he could not prove how the violation of the VCCR prejudiced him. *Id.* (citing 28 U.S.C. § 2254(a), (e)(2) (Supp. IV 1994)).

49. LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 13–14 (June 27).

50. *Id.*

51. *Id.* ¶¶ 14, 23.

52. *Id.* ¶ 23.

53. *Id.* ¶ 1. This was after diplomatic efforts had failed.

54. *Id.* ¶ 128(1).

55. *Id.* ¶ 15.

56. *Id.*

57. *Id.* ¶ 32. Despite the ICJ order, the LaGrands were executed. *Id.* at ¶ 34.

inherent in the LaGrands' claim.[58] The United States' failure to meet its obligation under the VCCR made it impossible for the brothers to raise this claim in line with the procedural default rules.[59] The United States' breach of its obligations to inform the LaGrands of their rights was the reason why they did not raise their claim in a timely fashion.[60] The ICJ determined that Article 36 created individual rights for the detained person.[61] The ICJ also concluded that while the procedural default rules did not violate the VCCR, they nevertheless proved problematic because they denied a foreign nation the opportunity to raise violations of the VCCR.[62] The ICJ ordered the United States to permit "review and reconsideration" of the LaGrands' case in light of the established violations.[63] The ICJ warned the United States that if it denied this review, it would further breach its obligations to Germany.[64]

Although this case is an example of the ICJ's willingness to issue orders that relate to the rights of individuals, the ICJ's decision reinforced the principle that the VCCR is a treaty between nation-states and is intended to define rights and obligations between nation-states. While the ICJ determined that the VCCR created individual rights, the invocation of those individual rights was up to the individual's nation-state (in this case, Germany).[65] Moreover, because the LaGrands were executed in 1999, two years before the ICJ issued its final decision,[66] even Germany could not receive remedy.[67]

The meaning and scope of the VCCR remained unsettled when the ICJ was again called to resolve a dispute regarding Article 36 of the VCCR in *Case Concerning Avena and Other Mexican Nationals*, decided in March 2004.[68] In 2003, Mexico brought suit against the United States and argued that, in fifty-two cases that spanned nine states, the United States had violated the VCCR.[69] One of these cases involved Jose Ernesto Medellín

---

58. *Id.* ¶ 11(2).

59. *Id.* ¶¶ 81–82.

60. *Id.*

61. *Id.* ¶¶ 77, 89.

62. *Id.* ¶ 90.

63. *Id.* ¶ 128(7).

64. *See id.* ¶ 125 (stating that although the ICJ did not impose material penalties, the ICJ would impose penalties in any susequent similar situation).

65. *Id.* ¶ 77 ("[T]he Court concludes that Article 36, paragraph 1, creates individual rights, which . . . may be invoked in this Court by the national State of the detained person.").

66. *See World Court Rules Against U.S., Says Germany's Rights Violated*, AMARILLO GLOBE-NEWS (June 28, 2001), http://amarillo.com/stories/2001/06/28/usn_rules.shtml.

67. *See Legrand*, 2001 I.C.J. ¶¶ 123–28.

68. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 54 (Mar. 31).

69. *Id.* ¶ 15. These cases occupied various stages of U.S. litigation: twenty-four remained in direct appeal, twenty-five exhausted direct appeal but post conviction relief was still available at the state or federal level, and three cases existed in which no judicial remedy remained. *Id.* ¶ 20.

Rojas.[70]

The United States unsuccessfully objected at the outset to the jurisdiction of the ICJ in this matter.[71] The ICJ insisted that the issue was a "question of interpretation of the obligations imposed by the Vienna Convention" that was proper under the Optional Protocol.[72] The ICJ also determined it was competent to review the merits of the case and to impose remedies if it found a breach.[73]

The United States then argued that it is difficult to discern who might be a foreign national because the language that a person speaks, or his appearance, might not indicate whether he is a foreign national.[74] The ICJ suggested a routine inquiry into nationality and notification during *Miranda* warnings and noted that "were each individual to be told at [the time of detention] that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 *(b)* would be greatly enhanced."[75] The ICJ did not require this solution but only recommended it.[76]

Mexico also presented a due process argument and reasoned that:

> Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled, and . . . therefore [it is] an essential requirement for fair criminal proceedings against foreign nationals.[77]

However, the ICJ found it unnecessary to attempt to define or enforce due process.[78]

Instead, the ICJ focused on the existence of a nation-state's duty to inform an arrested person "as soon as it is realized that the person is a

---

70. *Id.* ¶ 16 (number thirty-eight of the fifty-two individuals).

71. *Id.* ¶¶ 26–35.

72. *Id.* ¶ 30.

73. *Id.* ¶¶ 30, 34.

74. *Id.* ¶ 64.

75. *Id.*

76. *See id.* (suggesting that such an inquiry would be "desirable" but going no further).

77. *Id.* ¶ 30 (internal quotation marks omitted). Mexico successfully made a similar argument at the Inter-American Court of Human Rights in 1999. *See* Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 26, 141.7 (Oct. 1, 1999) (successfully arguing that foreign nationals have the right to consular assistance). However, the Inter-American Court of Human Rights executed zero enforcement of this judgment. Application Instituting Proceedings (Mex. v. U.S.), 2003 I.C.J. No. 128, ¶ 66 (Jan. 9), *available at* http://www.icj-cij.org/docket/files/128/1913.pdf ("The Inter-American Court's decision has had no apparent effect on United States policy and practice.").

78. *See Avena*, 2004 I.C.J. 12, ¶¶ 30, 124 (reasoning that, while Mexico's due process contention may be correct, the court need not decide the merits of that issue).

foreign national, or once there are grounds to think that the person is probably a foreign national."[79] The United States violated this duty,[80] and the ICJ ordered the United States to make adequate reparations.[81] The ICJ did not require the partial or total annulment of convictions.[82] Instead the ICJ ordered review and reconsideration of each of the fifty-two cases to ascertain actual prejudice to the defendant because of an Article 36 violation.[83] The ICJ left the "concrete modalities" for such review to the discretion of the United States.[84] The ICJ also encouraged the United States—much like it had ordered in *LaGrand*—to either revise the procedural default rules or somehow prevent their application in cases where a consular notification breach occurred.[85]

E. *The Supreme Court Fails to Find a Remedy*

The United States declined to prohibit the use of federal or state procedural default rules as the ICJ suggested in *Avena*.[86] Instead, the United States allowed those cases to take their proper course through the U.S. judicial system. However, the United States soon found itself dealing again with its failure to give proper consular notification. In 2006 the U.S. Supreme Court announced its decision in *Sanchez-Llamas v. Oregon*.[87] Here, the Court set out to answer three distinct questions: (1) does the VCCR grant rights that individuals may invoke in judicial proceedings; (2) is suppression of evidence a proper remedy for an Article 36 violation; and (3) is an Article 36 claim forfeited under state procedural default rules if a defendant fails to raise the claim at trial?[88]

The first question the Court found "unnecessary to resolve."[89] The Court "assume[d], without deciding, that Article 36 does grant . . . such rights."[90] This assumption allowed the Court to sidestep the issue of whether the VCCR was self-executing. If the Court denied suppression as a

79. *Id.* ¶ 88. There are two pieces to Article 36: the duty to inform detained foreign nationals of their ability to contact the consulate and the duty to inform the consulate of the detention. *See* Vienna Convention, *supra* note 2, 21 U.S.T. at 101, 596 U.N.T.S. at 1967. The latter duty appears only if the detainee so requests, but the former duty exists on its own as part of the international commitment of the VCCR. *See supra* Subsection I.A.

80. *Avena*, 2004 I.C.J. 12, ¶ 90.

81. *Id.* ¶ 121.

82. *Id.* ¶ 123.

83. *Id.*

84. *Id.* ¶ 131.

85. *Id.* ¶ 113. The ICJ did note that the United States makes "good faith efforts" to require law enforcement to give consular notification. *Id.* ¶ 149. The court took this as a commitment to follow through with these efforts and not to remain a repeat offender. *Id.* ¶ 149–50.

86. Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006).

87. *See id.* at 331.

88. *Id.* at 337.

89. *Id.* at 343.

90. *Id.*

remedy (regardless of whether the VCCR was self-executing), then it was not necessary to determine if the treaty was self-executing.[91] It also allowed the Court to avoid the question of how to enforce an individual right.

The Court contended that, as a federal court, it had limited authority over state court proceedings (of which *Sanchez-Llamas* was a part) and could intervene only "to correct wrongs of constitutional dimension."[92] The majority agreed that with no constitutional wrongs, any remedy enforceable at the state level must spring from the VCCR.[93] Because the VCCR provided no remedy, the Court declined to create one. If the Court created a remedy, then the Court would exceed its judicial role and usurp the power of Congress to ratify the terms and powers of a treaty.[94]

Sanchez-Llamas then argued that if the Court's authority must come from the VCCR to give Article 36 "full effect," the Treaty must mandate a judicial remedy of "*some* kind."[95] The Court rejected this argument and noted that it was unaware of any other country that afforded a remedy for violations of Article 36 in criminal prosecutions.[96] Even if the Court were to agree to some remedy, it maintained that it could not invoke suppression, which falls under the auspices of the exclusionary rule.[97]

In answer to the second issue before the Court concerning whether suppression was an appropriate remedy, the Court explained that it primarily invoked the exclusionary rule for constitutional violations.[98] Specifically, the exclusionary rule has been applied only to certain violations of the Fourth and Fifth Amendments through improper searches, seizures, and confessions extracted in violation of self-incrimination principles and due process.[99] Here, the Court found that a violation of Article 36 was unrelated to searches, interrogations, or the gathering of evidence; in other words the violation was unrelated to constitutional

---

91. As the *Medellín* decision makes clear, creating a rubric for distinguishing self-executing treaties from non-self-executing treaties involved additional, lengthy analysis. Medellín v. Texas, 552 U.S. 491, 505–06 (2008). This may have served as the impetus for the U.S. Supreme Court to avoid the discussion of the self-executing nature of the VCCR at this juncture.

92. *Sanchez-Llamas*, 548 U.S. at 345 (quoting Smith v. Phllips, 445 U.S. 209, 221 (1982)).

93. *Id.* at 346.

94. *Id.* at 347.

95. *Id.*

96. *Id.* (citing Supplemental Brief for the United States on Rehearing En Banc at A-8, United States v. Li, 206 F.3d 56 (2000) (Nos. 97-2034, 2413, and 98-1129, 1230, 1447, 1448), 1999 WL 33891052).

97. *Id.* at 350. The exclusionary rule prohibits the prosecutorial use of unconstitutionally seized evidence. *See* Weeks v. Michigan, 232 U.S. 383, 398 (1914) (prohibiting the federal government from such use); *see also* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the Fourteenth Amendment extends the exclusionary rule to state proceedings).

98. *Sanchez-Llamas*, 548 U.S. at 348.

99. *Id.*

concerns.[100] Furthermore, because other procedural due process protections existed for Sanchez-Llamas (the same as any criminal defendant in the U.S. justice system), there was no need for a separate remedy for an Article 36 violation.[101] A defendant could assert Article 36 violations along with other claims or as a basis for a constitutional violation (e.g., that it rendered a defendant's assistance to the police involuntary), but an Article 36 violation did not need independent protection or remedy.[102]

After it found that suppression was an inappropriate remedy, even if a right to consular notification existed, the Court moved to its third and final question of whether a defendant forfeits an Article 36 claim under state procedural default rules if a defendant fails to raise the claim at trial.[103] The Court's precedent from *Breard* answered this issue.[104] Every federal law, including treaties and the Constitution, is answerable to the rule of procedural default.[105] Therefore, a defendant cannot introduce Article 36 claims in habeas petitions that a defendant failed to raise in state court proceedings.[106]

In this case, the U.S. Supreme Court's holding failed to address the existence of the right to consular notification and its scope. Though the ICJ had issued decisions regarding consular notification in both *LaGrand* and *Avena* by this point, the Court ignored those decisions and found that the judgments were "entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[107] In the final analysis, the ICJ's interpretation of the VCCR did not persuade the Court to reconsider its understanding of the United States' domestic obligations under the VCCR according to *Breard*.[108] The case of *Medellín* would provide no clearer picture of Article 36.

F. *The Supreme Court Closes the Door*

Virtually all legal commentators agree *Medellín* was a landmark U.S. case in terms of treaty interpretation and the domestic presumption regarding the enforceability of treaties.[109] On close examination, *Medellín*

---

100. *Id.* at 349.
101. *Id.* at 350.
102. *Id.*
103. *See id.* at 350–51.
104. *See id.* at 351–52.
105. *Id.* at 356.
106. *Id.* at 357–58.
107. *Id.* at 355 (quoting Breard v. Greene, 523 U.S. 371, 375 (1988)).
108. *See id.* at 350–51.
109. *See, e.g.*, David J. Bederman, Medellín*'s New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 530, 540 (2008) ("[T]he *Medellín* decision signifies a substantial break with previous disputations between members of the Supreme Court as to the proper modalities of treaty interpretation . . . . Textualism is placed as a first principle of construction . . . ."); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L.

seemed to answer some questions, to muddle others, and to leave some purposefully unresolved with respect to rights under the VCCR.

José Ernesto Medellín was arrested in 1993 for the rape and brutal murders of two Houston teenagers.[110] At the time of his arrest, Medellín was given *Miranda* warnings, signed a waiver of his rights, and gave a detailed written confession.[111] However, law enforcement officers never informed Medellín of the VCCR obligation, which would have allowed him to notify the Mexican consulate of his detention.[112]

After the state trial court convicted Medellín and sentenced him to death in 1997, Medellín raised his VCCR claim in his first application for state post conviction relief.[113] The court held that the claim was procedurally deficient and that Medellín needed to raise this issue either at trial or on direct review.[114] Additionally, the trial court held Medellín lost on the merits because he did not show that this "non-notification" to the consulate impacted the validity of his conviction or punishment.[115] In 2003, Medellín filed a habeas petition in federal court and was denied relief on the same grounds.[116]

In the Fifth Circuit, Medellín used the ICJ's contemporaneous decision in *Avena* to argue that despite procedural default rules, the court must review and reconsider his case.[117] The Fifth Circuit issued two important

---

51, 53 (2012) ("In *Medellín v. Texas*, the Court reasoned that the treaties granting jurisdiction to the ICJ were non-self-executing and thus not enforceable unless implemented into law by Congress." (footnote omitted)); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008) ("*Medellín* . . . is best understood to have found the treaty at issue non-self-executing because the treaty imposed an obligation that required the exercise of nonjudicial discretion."); Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91, 119 (2009) ("U.S. treaties generally do not 'purport to convert the decisions and actions of international institutions into self-executing federal law.' *Medellín* interpreted the VCCR and its Optional Protocol to be consistent with this pattern." (footnote omitted) (quoting Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1589 (2003))). *But see* Medellín v. Texas, 552 U.S. 491, 533 (2008) (Stevens, J., concurring) ("[The VCCR] 'is itself self-executing and judicially enforceable.'" (quoting *id.* at 555 (Breyer, J., dissenting)); *Sanchez-Llamas*, 548 U.S. at 372 (Breyer, J., dissenting) ("[I]t is common ground that the [Vienna] Convention is 'self-executi[ng].'" (quoting S. EXEC. REP. NO. 91-9, at 5 (1969))).

110. *Medellín*, 552 U.S. at 501.

111. *Id.* (citing Brief for Respondent at 2, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984)).

112. *Id.* (citing Brief for Petitioner at 6–7, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984)).

113. *Id.*

114. *Id.* at 501–02.

115. *Id.*

116. *Id.* at 502.

117. *Id.* at 503; *see also* Brief for Petitioner at 12, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984).

and distinct holdings.[118] First, the court held the VCCR did not confer enforceable individual rights.[119] Second, the court found that, without regard to *Avena*, the court was bound by *Breard*, which held VCCR claims were subject to procedural default rules.[120]

In December 2004, the U.S. Supreme Court granted certiorari to *Medellín* to determine whether the ICJ holding bound domestic courts.[121] Before the U.S. Supreme Court could hear arguments, officials within the Bush Administration began to debate whether to take a position on these issues.[122] Advisors were aware of the President's reputation in certain foreign capitals as a unilateralist eager to exercise executive power in breach of international norms.[123] Additionally, Administration officials recognized the importance of *Avena* but were mindful of the authority of the state of Texas to carry out the death sentence a Texas jury imposed.[124] The President had little desire to interfere with state convictions, particularly given his previous opposition in *Montoya*.[125] The initial inclination of some officials in the Bush Administration was to ignore the decision of the ICJ.[126] Some advisors believed the federal government had no independent authority to interfere with state convictions.[127] Texas Governor Rick Perry and Texas Attorney General Greg Abbott were known as staunch proponents for states' rights, and some in the Bush Administration anticipated they would both publicly criticize any interference and remind the public of the President's position in the *Montoya* case.[128]

Others in the White House proposed a firmer response—to withdraw from the Optional Protocol.[129] However, there was concern, particularly at the State Department, that both withdrawal from the Optional Protocol and noncompliance with the ICJ order would only reinforce the belief that the United States was neither respectful of the rights of other nations nor in compliance with international law.[130] In addition, other Administration officials feared this perception would further encourage European public opposition to U.S. policy and would likely discourage European

118. *See* Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004), *aff'd sub nom.* Medellín v. Texas, 552 U.S. 491 (2008).

119. *Id.* at 280.

120. *Id.*

121. *Medellín*, 552 U.S. at 498.

122. Personal Account of Alberto R. Gonzales, *supra* note 27.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

governments from working with the United States in Afghanistan and Iraq.[131]

The lack of consensus within the White House led to intense debate over the appropriate responses to both *Avena* and *Medellín*.[132] Based on recommendations from senior aides, the President decided to issue a directive that state courts give effect to *Avena*.[133] Simultaneously, the President decided that to avoid future entanglements with the ICJ, the United States would withdraw from the Optional Protocol.[134] On February 28, 2005, President Bush issued such a memorandum to the Attorney General that directed state courts to give effect to *Avena* in accordance with general principles of comity.[135] A week later, on March 7, 2005, Secretary of State Condoleezza Rice informed the United Nations that the United States withdrew from the Optional Protocol and no longer recognized the ICJ's jurisdiction regarding the VCCR.[136] The February 28th memorandum was intended to please international allies who would view the presidential directive as an affirmative step toward compliance with an international court decision.[137] The March 7th letter satisfied the President's respect of federalism as it eliminated further interference by the ICJ on matters of state convictions.[138]

After the President issued his memorandum, the U.S. Supreme Court heard arguments in *Medellín*. The Court considered whether either *Avena* or President Bush's memorandum bound the states.[139] The U.S. Supreme Court began its analysis by addressing whether the ICJ judgments bound the United States with respect to VCCR violations.[140] The U.S. Supreme Court could have avoided this issue if it determined that there was no enforceable individual right afforded under the VCCR. While such a holding may have conflicted with the ICJ, it would have permitted the Court to avoid a broader holding that the ICJ's decisions have no authority in U.S. courts.

Though the Court acknowledged that the United States had an international obligation under the VCCR, the Court focused on whether *Avena* produced any domestic legal effects on court proceedings.[141] If the

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Medellín v. Texas, 552 U.S. 491, 498 (2008).
140. *Id.* at 499–500.
141. *Id.* at 504 ("No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States.

Court ascertained an automatic domestic legal effect, then the judgment of the ICJ would apply in state and federal courts of its own force.[142] The Court first looked at the treaties that created the ICJ and the United Nations to determine if those treaties mandated automatic domestic legal effect to the ICJ's decisions.[143]

Customarily, the first step to determine whether a treaty has binding domestic effect starts with an inquiry into whether the treaty is "self-executing" or "non-self-executing."[144] If a treaty is self-executing, it becomes binding domestic law of its own accord.[145] On the other hand, if a treaty is non-self-executing, it creates an international commitment upon the United States but cannot create binding domestic law unless Congress enacts implementing legislation.[146]

The U.S. Supreme Court decided that its task was to determine whether the Optional Protocol, the Charter of the United Nations, or the ICJ Statute was self-executing.[147] The Court concluded they were not self-executing and thus the ICJ's holding in *Avena* was not automatically binding domestic law.[148]

Surprisingly, the Court assumed, without deciding, that Article 36 granted enforceable individual rights.[149] This assumption leaves unanswered the existence of an individual right and encourages foreign nationals to continue to challenge federal and state convictions on the basis of the VCCR. Respectfully, under the doctrine of separation of powers, it is the rule of the Court to answer these questions. Additionally, as a matter of judicial economy, the Court should have answered this question in the negative.

The Optional Protocol requires that: "Disputes arising out of the interpretation or application of the [VCCR] shall lie within the compulsory

---

But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.").

142. *Id.* at 504.

143. *Id.* at 507–14.

144. *Id.* at 504–05; *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829); United States v. Percheman, 32 U.S. (7 Pet.) 51, 63 (1833).

145. *Medellín*, 552 U.S. at 505.

146. *Id.* at 504–05 (noting that this distinction was well explained in *Foster*); *id.* at 505 n.2 ("The label 'self-executing' has on occasion been used to convey different meanings. What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.").

147. *Id.* at 506 n.4.

148. *Id.* at 506.

149. *Id.* The Court made no determination about the self-executing nature of the VCCR.

jurisdiction of the International Court of Justice."[150] Importantly, the Optional Protocol does not address the effect of an ICJ judgment and whether states must comply with these judgments.[151] There is nothing about enforcement, only jurisdiction.[152] In the Court's citation to the signatory nations' post-ratification understandings of the Treaty, the Court reified the understanding that the ICJ judgments did not bind the Court.[153] Of the forty-seven nations that were parties to the Optional Protocol and the 171 nations that were parties to the VCCR at the time, Medellín did not identify one as a nation that treated ICJ judgments as binding domestic law.[154] Any obligation to actually *comply* with an order from the ICJ, the Court concluded, must come from the U.N. Charter, specifically the provision that addresses the effect of ICJ decisions.[155]

Article 94(1) of the U.N. Charter requires that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party."[156] The U.S. Supreme Court held that this phrasing was not a directive to U.S. state and federal courts because the U.N. Charter does not require that the United States "shall" or "must" comply with an ICJ decision, nor does it appear that the Senate intended this result when it ratified these words.[157] While that is sufficient to prove that the treaty is non-self-executing, the Court then stated that the sole remedy for noncompliance is a referral by an aggrieved state to the United Nations Security Council.[158] This nonjudicial remedy was evidence to the Court that the United Nations did not intend for ICJ judgments to be enforceable in domestic courts.[159]

Finally, the ICJ Statute, which was incorporated into the U.N. Charter, provided even more evidence that the ICJ's judgments did not constitute automatic binding domestic law.[160] The ICJ Statute states that the purpose of the court is to "arbitrate disputes between national governments."[161] The U.S. Supreme Court interpreted this provision to mean that the ICJ cannot allow Medellín, in his individual capacity, to be a party to an ICJ proceeding.[162]

The Court then turned to the President's memorandum to see if the

150. *Id.* at 507 (alteration in original) (quoting Optional Protocol, *supra* note 8, 21 U.S.T. at 326, 596 U.N.T.S. at 488).

151. *Id.* at 507–08.

152. *Id.* at 508.

153. *Id.* at 516–17.

154. *Id.* at 516.

155. *Id.* at 508.

156. *Id.* (quoting U.N. Charter art. 94, para. 1).

157. *Id.*

158. *Id.* at 509.

159. *Id.*

160. *Id.* at 511.

161. *Id.* (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006)).

162. *Id.* at 511–12.

Commander in Chief of the United States could change the Court's determination that the ICJ judgment in *Avena* was nonbinding.[163] *Youngstown* dictates that the President may act only with either Congress's or the Constitution's permission.[164] According to the Court, while the President is given great deference in the area of foreign affairs and treaty interpretation, he cannot unilaterally convert a non-self-executing treaty into a self-executing one.[165] The result of the Court's decision was that Medellín had no ability to enforce the review and reconsideration the ICJ required in *Avena*. Practically, the Court could have avoided a holding about the President's power or the weight of ICJ decisions with an unequivocal initial declaration that there did not exist an enforceable individual right.

II. THE DOMESTIC STORY OF FOREIGN NATIONAL CONSULAR RIGHTS

The U.S. Supreme Court left two questions unanswered in *Medellín*: (1)

---

163. *Id.* at 523.

164. *Id.* at 524 (referencing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). *Youngstown* is a seminal case that addresses the scope of inherent presidential power (i.e., without express constitutional or statutory authority). In the midst of the Korean War, the United Steelworkers Union announced a nationwide strike. President Truman, fearful that a shortage of steel products could endanger the nation and war effort in Korea, issued an order that permitted the Secretary of Commerce to take possession of steel mills and to operate them. *Youngstown*, 343 U.S. at 583. After he issued the order, President Truman reported the action to Congress, which took no action in response to the seizure of the mills. *Id.* The Court ultimately declared the seizure unconstitutional. *Id.* at 588–89. In his famous concurring opinion, Justice Jackson articulated three zones of presidential authority:

> Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, '[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.' Second, '[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.' . . . Finally, '[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'

Medellín, 552 U.S. at 524–25 (first, second, and fourth alterations in original) (citations omitted) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)).

165. *See Medellín*, 552 U.S. at 525; *see also id.* at 562 (Breyer, J., dissenting) ("Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors *favor*, rather than militate against, enforcement of the judgment before us."); Jama v. ICE, 543 U.S. 335, 336 (2005) (noting Court's "customary policy of deference to the President in matters of foreign affairs").

whether there is an enforceable individual right to consular notification, and, if so, (2) what is the remedy for a violation of that right? For ease of discussion, it is best to turn first to the question of a remedy. As far back as *Breard*, the U.S. Supreme Court was clear that "[e]ven were Breard's [VCCR] claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[166] The Court in *Sanchez-Llamas* grappled with the application of the exclusionary rule to a violation of the VCCR. It determined that there was no reason to invoke constitutional protection for a violation that other interests adequately secured.[167] Thus there is no remedy available under the Constitution, or federal or state legislation. There is no remedy provided by treaty or international agreement. Likewise, no U.S. court provides a remedy. Although this Article now turns to the question of the existence of an individual right, the discussion may be presently, and for the foreseeable future, purely academic since no remedy appears available.

A. *International Law as a Source of the Right to Consular Notification*

It is necessary to turn first to the text of the VCCR to see if this treaty is self-executing. As discussed above, if the VCCR is self-executing, it becomes immediately binding as U.S. law. However, even if the treaty were self-executing and imposed an automatic domestic obligation on courts to recognize a right, without a remedy to attach to such a violation, any transgression of non-notification becomes meaningless as a legal matter. At most, a promotion of "awareness" of the importance of notification of consular rights (1) ensures reciprocal treatment of Americans and (2) encourages positive foreign policy press. In fact, this is exactly the strategy that the Department of State adopted in its public awareness program for Article 36.[168] To confuse matters further, the Department pronounces in its awareness literature that the VCCR is self-executing and encourages American law enforcement to take this obligation seriously.[169] Not surprisingly, the State Department notes that the "most significant consequence [of non-notification] is that the United States will be seen as a country that does not take its international legal

166. Breard v. Greene, 523 U.S. 371, 373 (1998).

167. Sanchez-Llamas v. Oregon, 548 U.S. 331, 350 (2006).

168. DEP'T OF STATE MANUAL, *supra* note 13, at 6 (explaining that the VCCR is self-executing); *id.* at 29 (stating that reciprocity is the guiding principle in applying consular notification rights); *id.* at 31.

169. *Id.* at 6 ("Treaties such as the VCCR . . . are binding on federal, state, and local government officials to the extent they pertain to matters within such officials' competence as a matter of international law and the U.S. Constitution.").

obligations seriously."[170] While the Department of State did undertake efforts to promote awareness of consular notification,[171] these efforts cannot and do not make consular notification more than a nominal obligation.[172]

Next, it is essential to consider customary international law as a possible international basis for an enforcement mechanism.[173] Customary international law traditionally includes two components: (1) state practice and (2) *opinio juris*, the latter of which is the belief that a legal obligation exists for such practice.[174] The Sixth Circuit in *Emuegbunam* found no evidence that any other nation-state implemented a remedy for violations of Article 36 with regard to criminal defendants.[175] Therefore, the remedies, if any, are available through political channels from country to country. Use of these channels relies on the good faith of each individual country and its government and takes the "right" out of the hands of the individuals who suffer the violation.[176]

B. *Domestic Constitution as a Source for the Right to Consular Notification*

An individual right to consular notification is not found within the VCCR or other international sources. However, it is still necessary to consider whether such a right exists under American notions of due process. Synonymous with the term "alien," a foreign national is any

---

170. *Id.* at 31.

171. *See, e.g.*, *Training and Outreach by the State Department*, U.S. DEP'T OF STATE, http://travel.state.gov/content/travel/english/consularnotification/training-outreach.html (last visited Apr. 11, 2014).

172. If the picture for consular notification is bleak with a self-executing treaty, it would be beyond the pale for a non-self-executing treaty that must wait for Congress or individual states to implement it. Although consular notification would still exist as an "international obligation" between nations, there would be no way to enforce such an obligation, especially for individuals. This rabbit hole of executing versus non-self-executing treaties could continue if another treaty could be found to contain language implicating consular notification. But the same problem would persist without dedicated language of a remedy that is executed into U.S. law—such a "right" remains properly nothing more than a privilege granted by conscientious law enforcement. Thus, arguments to the executing nature of the VCCR become unimportant to the overall question because the text of the convention offers no remedy and none can be implied.

173. The State Department found customary international law as a source of the obligation. *See* DEP'T OF STATE MANUAL, *supra* note 13, at 46.

174. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

175. United States v. Emuegbunam, 268 F.3d 377, 393 (6th Cir. 2001) ("[N]o country remedies violations of the Vienna Convention through its criminal justice system. 'These practices evidence a belief among Vienna Convention signatory nations that the treaty's dictates simply are not enforceable in a host nation's criminal courts[.]'" (second alteration in original) (citation omitted) (quoting United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000))).

176. For examples of nation-state remedies, see generally JOHN QUIGLEY ET AL., THE LAW OF CONSULAR ACCESS: A DOCUMENTARY GUIDE 141 (2010).

individual who is not a citizen or national of the United States.[177] This term does not distinguish between those who cross the border legally or illegally; it serves only to identify a person as a citizen of a foreign land. It is immediately clear that those who are citizens of the United States receive all the protections and guarantees of the Constitution, but it is less clear what aliens are entitled to receive.

The contours of due process may be different regarding foreign nationals and citizens, especially in the deportation context.[178] This asymmetrical application does not extend to the criminal context, where courts offer foreign nationals the full panoply of rights available to a citizen criminal defendant.[179] The question is whether, in addition to these rights, law enforcement must also inform a foreign national criminal defendant of his ability to notify his consulate? To the extent any requirement in this area existed, it could arise only from the same constitutional foundations as the *Miranda* warnings.

Justice Earl Warren noted in *Miranda* that its questions "go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."[180] The Court's holding was meant to "insure that what was proclaimed in the Constitution had not become just a 'form of words,' in the hands of government officials."[181] Thus, if the Court deemed the problem of consular notification to be of a constitutional dimension, then the Court would have the authority to require states to issue such notifications.[182]

---

177. RUTH E. WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 1 n.1 (2011) ("The term 'foreign national' is synonymous with 'alien,' which is the term the Immigration and Nationality Act §101(a)(3) defines as a person who is not a citizen or national of the United States.").

178. In 1950, Justice Minton famously proclaimed that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

179. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 350 (2006) ("A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("'The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws. . . . ' [I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))).

180. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

181. *Id.* at 444 (citation omitted) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

182. *Sanchez-Llamas*, 548 U.S. at 346.

To the Court, the driving force behind *Miranda* warnings was to give meaning and life to the constitutional guarantees of the right against self-incrimination and the right to an attorney. Without protections, "an individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak."[183] This feeling of compulsion would no doubt heighten in the case of a foreign national. Beyond the common language and cultural barriers, a fundamental misunderstanding of how the system works may exist. Procedural protections must be in place because "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of free choice."[184]

However, the privilege against self-incrimination is inextricably linked to the right to counsel.[185] A warning about the right against self-incrimination is insufficient to protect the right; there must be "a right to consult with counsel prior to questioning, but also to have counsel present during any questioning."[186] Hence, *Miranda* warnings are expanded to include the right to an attorney and even that the government can provide an attorney.[187] Ostensibly, counsel could also help parse out the unique difficulties of being a foreign national in custody. Whether this would be successful for the detainee depends not only upon the detainee's awareness of the right to counsel but also upon the belief that this right truly exists—something that may prove difficult given different cultural expectations of the judicial process.

The protection of the right against self-incrimination hinges on first being *informed* of that right.[188] If the police inform a suspect of his rights, then it "will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[189] Moreover, it insulates the poor or uneducated defendant:

> The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates helplessness. To require the request would be to favor the defendant whose sophistication or status had

183. *Miranda*, 384 U.S. at 461.

184. *Id.* at 458.

185. *Id.* at 469.

186. *Id.* at 470.

187. *Id.*at 473–74.

188. *Id.* at 467–68 ("At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in a clear and unequivocal terms that he has the right to remain silent.").

189. *Id.* at 468.

> fortuitously prompted him to make it.[190]

Foreign nationals are precisely within the ambit of this protection.

While lower courts differ on whether the VCCR creates an individual right, all courts agree that this right, if it exists, is not fundamental.[191] Fundamental rights are those rights essential to ordered liberty in society and are deeply rooted in history and tradition.[192] Thus, substantive due process might be a foundation on which to build this fundamental right, but

> [s]ubstantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion.[193]

If Congress and the Executive take no action in support of consular notification as a fundamental right, or in the provision of a remedy, then it is unlikely the courts will do so on their own. The Court in *Sanchez-*

---

190. *Id.* at 471 (quoting People v. Dorado, 398 P.2d 361, 369–70 (Cal. 1965)).

191. Some courts have recognized that the VCCR confers a private right of action. *See, e.g.*, Osagiede v. United States, 543 F.3d 399, 411 (7th Cir. 2008); Jogi v. Voges, 480 F.3d 822, 824 (7th Cir. 2007); United States v. Lombera-Camorlinga, 206 F.3d 882, 883 (9th Cir. 2000); United States v. Esparza-Ponce, 193 F.3d 1133, 1138–39 (9th Cir. 1999); Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); United States v. Briscoe, 69 F. Supp. 2d 738, 745 (D.V.I. 1999), *aff'd*, 234 F.3d 1266 (3d Cir. 2000); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999); United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); State v. Prasertphong, 75 P.3d 675, 688 (Ariz. 2003), *opinion supplemented on other grounds*, 76 P.3d 438 (Ariz. 2003), *judgment vacated on other grounds*, 541 U.S. 1039 (2004). Other courts have not recognized an individual's private right of action under the VCCR. *See, e.g.*, United States v. Navarro-Flores, 421 F. App'x 863, 866 (10th Cir. 2011); Lopez v. Wallace, 325 F. App'x 782, 784 (11th Cir. 2009); Jeremiah v. Burnette, 297 F. App'x 854, 856 (11th Cir. 2008); United States v. Longo, 280 F. App'x 914, 915 (11th Cir. 2008); Gandara v. Bennett, 528 F.3d 823, 825 (11th Cir. 2008); Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005); Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004); Mendez v. Roe, 88 F. App'x 165, 167 (9th Cir. 2004); United States v. Banaban, 85 F. App'x 395, 396 (5th Cir. 2004); United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001); United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001); United States v. Umeh, 762 F. Supp. 2d 658, 664 (S.D.N.Y. 2011), *aff'd*, 2013 WL 2460471 (2d Cir. 2013); Diaz v. Van Norman, 351 F. Supp. 2d 679, 681 (E.D. Mich. 2005); Valle v. State, 70 So. 3d 530, 553 (Fla. 2011); Lugo v. State, 2 So. 3d 1, 17 (Fla. 2008); Gordon v. State, 863 So. 2d 1215, 1221 (Fla. 2003); Rahmani v. State, 898 So. 2d 132, 134 (Fla. Dist. Ct. App. 2005); Rodriguez v. State, 837 So. 2d 478, 481 (Fla. Dist. Ct. App. 2002); People v. Najera, 864 N.E.2d 324, 327 (Ill. App. Ct. 2007); Gomez v. Com., 152 S.W.3d 238, 242 (Ky. Ct. App. 2004); *In re* Interest of Antonio O., 784 N.W.2d 457, 464 (Neb. Ct. App. 2010); State v. Gegia, 809 N.E.2d 673, 681 (Ohio Ct. App. 2004); State v. Sanchez-Llamas, 108 P.3d 573, 574 (Or. 2005), *aff'd*, 548 U.S. 341 (2006); Cauthern v. State, 145 S.W.3d 571, 626 (Tenn. Crim. App. 2004).

192. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

193. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting).

Llamas explicitly said that the concerns regarding consular notification were incompatible with the concerns behind *Miranda*.[194] At best, improper consular notification may be a piece of the puzzle to defendants who make larger arguments about the voluntary nature of confessions or ineffective assistance of counsel.

III. DOMESTIC CREATION OF CONSULAR NOTIFICATION AS A RIGHT

If the foundation for the right to consular notification does not exist in a treaty, customary international law, or the Constitution as a product of due process, then legislators may nevertheless still create it. Nothing prevents the federal government or any of the fifty individual states from implementing and enforcing the right and including a proper remedy.

A. *Federal Creation of Consular Notification as a Right*

On July 14, 2008, House Representatives Howard Berman and Zoe Lofgren introduced a bill titled the "*Avena* Case Implementation Act of 2008."[195] This bill, if passed, would have executed the treaty and made it binding domestic law.[196] The bill purported to carry out U.S. obligations under the VCCR and to enable those who had experienced an Article 36 violation to instigate a civil action to obtain "appropriate relief."[197] Such relief was defined to be "any declaratory or equitable relief necessary to secure the rights."[198] Moreover, where criminal prosecution was concerned, relief also included "any[thing] required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate."[199] However, this bill was referred to the House Committee on the Judiciary and died in committee.[200]

Senator Patrick Leahy of Vermont introduced a similar bill titled "Consular Notification Compliance Act of 2011."[201] This bill also purported to attach a remedy to Article 36 via domestic implementation.[202] Senator Leahy's bill required that defendants convicted and sentenced to death by state courts could bring a consular notification claim

194. Sanchez-Llamas v. Oregon, 548 U.S. 331, 362 (2006) (Ginsburg, J., concurring).

195. Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2d Sess. 2008), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-110hr6481ih/pdf/BILLS-110hr6481ih.pdf.

196. *Id.*

197. *Id.* § 2(a).

198. *Id.* § 2(b)(1).

199. *Id.* § 2(b)(2).

200. *See H.R. 6481 (110th) Avena Case Implementation Act of 2008*, GOVTRACK.US, http://www.govtrack.us/congress/bills/110/hr6481 (last visited Apr. 11, 2014).

201. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (1st Sess 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1194is/pdf/BILLS-112s1194is.pdf.

202. *Id.*

notwithstanding any other federal or state law.[203] This remedy would override state procedural default rules.[204] Once a court obtained jurisdiction, the court would stay the execution pending review of the claim.[205] The defendant would then have to prove actual prejudice from the violation and, if successful, could win a new sentencing hearing or even a new trial.[206] Such a remedy would not go as far as to apply the exclusionary rule, as argued for in *Sanchez-Llamas*, but would give effect in domestic courts to the ICJ's *Avena* decision. It would enable courts to review cases in light of alleged Article 36 violations and remedy those violations through a domestic process. This bill was referred to the Senate Committee of the Judiciary in June of 2011, but subsequently died in committee.[207]

B. *State Creation of Consular Notification as a Right*

Currently, the federal government does not provide a remedy (or even a right to review cases) for violations of Article 36. However, at the state level, the story is different. Almost three-quarters of the states have dealt with VCCR violations in their case law, which demonstrates that the issue is broader than one isolated example in Texas.[208] While state courts have varied in how to process the VCCR, it does not appear that any state has approved suppression as a remedy. Some states have rejected the preliminary notion that the VCCR creates a judicially enforceable individual right[209] or that it is enforceable at all.[210] This rejection prevents

203. *Id.* § 4(a)(1).

204. *Id.*

205. *Id.* § 4(a)(2).

206. *Id.* § 4(a)(3).

207. *See S. 1194 (112th): Consular Notification Compliance Act of 2011*, GOVTRACK.US, http://www.govtrack.us/congress/bills/112/s1194 (last visited Apr. 6, 2014).

208. These thirty-seven states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See infra* notes 210–13, 218.

209. Seven states—Alabama, Kentucky, New Jersey, New Mexico, Oregon, Tennessee, and Wisconsin—have rejected an enforceable individual right stemming from the VCCR. *See, e.g.*, Albarran v. State, 96 So. 3d 131, 151 (Ala. Crim. App. 2011); Gomez v. Commonwealth, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004); State v. King, 858 A.2d 4, 13 (N.J. Super. Ct. App. Div. 2004); State v. Martinez-Rodriguez, 33 P.3d 267, 274 (N.M. 2001); State v. Sanchez-Llamas, 108 P.3d 573, 578 (Or. 2005); Young Bok Song v. State, M2010-02054-CCA-R3-CO, 2011 WL 2713738, at *1 (Tenn. Crim. App. July 13, 2011); State v. Navarro, 659 N.W.2d 487, 494 (Wis. Ct. App. 2003). From these cases it is clear that four of these states—Alabama, Kentucky, New Jersey, and Tennessee—have additionally rejected suppression as a remedy for any violations even if the rights are individually enforceable.

210. Arkansas incorrectly interpreted *Medellín* to hold that the VCCR is not domestically enforceable and thus courts do not need to apply it. Gikonyo v. State, 283 S.W.3d 631, 636 (Ark. Ct. App. 2008).

courts from taking the next step to remedy any violations in a criminal context. Of the states that allow for an individual right (or evade the issue like the Supreme Court), their courts universally hold that suppression is not an appropriate remedy.[211] These courts offer no other remedy.

A few state courts have dealt with the issue superficially and focused on the procedural defects of claims in order to avoid the issue of consular notification.[212] These decisions are consistent with the long history of federal consular notification litigation that uniformly holds that rights and obligations under the VCCR are subject to state procedural default rules.[213]

These results are unsurprising. After the U.S. Supreme Court's rejection of the exclusionary rule in *Sanchez-Llamas*, state courts followed suit (although, some courts had already rejected suppression as an appropriate remedy long before that decision). As a Colorado court of appeals noted, "The exclusionary rule deters only constitutional violations, not statutory or treaty violations."[214] But what about casting an Article 36 violation in a larger context, making it part of a voluntariness claim tied to *Miranda* or an ineffective assistance of counsel claim? These arguments, too, have failed to bring defendants any relief.[215] Some states have gone even further, as exemplified by a New York court's holding that "[an Article 36] violation is not a circumstance affecting the voluntariness of a statement, and [] there is no reason for evidence of such a violation to be considered

---

211. Twenty-one states have found that suppression is not a valid remedy without regard to the existence of a right. These states include: Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Missouri, Nevada, New York, North Carolina, Ohio, South Carolina, Texas, Utah, Virginia, and Washington. *See, e.g.*, Zuboff v. State, No. A-8692, 2006 WL 3114386, at *21 (Alaska Ct. App. 2006); State v. Prasertphong, 75 P.3d 675, 688 (Ariz. 2003) (en banc); People v. Enraca, 269 P.3d 543, 560 (Cal. 2012); People v. Preciado-Flores, 66 P.3d 155, 161–62 (Colo. App. 2002); Conde v. State, 860 So. 2d 930, 953 (Fla. 2003); Anaya-Plasencia v. State, 642 S.E.2d 401, 403 (Ga. Ct. App. 2007); People v. Vasquez, 824 N.E.2d 1071, 1076 (Ill. App. Ct. 2005); Zavala v. State, 739 N.E.3d 135, 140 (Ind. Ct. App. 2000); State v. Buenaventura, 660 N.W.2d 38, 46 (Iowa 2003); State v. Rosas, 17 P.3d 379, 386 (Kan. Ct. App. 2000); State v. Garcia, 26 So. 3d 159, 166 (La. Ct. App. 2009); Commonwealth v. Diemer, 785 N.E.2d 1237, 1244–45 (Mass. App. Ct. 2003); Cardona-Rivera v. State, 33 S.W.3d 625, 627 (Mo. Ct. App. 2000); Garcia v. State, 17 P.3d 994, 997 (Nev. 2001); People v. Ortiz, 17 A.D.3d 190, 191 (N.Y. App. Div. 2005); State v. Herrera, 672 S.E.2d 71, 79–80 (N.C. Ct. App. 2009); State v. Tuck, 766 N.E.2d 1065, 1067 (Ohio Ct. App. 2001); State v. Banda, 639 S.E.2d 36, 42, 43 (S.C. 2006); Rocha v. State, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000); State v. Kozlov, 276 P.3d 1207, 1227 (Utah Ct. App. 2012); Bell v. Commonwealth, 563 S.E.2d 695, 707 (Va. 2002); State v. Jamison, 20 P.3d 1010, 1016–17 (Wash. Ct. App. 2001).

212. *See, e.g.*, State v. Arroyo, 935 A.2d 975, 979–80 n.3 (Conn. 2007); Rummer v. State, 722 N.W.2d 528, 536 (N.D. 2006); Commonwealth v. Cam Ly, 980 A.2d 61, 98 (Pa. 2009).

213. *See supra* Part I.

214. *Preciado-Flores*, 66 P.3d at 161.

215. *See, e.g.*, Ledezma v. Iowa, 626 N.W.2d 134, 134 (Iowa 2001) (failing as part of an ineffective assistance of counsel claim); *Garcia*, 26 So. 3d at 159 (failing as part of a voluntariness claim).

by a jury in that regard."[216] Cases like these virtually eliminate the possibility of a defendant's successful use of VCCR violations as a basis to make a constitutional claim.

In those states that permit a defendant to raise a VCCR violation as a defense, before the defendant is eligible for relief, the defendant must show the lack of consular notification resulted in prejudice.[217] In states that require a showing of prejudice, the test for prejudice sometimes mirrors the standard necessary to overcome procedural default, except the burden is on the defendant. For example, Oklahoma devised a three-prong test for prejudice:

> (1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant. . . . The defendant must present evidence showing what efforts his consulate would have made to assist in his criminal case.[218]

While a defendant in Oklahoma is not required to show that the consular assistance would have made a difference in the outcome of the trial, he must show that assistance would have been provided.[219] Thus, the Oregon Supreme Court, in a case eventually granted certiorari by the U.S. Supreme Court, stated: "the only remedies for failures of consular notification under the [VCCR] are diplomatic, political, or exist *between [signatory] states* under international law."[220]

While it is true that remedies may not exist in the VCCR, states are still free to codify the VCCR and provide a remedy. As a Massachusetts court noted, "In order to enable the full effect to be given to art. 36 . . . the notifications it requires must be incorporated into the protocols of the State and local law enforcement agencies."[221] Five states—California, Florida, Georgia, Illinois, and Oregon—either passed or proposed legislation that references consular notification but does not include a remedy with this language.

---

216. *Ortiz*, 17 A.D.3d at 191.

217. *See, e.g.*, State v. Rosas, 17 P.3d 379, 385, 386 (Kan. Ct. App. 2000); State v. Byron, 683 N.W.2d 317, 323 (Minn. Ct. App. 2004); Torres v. State, 120 P.3d 1184, 1187, 1188 (Okla. Crim. App. 2005); State v. Lopez, 574 S.E.2d 210, 214 (S.C. Ct. App. 2002).

218. *Torres*, 120 P.3d at 1186; *see also* State v. Lopez, 633 N.W.2d 774, 783 (Iowa 2001) (explaining that several federal courts apply this test to determine whether prejudice results from Article 36 violations).

219. *Torres*, 120 P.3d at 1186, 1187. Although actual prejudice did exist in this case as to the capital sentence, there was no need for a remedy as that sentence was suspended.

220. State v. Sanchez-Llamas, 108 P.3d 573, 578 (Or. 2005) (alteration in original) (quoting United States v. Li, 206 F.3d 56, 63–64 (1st Cir. 2000)).

221. Commonwealth v. Gautreaux, 941 N.E.2d 616, 622 (Mass. 2011).

Oregon's legislative efforts focus on the education of law enforcement, but do not provide a remedy for VCCR violations. Oregon passed a statute that requires authorities to train law enforcement to "[u]nderstand the requirements of the [VCCR] and identify situations in which the officers are required to inform a person of the person's rights under the convention."[222] Legislation from other states also provide no remedy and require no compliance. Florida passed the strongest statutory language in 2001, which stated that failure to provide consular notification would not be a defense in any criminal proceeding.[223] California, too, codified the VCCR into California Penal Code § 834c and § 5028.[224] However, the statutory language provides no remedy for the violation of either. Georgia gives some effect to the treaty with its passage of Georgia Code Annotated § 42-4-14, which states, "When any person is confined, for any period, in [a] jail . . . in compliance with Article 36 of the [VCCR], a reasonable effort shall be made to determine the nationality of the person so confined."[225] Again, Georgia provides no remedy for failure to make such a reasonable effort. The Illinois legislature proposed a bill that goes a bit further and requires that notice of this right (to be codified into the statute) be given in open court.[226] If such notice is not given, and if the defendant can show prejudice as a result of the violation, then the court must allow either for a continuance or a remand and new trial.[227]

Overall, although states do not frequently provide remedies for violations, there may be a path forward in some states for defendants who raise their claims at the proper times or who are able to show prejudice from the denial of consultation. However, the burden is too high for most defendants and only a small incentive (or direction) exists for law enforcement to enforce notification. Therefore, the notification obligation remains an international promise between nation-states left to political and foreign policy authorities.

CONCLUSIONS

Three main conclusions are drawn from the consular rights litigation in the United States. The first is the strong pronouncement that procedural default rules that states invoke are paramount and the VCCR does not override these laws. The U.S. Supreme Court reinforced this conclusion in

222. OR. REV. STAT. § 181.642(b)(2) (West, Westlaw through ch. 80 of 2014 Reg. Sess.).

223. FLA. STAT. ANN. § 901.26 (West, Westlaw through chapters in effect from the 2014 2d Reg. Sess. of the 23rd Legis. through Mar. 31, 2014).

224. CAL. PENAL CODE § 834c(d) (West, Westlaw through ch. 10 of 2014 Reg. Sess.); *id.* § 5028(b).

225. GA. CODE ANN. § 42-4-14 (Lexis 2012).

226. S.B. 1906, 97th Gen. Assemb. (Ill. 2011), *available at* http://ilga.gov/legislation/97/SB/PDF/09700SB1906lv.pdf.

227. *Id.*

Breard: the VCCR intended nations to follow the treaty obligations "in compliance with" national laws, which may include procedural default rules. The U.S. Supreme Court reified this idea in *Medellín*, another case where the defendant ran afoul of procedural default rules and the Court firmly held them in place. The second conclusion is that there are binding legal limits on the invocation of the right the VCCR creates (if there is such a right). The procedural default rules provide some limits, but the refusal to apply the exclusionary rule to violations of the VCCR and the refusal to implement the decisions of the ICJ make these strictures all the more clear. At best, pronouncements of international legal bodies deserve "respectful consideration" but not implementation or enforcement.

Third, the U.S. Supreme Court missed an opportunity to deal cleanly and correctly with the issue of consular notification. This speaks more to what the Court failed to do than what it did. Without treaty language to support the existence of an enforceable individual right (or any other mechanism), there is no impetus for domestic implementation. Therefore, states may make their own determinations as to consular notification when the federal government does not guide the discussion via international obligations. Consular notification has its place as an international consideration and the VCCR is something law enforcement and foreign nationals should be aware of—but its violation has no accompanying force. Further, a decision from the Court on the absence of the right would stem the tide of consular notification litigation and avoid any holding about treaty interpretation or the binding nature of ICJ judgments.

In a concurring opinion in the First Circuit, two judges questioned the use of the word "right" regarding the VCCR.[228] They explained that Article 36 seems to use the word merely as a way to "implement . . . the treaty obligations as between [nation-states]. Any other phrasing of the promise as to what law enforcement officers will say to detainees would be artificial and awkward."[229] Phrasing the duties that accompany consular notification as something other than a "right" may be linguistically awkward, but far more accurate. After a long history of litigation over the meaning of Article 36, this right to consular notification is nothing more than an international obligation between nations that nations may or may not uphold. The Treaty itself does not make it a right, nor does any governmental body within the United States. Rather than avoid this question, the U.S. Supreme Court should have answered it in the negative: the consular notification provision does not provide an enforceable individual right.

228. United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000) (emphasis omitted).

229. *Id.*

APPENDIX A: TIMELINE

1963	Vienna Convention on Consular Relations opened for signature
1969	United States ratified the VCCR and Optional Protocol
1982	Karl and Walter LaGrand commit robbery and murder in Arizona and are arrested
1993	Medellín is arrested for rape and murder in Texas
1997	Medellín sentenced to death
1998	Breard (citizen of Paraguay) set to be executed in Virginia; raises consular notification rights; executed anyway due to U.S. Supreme Court's conclusion, that same year, that he had procedurally defaulted his right to raise the issue
1999	LaGrands executed in Arizona
2001	*LaGrand* case is decided by the ICJ
2003	Mexico filed suit in the ICJ against U.S. (*Avena*) over the issue of consular relations
March 2004	*Avena* is decided by ICJ
December 2004	U.S. Supreme Court grants certiorari to Medellín
February 28, 2005	Bush issues Memo regarding Medellín
March 7, 2005	U.S. pulls out of Optional Protocol
2006	*Sanchez-Llamas* decision issued by Supreme Court
2008	*Medellín* decision issued by Supreme Court