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Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations within the States

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One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.[1]

I. INTRODUCTION

If American citizens are detained or arrested in a foreign country, they should have the opportunity to speak with an American official.[2] This is because the United States is a party to several international agreements guaranteeing Americans consular access when they are detained or arrested abroad.[3] Many Americans may already be aware of this right to consular access, as the right is often memorialized in the movies as a demand to speak with the American Embassy.[4] However, the right of Americans to speak with their representatives comes with a small price. In exchange for ensuring American citizens the right to consular assistance abroad, the United States has agreed to shoulder the responsibility of notifying foreign nationals of their right to speak with their nations' consular officials when they are detained or arrested in the United States.[5] The problems that arise when trying to ensure compliance with these international rights by the individual states of the union are the subject of this Comment.

Four recent death penalty cases involving foreign nationals have alerted the world that the United States has frequently violated its consular notification duties.[6] In April 1998, Angel Francisco Breard, a Paraguayan national, was executed in Virginia.[7] In March 1999, two German nationals, Karl and Walter LaGrand, were executed in Arizona.[8] Finally, in perhaps the most publicized consular notification

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1. Hines v. Davidowitz, 312 U.S. 52, 64 (1941); *see id.* (discussing the powers of state and federal governments in the area of regulation of aliens).

2. *Cf. infra* Part II.A-B (discussing the legal basis for consular notification).

3. *See infra* Part II.A-B (detailing the United States' consular notification obligations).

4. For instance, in the popular recent movie *Red Corner*, American Jack Moore repeatedly demands to speak with the American Embassy when he is detained in China. RED CORNER (Metro-Goldwyn-Mayer 1997).

5. *See generally infra* Part II (discussing the duty of United States officials when a foreign national is arrested).

6. *See infra* notes 7-15 and accompanying text (discussing the situations of four recently executed foreign nationals: Angel Francisco Breard, Karl and Walter LaGrand, and Joseph Stanley Faulder).

7. *See Virginia Executes Paraguayan Killer Put to Death Despite Pleas from Albright, World Court*, ARIZ. REPUBLIC, Apr. 15, 1998, at A4, *available in* 1998 WL 7764387 (reporting Breard's death).

8. *See* Jerry Nachtigal, *LaGrand Dies in State Gas Chamber; Killer Executed Despite Protests from Germany*, ARIZ. REPUBLIC, Mar. 4, 1999, at A1, *available in* 1999 WL 4155894 (reporting that Walter LaGrand died in Arizona's gas chamber one week after his brother, Karl LaGrand, was executed by lethal injection).

case to date, Joseph Stanley Faulder, a Canadian national, was executed in Texas on June 17, 1999.[9] In each of these cases, the states involved admitted that they had not advised the foreign nationals of their right to speak with their nations' consular officers.[10] However, preparations for each execution continued, despite pleas from the United States State Department,[11] the International Court of Justice,[12] and each accused's nation[13] that the executions be halted while the nationals' consular notification claims were considered. The Supreme Court denied certiorari to each national's last-minute appeals.[14] This left the ultimate decision—whether to address an amorphous international law concern, or uphold the validity of state

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9. *See* Bruce Tomaso, *Canadian Executed in '75 Killing; His Death Caps Dispute on International Treaty*, DALLAS MORNING NEWS, June 18, 1999, at 1A, *available in* 1999 WL 4128994 (documenting Faulder's death).

10. *See* Federal Republic of Germany v. United States, — U.S. —, 1999 WL 107412 (1999) (Breyer, J., dissenting) (noting that Arizona officials admitted, only a few days before Walter LaGrand's execution, that they were aware when LaGrand was arrested that he was a German national); Paraguay v. Allen, 134 F.3d 622, 624 (4th Cir. 1998) (stating that Breard had not been notified during his detention and trial of his right to contact the Paraguayan consulate); Rick Lyman, *A Scheduled Execution in Texas Stirs Protest from Canadian Government*, N.Y. TIMES, Dec. 8, 1998, *available in* 1998 WL-NYT 9834101002 (reporting that Faulder was never informed at the time of his arrest and questioning that he had the right to contact the Canadian Consulate).

11. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 378 (1998) (noting that the United States Secretary of State sent a letter to the Governor of Virginia requesting a stay of Breard's execution); Paul Koring, *Texas Considers Giving Faulder a 30-day Reprieve; Canadian Ambassador Makes a 'Forceful Appeal'*, GLOBE AND MAIL (Toronto, Can.), Dec. 9, 1998, at A1, *available in* WESTLAW, 12/09/1998 GLOBEMAIL A1 (reporting that the Secretary of State requested that the Governor of Texas grant Faulder a 30-day reprieve).

12. Paraguay and Germany each brought actions against the United States in the International Court of Justice based on the Vienna Convention Violations. *See* Case Concerning the Vienna Convention on Consular Relations (Ger. v. U.S.), 38 I.L.M. 308, 313 (Mar. 3, 1999) (ordering provisional measures in the *LaGrand* case); Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810, 819 (Apr. 9, 1998) (setting forth the provisional measures order of the World Court in the *Breard* case). In both cases, the court issued provisional measures orders instructing the United States to take measures to ensure that the nationals were not executed pending the final decisions in the international cases. *See Germany*, 38 I.L.M. at 313 (ordering that Walter LaGrand not be executed until the court issued its final order); *Paraguay*, 37 I.L.M. at 819 (ordering that Angel Francisco Breard not be executed until the court had given its final order). Several months after Breard was executed, Paraguay dropped its case. *See* International Court of Justice, *Press Comminque' 98/36*, (Nov. 11, 1998) <http://www.icj-cij.org/Presscom/Press1998/ipr9836.htm> (copy on file with the *McGeorge Law Review*) (publishing Paraguay's decision not to go forward with its case against the United States).

13. *See generally* Federal Republic of Germany v. United States, — U.S. —, 1999 WL 107412, *1 (1999) (denying Germany's request for an injunction prohibiting the execution of Walter LaGrand); Mark Shaffer, *Germany Fights to Save 2 in Florence; Brothers Face Death in Murder of Banker*, ARIZ. REPUBLIC, Feb. 18, 1999, at A1 (discussing German officials' efforts in the LaGrand case); Lyman *supra* note 10 (reporting Canadian officials' attempts to prevent Faulder's execution). Paraguay brought claims before the International Court of Justice and the United States Supreme Court in its attempt to save Breard. *See Breard*, 523 U.S. at 378-79 (rejecting Paraguay's claims in Breard's case); *Virginia Executes Paraguayan Killer Put to Death Despite Pleas from Albright, World Court*, *supra* note 7 at A4 (reporting that Breard had been executed despite an order of the International Court of Justice that Breard's execution should be blocked).

14. *See* Faulder v. Johnson, 119 S. Ct. 2363, 2363 (1999) (denying one of Faulder's last-minute petitions for certiorari); Federal Republic of Germany v. United States, — U.S. —, 1999 WL 107412, *1 (1999) (denying Germany's last-minute claims on behalf of Walter LaGrand); Breard v. Greene, 118 S.Ct. 1352, 1354-56 (1998) (denying last-minute claims by Breard, Paraguay, and the Paraguayan Consul).

sentences—to the governors of each state. Each governor, not surprisingly, upheld his or her state's laws over the international obligation.[15]

The consular notification claims in these death penalty cases are not exceptions. Rather, they merely publicize an increasing number of legal actions by foreign nationals who have been detained without consular assistance.[16] Although most of the claims have failed for procedural reasons, they have raised concern in the international community regarding the United States' intentions not only with regard to consular notification, but with regard to treaty obligations in general.[17] The effect of this concern remains to be seen, but given that "[i]nternational law is founded upon mutuality and reciprocity,"[18] the potential international backlash could be dangerous for Americans who are arrested or detained abroad.[19]

Poised against this international dilemma lies the murky area of federalism and foreign affairs. Under existing case law, the role of the states in the administration of this nation's international obligations is somewhat unclear. Although a well-accepted maxim subsists in matters of foreign affairs that "the states do not exist,"[20] recent decisions of the Supreme Court may have given cause to question the extent of that "non-existence." These Supreme Court decisions have developed for the states a structural immunity from federal commandeering of state legislatures or state executive officials.[21] One scholar has suggested that this immunity could extend to the area of foreign affairs,[22] an area in which total federal control over the treaty process historically has resulted in the individual states being silent partners to the United States' international agreements.[23] If this suggestion is true, the ability of the United States to meet its international obligations could be jeopardized, as the states are often left to meet the nation's international obligations.[24] Part III of

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15. *See infra* note 147 and accompanying text (documenting the reactions of the governors of Virginia, Texas, and Arizona when dealing with the consular notification issues raised by these cases).

16. *See infra* Part II.C (examining the cases that raise consular notification claims); *see generally* Mark Warren, *Death Penalty Information Center: Foreign Nationals and the Death Penalty in the United States* (last modified Mar. 31, 1999) <http://www.essential.org/dpic/foreignnatl.html> (copy on file with the *McGeorge Law Review*) (compiling a broad array of statistics and information relating to consular notification violations in the United States).

17. *Cf. infra* notes 289-91 and accompanying text (discussing the international backlash over the United States' actions in the Vienna Convention cases).

18. Hilton v. Guyot, 159 U.S. 113, 228 (1895); *see* Breard v. Pruett, 134 F.3d 615, 622 (1998) (Butzner, J., concurring) (quoting this phrase from *Hilton* when discussing the importance of the nation's consular notification obligations).

19. *See infra* notes 47-49 (noting the possible repercussions under international law for the material breach of a treaty).

20. United States v. Belmont, 301 U.S. 324, 331 (1937); *see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) (asserting that the states' rights trend in the United States is not likely to lessen federal control over foreign affairs).

21. *See infra* Part III.C (examining the recently developed "commandeering" immunity).

22. *See* HENKIN, *supra* note 20, at 166-67 (questioning whether the newly devised state immunity would apply to foreign affairs).

23. *Cf.* HENKIN, *supra* note 20, at 150-51 (discussing the interaction between states and foreign policy).

24. *Id.*

this Comment examines this dilemma, using the federal Consular Notification and Access Program, which directs state officials to carry out national consular notification obligations, as the example by which to evaluate the larger question.

This Comment has three goals. The first is to educate the reader on the law concerning consular notification and access so that the nation's current dilemma is understood. Thus, Part II of this Comment briefly analyzes the nation's international consular notification obligations to determine which rights, if any, are granted to defendants because of those international obligations. Part II also synthesizes the state and federal cases that have addressed claims brought under the Convention. The second goal is to discuss an interesting conflict of judicial reasoning. Part III of this Comment explores this conflict by addressing the question of whether the Supreme Court's newly devised state immunity from federal commandeering extends to the area of foreign relations. The third goal is a practical one: to propose a workable compromise solution to the consular notification problem that would closely comply with the United States' international duties, without being unconstitutional under existing case law. Thus, Part IV concludes by offering a method of enforcing the Convention within the states.

II. THE UNITED STATES' CONSULAR NOTIFICATION OBLIGATIONS

The United States has long recognized the importance of insuring consular access to Americans detained or arrested in foreign countries.[25] Therefore, the nation has become a party to the widely followed Vienna Convention on Consular Relations,[26] as well as to several other international agreements which contain consular access provisions.[27] Article 36 of the Vienna Convention sets forth three rules designed to ensure that consular officers will be able to speak with their fellow nationals if those nationals are detained or arrested.[28] The Convention is considered

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25. *Cf.* LUKE T. LEE, CONSULAR LAW AND PRACTICE, 133-45 (2d ed. 1991) (discussing provisions in consular relations agreements regarding the protection of nationals in the courts of foreign countries, both before and after the Vienna Convention was enacted).

26. Vienna Convention on Consular Relations, Aug. 24, 1963, 21 U.S.T. 78 [hereinafter Vienna Convention].

27. *See* U.S. DEP'T OF STATE, PUB. NO. 10518, CONSULAR NOTIFICATION AND ACCESS 50-58 (1998) [hereinafter CONSULAR ACCESS PUBLICATION] (providing a reference table of all of the United States' consular relations agreements).

28. The Convention provides for a right to consular notification, a right to be notified of the right to notification, and the right of nations to assist their nationals. *See infra* Part II.B (detailing each of the rights granted by Article 36 of the Vienna Convention). The text of Article 36 of the Convention provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) *if he so requests, the competent authorities of the receiving state shall, without delay,*

federal law and is therefore binding on state and federal officials.[29] However, the treaty text does not provide a remedy for its violation and, although suppression of evidence obtained as a result of violations of the Convention has been suggested,[30] no judicial remedy for violation of the Convention currently exists.

This section addresses the United States' consular notification obligations. The history and significance of consular notification is discussed first, with an emphasis on the importance the United States has placed on making sure that American consular officers have access to Americans who are detained or arrested abroad.[31] Next, this section evaluates the Vienna Convention on Consular Relations, to determine what rights it has granted to nations and their citizens.[32] Finally, the legal effect of the treaty obligations is discussed, including a consideration of the difficulties courts have encountered when addressing claims arising under the Convention.[33]

A. Consular Notification—A Nation's Right

The ability of a nation to protect its citizens' interests in foreign countries is a fundamental precept of consular relations. Nations utilize "consular officers" to protect the interests of their nationals in foreign countries.[34] These officers have a general duty to protect their fellow nationals residing in or visiting the nation in

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inform the consular post of the sending state if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*

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

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

Vienna Convention, *supra* note 26, art. 36, 21 U.S.T. at 100-01 (emphasis added).

29. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5 (2d ed. 1988) (discussing the legal effect of treaties); *infra* notes 50-54 and accompanying text (outlining the legal status of treaties within the domestic legal system).

30. *Cf. infra* note 89 and accompanying text (presenting two cases in which suppression of evidence was suggested by the courts but not utilized).

31. *Infra* Part II.A.

32. *Infra* Part II.B.

33. *Infra* Part II.C.

34. *See generally* Vienna Convention, *supra* note 26, art. 1, 21 U.S.T. at 80 (defining "consular officer" as "any person . . . entrusted . . . with the exercise of consular functions").

which the consular officer is living.[35] Complying with this duty in foreign lands is made easier because "[a] consul's right to protect his nationals has been recognized by many publicists and affirmed by the practice of [nations]."[36] Consular officers protect their fellow citizens in several ways. Consular officers represent a fellow national's interests when the national is absent from a foreign state in which he or she has interests,[37] assist nationals with repatriation or in civil actions,[38] ensure that nationals are receiving "judicial equality and fairness,"[39] and may even loan money to a national to get to the airport for a departing flight.[40]

One of the most important duties of the consular officer is to communicate with fellow nationals who are detained or arrested.[41] This function, in combination with the consular officers' other duties, gives rise to consular notification provisions in international agreements.[42] The United States has negotiated treaties with consular notification provisions with nearly every country.[43] These provisions form the mechanism which guarantees Americans the right to request consular assistance if they are ever detained in a foreign country.[44]

With the benefits of these agreements, however, comes the obligation to see that other nations' citizens receive similar protections when they are arrested in the United States.[45] The United States State Department addresses this reciprocal duty in the Department's Consular Access Publication, stating:

> These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can provide whatever consular services they deem appropriate.[46]

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35. *See* LEE, *supra* note 25, at 124 (listing nations that maintain that a consul is "duty-bound" to accord protection to his or her fellow citizens).

36. *Id.*

37. *See id.* at 127 (citing Mexican Consular instructions).

38. *See id.* at 126-27 (citing Dominican Consular instructions).

39. *See id.* at 126 (citing French Consular instructions).

40. *See id.* at 126 (citing British Consular instructions).

41. *See id.* at 133 (emphasizing that communication with nationals in prison is a "major protective function").

42. *See generally id.* at 133-51 (discussing, in detail, the history of the consular right to be notified of the detention of nationals, and instances of state action affirming or discussing the right).

43. *See* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 51-58 (providing a list of all of the United States' consular relations agreements).

44. *See id.* at 13 (emphasizing that the consular notification agreements apply to American nationals arrested abroad just as they apply to foreign nationals arrested in the United States).

45. *See infra* text accompanying note 46 (quoting the State Department mantra concerning the reciprocal duty raised by the consular notification agreements).

46. CONSULAR ACCESS PUBLICATION, *supra* note 27, at 3.

Although this directive from the State Department is couched in permissive terms, the obligation to advise nationals is much more serious. This is because every violation of the Convention can be considered a breach of a binding agreement between the United States and another country.[47] The remedy for the breach of a treaty can be the suspension of the operation of the treaty between the nation that has breached the treaty and the affected nation.[48] It is therefore an open question how many times the United States can violate the Vienna Convention before Americans will be deprived of its benefits abroad.[49]

However, ensuring compliance with consular notification obligations first requires determining which rights are guaranteed by the various consular agreements within the United States' legal system. The United States' consular notification agreements, as treaties, are the "supreme Law of the Land."[50] They preempt conflicting state law.[51] A treaty is considered self-executing and equivalent to an act of Congress when it can "operate[] . . . without the aid of any legislative provision."[52] The Vienna Convention on Consular Relations is considered a self-executing treaty.[53] A self-executing treaty is subject to judicial interpretation regarding the specific rights and benefits to be conferred on individuals by the instrument.[54] With these legal principles in mind, exactly which rights and benefits

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47. *See generally* Vienna Convention on the Law of Treaties, art. 60(2), 1155 U.N.T.S. 331, 346 (discussing the consequences of a material breach of a multilateral treaty).

48. *Id.* art. 60(2)(b) (recognizing that "[a] party specially affected by the breach [is entitled] to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State").

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

> (The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.).

50. U.S. CONST. art. VI, § 2.

51. *See* TRIBE, *supra* note 29, § 4-5, at 226 (stating that it is "indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control").

52. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); *see* Head Money Cases: Edye v. Robertson, 112 U.S. 580, 598-99 (1884) ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."); *see also* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 586-89 (1997) (discussing self-executing treaty doctrine).

53. *See* S. EXEC. REP. No. 91-9, app. 5 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (confirming before the Senate Foreign Relations Committee that the treaty is self-executing); *see also* Kadish, *supra* note 52, at 588 n.147 (listing authority for the conclusion that the Vienna Convention is self-executing).

54. *See* Kadish, *supra* note 52, at 586-89 (arguing that because the Supreme Court has decided that the Supremacy Clause itself is not a source of federal rights, the treaty itself must be construed to confer private, enforceable rights); *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 86 (1993) (comparing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), where Justice Marshall held that a treaty was not self-executing, with *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), where Justice Marshall held that the same treaty was self-executing after reviewing the Spanish-language version of the treaty).

are bestowed on foreign nationals by the Vienna Convention on Consular Relations is the subject of next section.

B. *The Vienna Convention on Consular Relations*

The Vienna Convention on Consular Relations represents the will of the world in regard to consular relations. One hundred sixty-three of the world's nations are parties to the Convention.[55] Even nations that are not officially parties to the Convention may be bound by—and receive the benefit of—its provisions if, as is widely thought, the Convention embodies customary international law.[56]

Article 36 of the Convention confers three rights upon consuls and foreign nationals.[57] The first is the right of a consul to assist fellow nationals who have been arrested or detained.[58] The second is the right of nationals to determine whether they desire such consular assistance.[59] The third is the right of the national to be notified of the right to seek consular assistance.[60] Under the terms of Article 36, nations are bound to ensure that their laws and regulations give "full effect . . . to the purposes for which the . . . Article [is] intended."[61] This subsection briefly explores each of these rights, their interaction, and history. This review illustrates that the intent of Article 36 is to convey individual rights on foreign nationals. In principle, therefore, under the self-executing treaty doctrine,[62] this nation's legal system should give effect to the rights conferred in Article 36.[63]

1. *The "Primary" Right: The Right of Nations to Assist Their Nationals Who Have Been Arrested or Detained*

Through the use of consular officers, sovereign nations have traditionally had the right to communicate with and assist their nationals who are arrested or detained

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55. United Nations Treaty Database, *Vienna Convention on Consular Relations* (visited Oct. 27, 1998), <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_iii_boo/_6.html>.

56. *See* LEE, *supra* note 25, at 26 (giving evidence that even states that were not parties to the Convention felt bound by its provisions); *see id.* at 142 (suggesting that Article 36, when completed, codified the "broad outlines of international custom").

57. *See supra* note 28 (setting forth the text of Article 36).

58. Vienna Convention, *supra* note 26, art. 36(1) 21 U.S.T. at 100-01; *see infra* Part II.B.1 (discussing the rights of nations under the Vienna Convention).

59. Vienna Convention, *supra* note 26, art. 36(1), 21 U.S.T. at 100-01; *see infra* Part II.B.2 (discussing the rights of individuals under the Vienna Convention).

60. Vienna Convention, *supra* note 26, art. 36(2), 21 U.S.T. at 100-01.

61. Vienna Convention, *supra* note 26, art. 36(2), 21 U.S.T. at 100-01.

62. Under self-executing treaty principles, if a treaty confers individual rights, those rights are enforceable in our courts. *See supra* notes 50-54 and accompanying text (outlining the basic principles of constitutional treaty law).

63. *But see infra* Part II.C (discussing the various conclusions of courts that have faced consular notification questions).

in foreign jurisdictions.[64] The drafters of the Convention unequivocally recognized and codified this right in Articles 36(1)(a) and 36(1)(c).[65] The United States has long recognized the importance of ensuring that Americans detained or arrested abroad are able to communicate with American consular officers.[66] As early as 1935, the government had entered into international agreements conferring the right of consular officials to be notified of an arrest of a national.[67] The United States has relied extensively on these agreements to protect Americans detained or arrested abroad.[68] By becoming a party to the Vienna Convention in 1963, the United States was assured that it would be able to realize the benefits guaranteed by the Convention in every nation with which the United States did not already have a consular relations agreement.[69] Through the Vienna Convention and several bilateral agreements, the United States has now contracted with almost every country in the world to ensure that American nationals may receive the benefits of consular assistance if they are arrested abroad.[70]

2. *The "Secondary" Rights: The Right of a National to Determine Whether to Seek Consular Assistance, and the Right to Be Notified of the Right to Seek Consular Assistance*

The right of a national to request consular access, and the right to be notified of the right to consular access, are guaranteed in Article 36(1)(b) of the Convention.[71] This provision shifts the focus of the Article away from the rights of

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64. *See* LEE, *supra* note 25, at 134 ("Essential to the fulfillment of a consul's protective function are his right to be informed immediately of a detention of nationals of the sending State, to visit them in prison, and to assist them in legal and other matters."). Lee also sets forth substantial evidence showing that allowing detainees to communicate with consular officials was the practice of states even before the Vienna Convention was signed. *See generally id.* at 133-38 (exploring the evidence, including treaties and diplomatic notes, showing that allowing consular assistance was the traditional practice of states, and explaining the limited circumstance under which such assistance may have been denied).

65. *See supra* note 28 (providing the text of Articles 36(1)(a) and 36(1)(c) of the Vienna Convention).

66. *See* LEE, *supra* note 25, at 134 (noting several instances in which the United States reaffirmed its belief in its right to protect its nationals and questioned other countries regarding possible violations of the right).

67. *See id.* (noting 28 international agreements into which the United States had entered prior to the Vienna Convention, each of which have conveyed the right to be notified of the arrest of nationals).

68. *See* LEE, *supra* note 25, at 134-50 (detailing several instances, both before and after the Vienna Convention, where the United States asserted the right to consular notification of the arrest of American nationals).

69. *See generally* S. EXEC. REP. 91-9, app. (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (discussing the benefits of ratifying the Convention); S. EXEC. REP. 91-9 (1969) (recommending that the Senate approve the ratification of the Convention).

70. *See* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 50-57 (listing the countries or jurisdictions to which the United States has consular obligations). According to the State Department publication, only 16 countries or jurisdictions do not have consular agreements with the United States. *Id.* These nations are: Afghanistan, Burundi, Cambodia, the Central African Republic, Comoros, Congo (Brazzaville), Cote d'Ivoire (Ivory Coast), Libya, Mauritania, Monaco, Nauru, Qatar, San Marino, Sri Lanka, and Uganda. *Id.*

71. *See* Vienna Convention *supra* note 28, art. 36(1)(b), 21 U.S.T at 100-01 (emphasizing the relevant language of Article 36).

nations, and towards the rights of individual nationals.[72] Reaching the conclusion that the Article guarantees individual rights, however, is not as easily accomplished as concluding that the Article confers consular assistance rights upon nations.[73] This is because the Convention generally addresses consular operations, and not individual rights.[74] In fact, differing interpretations of Article 36 and the purpose of the Convention have led to varying decisions in the courts regarding whether the Convention grants individual rights.[75]

Evaluation of the history of the Convention, however, indicates that the grant of individual rights in Article 36 was necessary to ensure that consular officers would be able to avail themselves of their right to assist arrested or detained nationals.[76] The original draft of the Convention provided for mandatory consular notification when a foreign national was detained in a foreign country.[77] Several nations objected to this provision.[78] Among the objections was the argument that an individual's wishes should be considered when determining whether or not the national's consulate should be notified.[79] Some states felt that automatic notification would infringe on an individual's right of privacy.[80] Eventually, the delegates decided that to protect individual rights, consular officers would be notified of an individual's arrest or detention only at the request of the individual.[81]

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72. The provision requires that a national be informed, without delay, of the availability of consular assistance, and that the proper officials be notified if the national requests such assistance. *See supra* note 28 (quoting the text of Article 36(1)(b)).

73. *See supra* notes 64-70 and accompanying text (illustrating how the Convention confers the right upon a nation, through its consular officers, to assist its nationals).

74. The preamble of the Convention states that the Convention's primary function is to "ensure the efficient performance of functions by consular posts on behalf of their respective states." Vienna Convention, *supra* note 26, preamble, 21 U.S.T. at 79; *cf.* Kadish, *supra* note 52, at 593 (recognizing that the Vienna Convention on Consular Relations is "an awkward place to enumerate the rights of an individual national").

75. *See infra* notes 100-07 (summarizing the case law regarding whether the Convention grants individual rights).

76. *See infra* notes 77-81 and accompanying text (outlining the history of the provision).

77. LEE, *supra* note 25, at 138.

78. *See id.* at 138-39 (listing several objections to the original mandatory notification provision).

79. *See id.* at 138-42 (describing the debate over Article 36 which took place at the Vienna Conference on the Vienna Convention on Consular Relations); *see also* Kadish, *supra* note 52, at 596-600 (discussing the debate over Article 36); S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 729-30 (1995) (same).

80. *See* Kadish, *supra* note 52, at 597-98 (reciting the concern of some Convention delegates that not all detained nationals would desire that their nation be notified of their situation); *see also* Shank & Quigley, *supra* note 79, at 730 ("Other states objected that a detainee might not want his detention to be known to officials of his state of nationality.").

81. *See* LEE, *supra* note 25, at 142 (discussing the adoption of Article 36 at the Vienna Conference); Kadish, *supra* note 52, at 597-99 (recounting the debate over whether consular notification should be at the detainee's request or automatic). The United States has altered this provision in several bilateral treaties which require mandatory notification of the consulate, regardless of whether the individual desires the consulate to be notified; *see generally* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 4-5 (explaining that some nations' consulates must be notified regardless of the individual national's wishes). There are currently 56 mandatory notification countries, many of which are successors to the consular relations agreement between the United States and the former Soviet Union. *See id.* at 5 (listing the mandatory notification countries); *cf. id.* at 5 n. 4 (explaining

Article 36(1)(b) also provides that detainees must be notified of their right to seek consular access.[82] The individual's right to notification of the availability of consular assistance was a necessary corollary of the provision guaranteeing individuals a choice of whether or not their consulate would be notified.[83] Many nations' representatives had expressed concerns that if consular notification was not mandatory, detaining nations could merely claim that the individual had not requested consular assistance, thus relieving that state of any duties under Article 36.[84] Therefore, the last clause of Article 36(1)(b) was added, requiring the detaining authorities to notify the detained individual of the possibility of consular assistance.[85]

C. The Courts and Consular Notification

This section briefly considers recent cases in which Article 36 claims were raised. The review of these cases demonstrates two clear propositions: first, that understanding the purpose of Article 36 is necessary to ensure that the treaty be given the "full effect" required under the terms of the agreement;[86] and second, that not only have courts failed to give Article 36 its "full effect" within this nation's laws, but they have given the Article little effect at all.[87]

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that the Soviet Union's successor states are listed as separate countries).

82. *See* Vienna Convention, *supra* note 26, art. 36(1)(b), 21 U.S.T. at 101 ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph . . . .").

83. *Cf.* Shank & Quigley, *supra* note 79, at 730 n.57 and accompanying text (noting the concern of states that if consular access were to be based on a national's desire for consular access, a detaining state could rebut claims of Convention violations by stating that the detainee had not requested consular access).

84. *See* LEE, *supra* note 25, at 140-42 (citing the concerns of numerous delegates at the conference that disputes between nations regarding whether or not an individual had actually requested assistance would arise if the notification of the consulate were made contingent on the request of the detained national).

85. *See id.* at 142 (indicating that the amendment which added the right to be notified of the *availability* of consular assistance was a "logical sequel" to the compromise amendment which placed the decision of *whether* the consul should be notified in the hands of the detainee); *see also* Shank & Quigley, *supra* note 79, at 730 (summarizing the debate over the Convention); Kadish, *supra* note 52, at 598 (noting that the provision granting a foreign national the consular access notification right was a compromise agreement adopted only two days before the close of the Convention).

86. *See* Vienna Convention, *supra* note 26, art. 36(2) ("[S]aid laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."); *supra* note 28 (quoting the text of Article 36).

87. *Cf. infra* Part II.C (illustrating that in all but one Vienna Convention case, a remedy for the treaty's breach has not been forthcoming).

Although courts are aware of the importance of the Vienna Convention,[88] thus far the decisions in Article 36 cases have given the provision little practical effect.[89] Courts have faced four main difficulties when addressing Vienna Convention claims. First, many claims have met with procedural difficulties.[90] Second, the courts are reluctant to officially recognize that the Convention creates private enforceable rights that grant individual nationals standing to raise claims under the Convention.[91] Third, even when the courts do recognize that an individual right exists, they are unable or unwilling to accept arguments that the lack of consular notification has somehow prejudiced the detainee.[92] Finally, exactly which remedy should be granted upon a showing of prejudicial effect is unclear.[93] This section considers the first three of these difficulties.

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88. *Cf.* Breard v. Pruett, 134 F.3d 615, 621 (4th Cir. 1998) (Butzner, J., concurring) (concurring to "emphasize the importance of the Vienna Convention"); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) ("While we in no way approve of Texas' failure to advise Faulder" [of his rights under the Convention,] [t]he violation . . . does not merit reversal."); United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979) (Takasugi, J., dissenting) (calling on the court to show the integrity of the nation's treaties by honoring their provisions); *id.* (comparing a violation of the treaty as "equal [to] if not greater than a constitutional violation"); United States v. $69,530.00 in United States Currency, 22 F. Supp. 2d 593, 595 (W.D. Tex. 1998) ("Such international agreements are important and are entitled to enforcement. . . ."); Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court.").

89. A few laudable cases have predicted possible enforcement of the Convention's mandates if future violations occur. *See, e.g.*, United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1098 n.10 (S.D. Cal. 1998) (stating "that in an appropriate case, a violation of the Convention may warrant suppressing a defendant's statements or granting other appropriate relief"); Colorado v. Mata Medina, No. 97 CR307 (Colo. Dist. Ct. May 7, 1998) (visited Jan. 7, 1999) <http://www.state.co.us/gov_dir/pdef_dir/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html> ("Nor does this Court by its ruling [that suppression would not be granted for a violation of Article 36 in this case] suggest that suppression is never an option when an Article 36 violation occurs.").

90. *See infra* notes 94-99 and accompanying text (discussing various procedural obstacles that have stymied Vienna Convention claims).

91. *See infra* notes 100-07 (surveying the case law regarding whether the Convention grants individual rights).

92. *See infra* notes 108-15 (discussing the case law regarding whether Vienna Convention violations prejudice foreign nationals in the United States).

93. This Comment does not address the issue of what remedy should be granted for a prevailing claim based on Article 36. Although the exclusion of evidence gained as a result of a violation of the Convention would seem to be a possible remedy, courts have been reluctant to expand the use of the rule to cover treaty violations. *See, e.g.*, United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122 (C.D. Ill. 1999) (refusing to apply the exclusionary rule because the Vienna Convention does not provide for it and the violation of the treaty is not equivalent to the violation of a constitutional right); United States v. $69,530 in United States Currency, 22 F. Supp. 2d 593, 595 (W.D. Tex. 1998) (refusing to extend the exclusionary rule for violations of the Convention because treaty rights "should not be cloaked with the 'nontextual and unprecedented remedy'" (citation omitted)). However, in the sole case where the lack of notification was found to prejudice the national, a reversal of the conviction was granted. *See* United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980) (reversing a conviction for illegal reentry after deportation after finding that the deportee had been prejudiced by the government's failure to notify him of his consular notification rights); *see also infra* note 114 (discussing the *Rangel-Gonzales* case).

Foreign affairs issues often do not provide proper parties or issues for judicial review.[94] The Vienna Convention cases are no exception. The rights under the Convention must be "exercised in conformity with the laws and regulations of the receiving State."[95] Therefore, claims that are procedurally defaulted[96] or that violate the Eleventh Amendment[97] and are not reviewed have been said not to violate Article 36.[98] Similarly, although two courts have found that the Consulate may bring a claim alleging that its right to assist its national has been violated, those claims were dismissed for lack of subject-matter jurisdiction.[99]

The question of whether Article 36 confers upon foreign nationals private enforceable rights which grant them standing to raise claims under the Convention has not been conclusively decided.[100] The case law in the United States, however, suggests a general acceptance of the argument that it does.[101] In *Breard v. Greene*,[102] the Supreme Court stated that the Convention "arguably" confers individual

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94. *See* HENKIN, *supra* note 20, at 3 (surmising that foreign affairs issues do not ordinarily provide proper parties or issues for judicial review). This has been particularly true with respect to the Vienna Convention cases, the review of which has been hampered by procedural obstacles.

95. Vienna Convention, *supra* note 26, art. 36(2), 21 U.S.T. at 101.

96. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 375 (1998) (holding that Breard's Vienna Convention claims were procedurally defaulted because he failed to raise them in state court); Villafuerte v. Stewart, 142 F.3d 1124, 1125 (9th Cir. 1998) (observing that the national's claim was procedurally defaulted for having failed to raise it in state court until the third Post-Conviction Relief petition); LaGrand v. Stewart, 133 F.3d 1253, 1261-62 (9th Cir. 1998) (holding the claim to have been procedurally defaulted for not having been raised in a state proceeding); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (finding that the claim was procedurally defaulted).

97. *See Breard*, 523 U.S. at 377 (discussing why Paraguay's claims might violate the fundamental principle of the Eleventh Amendment: that the states are immune from suits brought against them by foreign nations).

98. *Id.* at 375-76 (stating that Breard failed to exercise his rights in conformity with United States law by failing to raise his claims in state court); United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243 (9th Cir. 1999), *withdrawn*, 188 F.3d 1177 (explaining that most nationals have failed to exercise their rights in conformity with U.S. laws by failing to raise their claims in state court).

99. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274-75 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert. denied*, 523 U.S. 371 (1998) (concluding that Paraguay had standing to bring its claims under the treaty because it was asserting its own rights and not Breard's, but finding no subject matter jurisdiction); Consulate Gen. of Mexico v. Phillips, 17 F. Supp. 2d 1318, 1326 (S.D. Fla. 1998) (finding no subject matter jurisdiction after distinguishing between the rights of a consulate and the rights of a defendant under the Vienna Convention).

100. *See generally* United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998) (discussing the debate over whether or not the Convention confers rights on defendants or consuls). In summarizing the debate, the court stated:

> This is a murky inquiry indeed. The language of the Convention states that law enforcement officials shall tell the arrestee of the arrestee's right to contact the consul. This seems to protect individual rights. However, the introductory sentence of article 36 indicates that this provision is not designed to benefit individuals, but rather seeks to 'facilitat[e] the exercise of consular functions . . . .'"

Id. at 1095.

101. *See infra* notes 102-07 (surveying the cases that have discussed whether or not the Convention confers individual rights).

102. 523 U.S. 371 (1998).

rights.[103] Three circuit courts that have addressed Article 36 questions have all assumed, without deciding, that the Convention creates individual rights.[104] Eight district and state courts have either explicitly or implicitly accepted the contention that defendants have standing to raise Article 36 claims.[105] Meanwhile, only two other courts have doubted that the Convention conveys individual rights.[106] Finally, the Ninth Circuit seems to have illustrated the difficult nature of the standing question by withdrawing, for en banc review, an earlier decision that had explicitly held that a foreign defendant had individual rights under the Convention.[107]

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103. *Id.*; *see id.* at 376 ("The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969.").

104. *See* United States v. Salas, No. 98-4374, 1998 WL 911731, at *3 (4th Cir. 1998) (assuming defendant had standing without deciding the issue); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (stating that the Vienna Convention "requires an arresting government to notify a foreign national who has been arrested, imprisoned or taken into custody or detention of his right to contact his consul"); *cf.* Waldron v. INS, 17 F.3d 511, 518-19 (2d Cir. 1994) (construing an INS regulation based on the Convention, and moving directly into substantive matters without discussing standing).

105. Two districts courts have expressly recognized that defendants have privately enforceable rights under the Convention. *See* United States v. Chaparro-Alacantara, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) (holding that the defendants do have standing under Article 36 to address violations of the provision); United States v. $69,530 in United States Currency, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998) (rejecting the government's argument that the Convention creates no enforceable rights). Six courts have implicitly recognized that defendants have standing by speaking of the defendants' "rights" under the Convention and evaluating their claims. *See* United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998) (stating that the history, practice of nations, and case law support a finding of standing, but leaving the issue undecided); Mami v. Van Zandt, No. 89 Civ. 0554, 1989 WL 52308, at *1 (S.D.N.Y. 1989) (evaluating substantive aspects of the defendant's claim without discussing standing); Cardona v. Texas, 973 S.W.2d 412, 417-18 (Tex. Ct. App. 1998) (assuming that the defendant had standing without discussing the issue); Al-Mosawi v. Oklahoma, 956 P.2d 906, 909 n.6 (Okla. Crim. App. 1998) (discussing the substantive aspects of defendant's claim without addressing standing); Ohio v. Loza, No. CA96-70-214, 1997 WL 634348, at *2 (Ohio Ct. App. 1997) (assuming without discussion that the defendant had standing rights under the treaty); Colorado v. Mata-Medina, No. 97 CR307, at 4 (Colo. Dist. Ct. May 7, 1998) (visited Jan. 7, 1999) <http://www.state.co.us/gov_dir/pdef_dir/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html> (rejecting an argument that the defendant had a duty to request that notice be given to the consulate, but not discussing the standing issue).

106. *See* United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) (leaving the standing question open, despite doubt that the Convention creates privately enforceable rights); Kasi v. Virginia, 508 S.E.2d 57, 63-64 (Va. 1998) (relying solely on the preamble of the treaty and the legal argument—misguided, in this author's view—of the defendant, with neither mention of the text of Article 36 itself, nor case law construction of the provision, to hold that the Convention does not confer individual rights).

107. *See* United States v. Lombera-Camorlinga, 188 F.3d 1177 (9th Cir. 1999) (withdrawing two of the circuit court's earlier decisions and ordering that the cases be re-heard en banc); *see also* United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243 (9th Cir. 1999), *withdrawn*, 188 F.3d 1177(holding that defendants have individual rights under the Vienna Convention and standing to enforce those rights); United States v. Oropeza-Flores, 173 F.3d 862 (9th Cir. 1999), *withdrawn*, 188 F.3d 1177 (1999) (relying on *Lombera-Camorlinga* for the proposition that Article 36(1)(b) creates individual rights). The Ninth Circuit's indecision in this area exists despite the fact that they have dealt with standing in several other consular notification cases. *See* Villafuerte v. Stewart, 142 F.3d 1124, 1125 (9th Cir. 1998) (implying that the defendant had standing by stating that Article 36 "requires a detaining state to inform a detained foreign national of his right to consult with consulate officials," and moving on to other analyses); LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998) ("[A]uthorities of the receiving state are required to inform the arrested national 'without delay of his rights under [Article 36(1)(b)].'"); United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir 1980) (holding that INS regulations based on the

The third problem that nationals raising Vienna Convention claims have faced is the use of a prejudice standard to evaluate claims arising under the Convention. In *Breard*, the Supreme Court implicitly approved of the use of a prejudice standard to decide if violations of the Convention were meritorious.[108] Under this standard, foreign nationals must be able to show that the failure of the government to notify them of their right to seek consular assistance had a prejudicial effect on their trials.[109] Although the *Breard* statement was only dictum, every case since *Breard* that has evaluated the merits of an Article 36 claim has looked for a showing of prejudice.[110] Generally, courts have asked for evidence tending to show that the defendant would have attempted to contact the consulate if he or she had known of the right, and that the consulate would have assisted him or her.[111] Additionally, defendants must argue how the lack of consular assistance prejudiced their individual cases.[112] They must make this claim with some specificity, and the claim must not be mere speculation.[113]

The use of a prejudice analysis has thus far meant almost certain failure of an Article 36 claim. For instance, of fifteen cases in which a court has analyzed a defendant's claim for prejudice, only one such claim has survived.[114] However,

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Vienna Convention establish personal rights); United States v. Calderon-Medina, 591 F.2d 529, 531 n.6 (9th Cir. 1979) (rejecting the government's argument that the treaty was not for the benefit of individuals, but rather for the benefit of consuls).

108. *See* Breard v. Greene, 523 U.S. 371, 375-78 (1998) (analyzing Breard's prejudice claim despite the fact that the Court found the claim was procedurally defaulted).

109. *See id.* at 377 (noting that the Court believed that Breard's claim—that with the advice of his consulate he would have accepted the state's offered plea bargain to avoid the death penalty—was far too speculative to prove prejudice and warrant the overturning of his conviction).

110. *See, e.g., Salas*, No. 98-4374, 1998 WL 911731, at *3 (stating that the defendant must establish prejudice to prevail on a motion to suppress on the ground that the defendant's Article 36 rights were violated); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1096-98 (S.D. Cal. 1998) (denying motion to suppress because the defendant had failed to make the requisite showing of prejudice); Kasi v. Commonwealth, 508 S.E.2d 57, 64 (Va. 1998) (theorizing, in dicta, that defendant's Article 36 claim of prejudice was at least as speculative as Breard's). *But see* United States v. $69,530 in United States Currency, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998) (determining that requiring a showing of prejudice in civil forfeiture actions would be inappropriate).

111. *See, e.g.*, United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999) (deciding that the defendants failed to show prejudice because they failed to show that, if they had been advised of their notification rights, they would have stopped speaking with INS agents); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1254-55 (D. Utah 1999) (holding that the defendant was not prejudiced by an Article 36 violation because the defendant did or could not show how contacting the consulate would have helped his case).

112. *See, e.g., Salas*, No. 98-4374, 1998 WL 911731, at *3 (finding that an Article 36 claim was properly rejected because the defendant had not asserted how the claimed violation affected the outcome of his case).

113. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 377 (1998) (holding that Breard's claim—that if he had been advised by consular officials, he would have accepted a life-sentence plea bargain—was "far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error").

114. In *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980), the Ninth Circuit evaluated the consular notification claim of a deportee who had been convicted of illegal reentry. *Id.* at 529-30. The alien's claim was based upon an INS regulation, which in turn was based upon Article 36. *Id.* at 530. The court found prejudice because the alien had met the burden of presenting "evidence that he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a

many of these claims failed because the defendant simply did not plead well.[115] Thus, the possibility still exists that, in a proper case, a well-pled showing of actual prejudice may survive the prejudice analysis.

Proponents of the Convention, and of international law in general, can claim a few victories in this area. First, the fact that many courts seem to have accepted the premise that the Convention grants defendants rights that are enforceable in U.S. courts ensures that in a proper case, a defendant, and thus a nation, may be granted a remedy for a violation of the Convention. Second, as the Convention becomes more widely known among defense attorneys, the likelihood of a successful claim being raised greatly increases.[116] Finally, a few courts are beginning to aid in the Convention's enforcement. For instance, a Colorado state court judge's ruling informed law enforcement officials that the Convention's commands must be followed and that suppression of evidence may be a possible remedy when violations of the Convention occur.[117] Another court has held that consular officials do have standing to raise claims under the Convention for violations of their right to be notified of a fellow national's detention and their right to assist that national.[118]

However, the country should not wait for this area of law to develop one case at a time. The treaty requires that "full effect" be given to the treaty through this nation's laws.[119] Allowing courts to continue to construe the treaty's rights and remedies without guidance will lead to more violations of the treaty by the United States. Therefore, federal legislation or an authoritative judicial decision specifying

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likelihood that the contact would have resulted in assistance to him in resisting deportation," without the government presenting any evidence to rebut the alien's claim. *Id.* at 533. Although *Rangel-Gonzales* was based on the INS regulations and not the treaty itself, the case has been cited in subsequent Article 36 cases. *E.g.*, United States v. Lombera-Camorlinga, —F.3d—, 1999 WL 160848, at *3 (9th Cir. 1999), *withdrawn*, 188 F.3d 1177 (1999).

115. *See, e.g.*, *Salas*, No. 98-4374, 1998 WL 911731, at *3 (finding that a national failed to meet the prejudice requirement because the national failed to show how the lack of notification affected the outcome of the case); United States v. Maldonado-Vences, No. 98-4499, 1998 WL 911711, at *2 (4th Cir. 1998) (finding no prejudice where the national failed to present evidence that he had tried to contact the consulate, even after he was informed of the availability of consular assistance).

116. *See generally, e.g.*, John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, Sept.-Oct. 1998, at 28 (promoting awareness and use of the Convention as a defense tool).

117. *See* Colorado v. Mata-Medina, No. 97 CR307, at 4 (Colo. Dist. Ct. May 7, 1998) (visited Jan. 7, 1999) <http://www.state.co.us/gov_dir/pdef_dir/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html> (informing local law enforcement officials of the need to enforce the Convention, and reserving the right to suppress evidence as a result of a violation of the Convention).

118. *See* Consulate Gen. of Mexico v. Phillips, 17 F. Supp. 2d 1318, 1322-23 (S.D. Fla. 1998) (finding that the Mexican Consulate had a right to be notified and to be of assistance to the national, and that the consulate also had standing to assert that right).

119. *See* Vienna Convention, *supra* note 26, art. 36(2), at 101 (setting forth a dual requirement for the Article's enforcement: the Article "shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended").

how to implement the treaty, and mandating the remedy for its violation, is necessary to guide the judiciary.[120]

Before fashioning this law, however, a threshold question may be considered: Does the state immunity from federal commandeering[121] extend to the area of foreign affairs, an area where the federal government has historically enjoyed complete control? The next section considers this question.

III. CONSULAR NOTIFICATION AND THE STATES

The federal government has historically enjoyed vast control over the conduct and design of the nation's foreign affairs.[122] This control stems from a string of judicial decisions that have significantly broadened the Constitution's textual delegation of federal foreign affairs powers.[123] These decisions have also seemingly deprived the states of any sovereignty in the area of foreign affairs.[124] The decisions reflect the opinions of the Court, the founders, and international law scholars that, in the area of foreign relations, it is imperative that the nation speak with one voice, lest actions of the individual states implicate the responsibility of the entire union.[125]

However, two recent cases have bestowed upon the states a narrow immunity from federal regulation.[126] This immunity stems not from any explicit constitutional text, but rather from an interpretation of the history and structure of the Constitution itself.[127] This interpretation has led the current Court to conclude that the federal government was designed to act upon individuals, not upon the states.[128] Therefore, the Court has decided that the federal government cannot commandeer the legislature or officials of the states and direct them to carry out federally designed programs.[129]

Still, the question remains: What about an area where recurring omissions by state officials violate international law and legally implicate the responsibility of

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120. *See* HENKIN, *supra* note 20, at 167 (explaining that federal remedies for state violations of international obligations are often not available or timely).

121. *See infra* Part III.C (discussing the development of a state immunity from federal commandeering of state officials and legislatures).

122. *See infra* Part III.B (discussing the broad foreign affairs powers of the national government).

123. *See infra* Part III.B (same).

124. *See infra* Part III.B (same).

125. *See, e.g.*, notes 180-84 and accompanying text (relating the reasons why national policy must prevail over state policies in the area of foreign relations).

126. *See infra* Part III.C (discussing the *New York v. United States* and *Printz v. United States* cases).

127. *See infra* Part III.C (same).

128. *See infra* Part III.C (same).

129. *See infra* Part III.C (same).

the United States as a whole?[130] This is what is occurring in the Vienna Convention cases. Because no federal legislation that would give effect to Article 36 within the states has been approved,[131] the government has relied upon the State Department to educate the states regarding the United States' obligations under the Convention.[132] The states are then relied upon to comply with the treaty.[133] As the Breard, Faulder, and LaGrand situations illustrate, however, the states are violating the treaty.[134] Under these circumstances, when important international obligations are at stake, the question arises whether the federal government may require state officials to carry out an international responsibility.

A. Consular Notification Issues and Federalism Concerns

1. Vienna Convention Cases and Federalism Issues

"[W]here foreign affairs begin to touch the states . . . the plenary powers of the national government take on all the colors of federalism."[135] When a state arrests a foreign national, that state becomes tangentially involved in the conduct of the nation's foreign affairs, and must take account of international obligations pertaining to the treatment of that national.[136] The federal government could attempt to preempt all of these interactions, but that method of ensuring compliance with the nation's international obligations is impractical.[137] Therefore, the interactions

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130. Even if the direct actions of the signatory, the United States, are not the cause of the violation, violations by the states can implicate the responsibility of the United States as a whole. *See* ILC Draft Articles on State Responsibility, ILC's 1996 Report, U.N. G.A.O.R., 51st Sess., Supp. No. 10, art.7(1), 125 *available at* <http://www.un.org/law/ilc/reports/1996/96repfra.htm> (copy on file with the *McGeorge Law Review*) ("The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question"); *see also* ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 200 (Kraus Reprint Co. 1970) (1938) (stating briefly that a claim by one nation against another would be justified when a nation fails to give an arrested foreign national the opportunity to communicate with his or her consul).

131. *See generally* Shank & Quigley, *supra* note 79, at 738-39 (discussing the lack of laws governing state and municipal implementation of the Vienna Convention). *But see* The Recognition of International Treaties Act of 1965, FLA. STAT. ANN. ch. 901.26 (West Supp. 1999) (requiring officials to notify embassies when foreign nationals are detained, but specifying that lack of notification is not grounds for a defense in a criminal proceeding).

132. *Cf.* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 4 (promulgating procedures for state officials to follow when a foreign national is arrested or detained).

133. *Id.*

134. *See supra* notes 7-14 and accompanying text (setting forth the details of these cases).

135. HENKIN, *supra* note 20, at 167.

136. *See id.* at 150-51 (acknowledging that even though supreme authority over foreign affairs rests with the federal government, the states inevitably touch foreign affairs in the course of their everyday events).

137. *See id.* at 150 (recognizing that the federal government could, in principle, bring all state interaction with foreign affairs under its control, but that it has no inclination to do so).

between state governments and foreign nationals will occur, and, in theory, are to be guided by any international agreements that pertain to the national.[138]

Contrast this duty of implementation with the U.S. Supreme Court's recent teachings on the design of the nation's government. The Court has embraced the notion that the dual system of sovereign governments was designed to protect individuals, not state or national governments.[139] This design was intended to protect "the diverse needs of a heterogenous society,"[140] and to check potential abuses of governmental power[141] by either the state or the federal government.

There may be situations, however, where state or federal officials desire to stray from the federal system to avoid responsibility for tough decisions.[142] For instance, "[i]f a federal official is faced with the alternative of choosing a location [for a nuclear waste disposal site] or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision."[143] Shades of this motive color Vienna Convention cases. In the *Breard* and *Faulder* cases, for example, the Secretary of State asked the governors of each state to stay the executions.[144] This was the national government's only action in favor of upholding the Convention, even though other actions may have been more effective.[145] This left the governors with a difficult decision in each case—whether to adhere to an international obligation that most of their constituents probably did not know of or understand, or whether to adhere to their states' criminal justice

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138. *Cf. id.* at 150-51 (explaining that the duties under many of the nation's international agreements are left to the states to be implemented). In some instances, the federal government has appended federal-state clauses onto treaties, indicating the intention to leave implementation of the treaty rights in the hands of each state. *See id.* at 151 (explaining that such clauses were added to human rights agreements during the 1990's). However, no such clause was appended to the Vienna Convention.

139. *See* Printz v. United States, 521 U.S. 898, 921 (1997) ("Th[e] separation of the two spheres is one of the Constitution's structural protections of liberty."); New York v. United States, 505 U.S. 144, 181 (1992) (explaining that the division of authority between the federal and state governments exists for the benefit of individuals); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (listing the benefits to individuals under the federalist structure of government).

140. *Gregory*, 501 U.S. at 458.

141. *See id.* (observing that the potential check on governmental abuses of power is one of the principal benefits of a federal system); *see also Printz*, 521 U.S. at 921-22 (reaffirming *Gregory*).

142. *See New York*, 505 U.S. at 182-83 (explaining that federal officials can avoid responsibility for choosing a location for a nuclear waste dump by directing the states to choose the location, and that state lawmakers may wish to avoid responsibility by having Congress select the location).

143. *Id.* at 182-83; *see id.* (contending that state officials cannot consent to being commandeered by Congress because doing so may relieve both federal and state lawmakers from responsibility for difficult decisions—a proposition that would hardly advance federalism).

144. *See supra* note 11 (citing the response of the Secretary of State in the Breard and Faulder situations).

145. In fact, in the *Breard* case, the Secretary of State solicited the Governor of Virginia to stay the executions, while the Department of Justice opposed Breard and Paraguay's last-minute petitions for certiorari in the Supreme Court. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 676 (1998) (relating the contradictory positions of the Department of State in the *Breard* case).

concerns by enforcing the penalties given to the defendants by the state.[146] The response of the governors was hardly surprising. In each case, the governors upheld their state laws over the Vienna Convention concerns.[147] George W. Bush, the governor of Texas, left no doubt as to where his loyalty was, stating: "In general, I will uphold the laws of the State of Texas, regardless of the nationality of the person involved."[148]

The Supreme Court also seemed to have federalism concerns when it discussed Breard's situation in its short per curiam opinion denying Breard's petition for certiorari:

> It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions . . . on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with [Breard's home nation]. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.[149]

Does this dictum suggest that this Court, ever-mindful of protecting the states' rights, was uncomfortable with forcing implementation of this treaty, a duty delegated to the executive branch, upon the states? Although the Court has in the past deferred to the will of the State Department when that deference meant only the bending of a judicially created doctrine,[150] the tenets of federalism, created by

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146. That the decision was the Governor's to make, rather than the Supreme Court's, was explicitly stated by the *Breard* Court. *See infra* note 149 and accompanying text (quoting the Court's dicta with regard to who had the power to decide whether to stay Breard's execution in light of the order of the World Court).

147. *See, e.g.*, Heather Urquides, *Hull Denies Clemency Board Plea for LaGrand*, ARIZ. DAILY STAR, Mar. 3, 1999, *available in* 1999 WL 5715004, at 1A (reporting that Arizona Governor Jane Hull decided to move forward with the execution of Walter LaGrand despite the fact that the Arizona Executive Board of Clemency had granted LaGrand a sixty-day reprieve so that Germany would have time to present its case to the International Court of Justice); *Virginia Executes Paraguayan Murderer: Sentence Carried Out Despite Requests from U.S. Secretary of State, World Court to Block It*, AUGUSTA CHRONICLE, Apr. 15, 1998, *available in* 1998 WL 17657041, at A03 (relating that Virginia Governor Jim Gilmore refused to halt Breard's execution despite the Order of the World Court and request from the United States Secretary of State that the execution be blocked); *infra* note 148 and accompanying text (stating the reaction of Texas Governor George W. Bush to Faulder's Vienna Convention claims).

148. Lyman, *supra* note 10.

149. Breard v. Greene, 523 U.S. 371, 378 (1998).

150. *See generally* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765-70 (1972) (accepting the State Department's theory that the act of state doctrine should not govern when its application would frustrate foreign affairs, because the doctrine was judicially created to advance the interests of foreign affairs).

the Constitution's very structure, may be too important to bend.[151] Thus, the deference the Court showed the governors raises doubts as to the possibility of ever attaining consistent enforcement within the states of Article 36 under the government's current program.

B. The Vast Foreign Affairs Powers of the Federal Government

To truly understand the conflict between the foreign affairs powers of the federal government and the states' rights-based commandeering immunity, a discussion of the development of both of these extraconstitutional grants of power must ensue. In the area of foreign affairs, the federal government enjoys control over the conduct of the nation's foreign relations to such a vast extent that it exceeds explicit constitutional authority.[152] The breadth of this federal control can be attributed to judicial recognition of the need of the union, in the area of foreign relations, to speak with one voice.[153] This section discusses the leading cases developing and defining the limits of the federal foreign affairs powers.

The broadest finding of extraconstitutional federal foreign affairs powers came in 1936 in *United States v. Curtiss-Wright Export Corp.*[154] In 1934, Congress authorized President Roosevelt to prohibit the sale of arms to countries engaged in armed conflict in the Chaco.[155] The President issued a proclamation prohibiting such sales.[156] When indicted for conspiracy to sell arms to foreign governments in violation of the joint resolution of Congress, Curtiss-Wright argued that the Joint Resolution was an unconstitutional delegation of law-making authority to the executive branch.[157] On appeal from a demurrer in favor of Curtiss-Wright, the Supreme Court held that, in the area of foreign affairs, the federal government's powers extended beyond those specifically enumerated in the Constitution.[158] In reaching this holding, the Court recognized that, to avoid embarrassment and achieve success in the nation's international goals, executive actions would need

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151. *See generally* Bradley & Goldsmith, *supra* note 145, at 676 (asserting that in *Breard* the federal government correctly assigned great weight to the interests of Virginia).

152. As Professor Henkin points out, the Constitution does address foreign affairs powers often; however, it does not come close to covering every possible aspect of foreign relations. *See* HENKIN, *supra* note 20, at 14-16 (discussing the "'spotty' treatment of foreign relations in the Constitution"). For instance, the Constitution delegates the power to make treaties but not to break them, and the power to make war but not to make peace. *Id.* at 14. Highly relevant to this Comment is the delegation of the power to define and punish violations of international law, but not the power to "carry out [the nation's] obligations under international law." *Id.*

153. *See infra* notes 180-84 and accompanying text (summarizing why federal priorities must preempt state priorities in the area of foreign affairs).

154. 299 U.S. 304 (1936).

155. *Id.* at 311.

156. *Id.*

157. *Id.* at 314-15.

158. *See generally id.* at 314-22 (discussing the reasons that federal foreign affairs powers exceed explicit constitutional authority).

to be free "from statutory restriction[s] which would not be admissible were domestic affairs alone involved."[159]

The Court used the *Curtiss-Wright* case to solidify the power of the federal government in the area of foreign relations.[160] Using sweeping dicta, the Court clarified its sentiment regarding the federal government's foreign affairs authority, declaring: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs."[161] The Court further ruled that the states retained no sovereignty in the area of foreign affairs, because they never had sovereignty in the first place, and stated: "[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source."[162] According to the Court, that source was the British Crown.[163] Based on this theory, the Court reasoned that in order to act as a sovereign nation, the United States government must possess all powers necessary to conduct international relations.[164]

In *Missouri v. Holland*,[165] the Supreme Court evaluated a claim that touched upon the limits of the treaty power with regard to federalism and the Tenth Amendment. In 1918, Congress enacted the Migratory Bird Treaty Act, which "prohibited the killing, capturing or selling" of certain birds unless those acts were done in a fashion permitted by the Act.[166] According to the Court, a similar piece of domestic legislation, justified under the Commerce Clause, had been declared unconstitutional in the district courts.[167] In *Holland*, the State of Missouri sued a federal game warden to prevent the warden from enforcing the Act on the ground that the Act unconstitutionally interfered with the Tenth Amendment rights of the State.[168] The issue was whether the United States could enforce legislation, enacted

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159. *Id.* at 320.

160. *See* TRIBE, *supra* note 29, at 211 (recognizing that the *Curtiss-Wright* decision "might have been bottomed upon narrower grounds," but that Justice Sutherland used the case to develop his theories about federal foreign affairs powers).

161. *See Curtiss-Wright*, 299 U.S. at 315-16 (addressing a separation of powers argument advanced by a private corporation against the government).

162. *Id.* at 316.

163. *Id.*

164. *Id.* at 318. Although the Court's reasoning and history in *Curtiss-Wright* have been subject to criticism, the holding remains strong law. *See* HENKIN, *supra* note 20, at 19-21 (suggesting that although Justice Sutherland's history may have been suspect, his decision was constitutionally sound); *id.* (discussing criticisms of Justice Sutherland's history and sovereignty theory).

165. 252 U.S. 416 (1920).

166. *See id.* at 431(explaining the provisions of the Act).

167. *Id.* at 432.

168. *Id.* at 430-31.

pursuant to a treaty, that it could not have enforced without the treaty.[169] Missouri's core argument was that the treaty power was a limited power, and stated: "[O]ne such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."[170] Addressing this argument for the Court, Justice Holmes framed the argument in terms of the Tenth Amendment, stating:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.[171]

Holmes rejected Missouri's argument, reasoning that the treaty power had been delegated to the federal government, and, therefore, "whatever is within its scope is not reserved to the states: [T]he Tenth Amendment is not material."[172]

The *Holland* opinion, however, did not envision complete federal control over foreign affairs. Rather, the Court only foreclosed states' rights arguments based on the Tenth Amendment.[173] Therefore, arguments based on other theories of state sovereign immunity may be outside of *Holland's* holding.[174] One example of this proposition, offered by Professor Henkin, is "a treaty that commands state legislatures . . . or coopts state officials."[175]

Another question the *Holland* Court left open was whether the government could legislate contrary to a specific constitutional prohibition, if the legislation was pursuant to a treaty.[176] In *Reid v Covert*,[177] the Supreme Court answered this question in the negative when it held that treaties themselves must comply with specific constitutional prohibitions.[178] The Court reasoned that to rule otherwise

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169. *Id.* at 432. The statute considered in *Holland* was promulgated to protect migratory birds. *Id.* at 431. The statute was enacted pursuant to a treaty into which the United States had entered into with Great Britain concerning the protection of birds that traversed between the United States and Canada. *Id.* Similar domestic legislation had been struck down in the district courts. *Id.* at 432.

170. *Id.*

171. *Id.* at 433-34.

172. *See* HENKIN, *supra* note 20, at 191 (summarizing Holmes' argument in *Holland*).

173. *Id.* at 193 (emphasizing that *Holland* did not say that there were no limitations on the federal treaty power, only that there were none stemming from "invisible radiations" from the Tenth Amendment).

174. *Id.* at 193-94 (proposing hypothetical situations that might raise state sovereign immunity arguments).

175. *Id.*

176. *See Holland*, 252 U.S. at 433 ("The treaty in question does not contravene any prohibitory words to be found in the Constitution.").

177. 354 U.S. 1 (1957) (plurality opinion).

178. *Id.* at 16-18 (distinguishing *Missouri v. Holland* on the grounds that the treaty considered in that case was not inconsistent with any constitutional prohibition).

would have the impermissible effect of allowing for amendment of the Constitution through use of a treaty.[179]

State policies and laws that are contrary to national foreign policy are also given no constitutional protection.[180] In several cases, the Supreme Court has discussed why federal foreign policy must outweigh state laws or policies.[181] The discussion in the two cases quoted below illustrates well the importance of deferring to national policy over inconsistent state policies:

> If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If State action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power.[182]

> Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.[183]

Thus, the cases have developed a broad national power in the area of foreign affairs. However, as Professor Henkin points out, this supreme national authority over foreign affairs does not—and could not—serve to completely preempt all state involvement in federal affairs.[184]

C. *Recent Cases Developing a Narrow State Immunity from Federal "Commandeering" of State Legislatures or Officials*

Poised against the weighty authority in favor of preferring federal foreign policy over state interests are two seemingly unrelated cases that have developed a narrow state immunity against federal intrusion. In *New York v. United States*,[185]

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179. *Id.* at 17.

180. *See generally* TRIBE, *supra* note 29, § 4-6 (explaining that because all foreign policy responsibility is in the federal government, any encroachment that distorts this responsibility is unconstitutional).

181. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942) (discussing why state action which is inconsistent with foreign policy should not be upheld); Hines v. Davidowitz, 312 U.S. 52 (1941) (rejecting a Pennsylvania statute regarding the registration of aliens on the grounds that the state statute conflicted with federal law); United States v. Belmont, 301 U.S. 324 (1937) (upholding an international compact against a contrary state policy); Hauenstein v. Lynham, 100 U.S. 483 (1879) (reversing a state court decision which upheld a state law denying Swiss claims to intestate property interests, when a treaty between the United States and Switzerland would have permitted the Swiss heirs to sell the property interests).

182. *Pink*, 315 U.S. at 232.

183. *Hines*, 312 U.S. at 63.

184. *See* HENKIN, *supra* note 20, at 150 (discussing the relationship between foreign affairs and the states).

185. 505 U.S. 144 (1992).

the Court considered certain provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[186] This Act attempted to resolve the radioactive waste disposal problem in the states, which had resulted from having too much low-level waste and not enough waste-disposal sites.[187] The Act was based largely on a compromise proposal submitted to Congress by the National Governors' Association.[188] Under the "take-title" provision of the Act, states were to provide for a method of private low-level waste disposal by 1996, or they would be forced to take title to the waste.[189] Although New York had participated in the Act's formulation,[190] by 1990 it had been unable to provide a site for the waste's disposal within the state, and had not joined an interstate compact enabling it to dispose of its waste in another state.[191] Thus, New York challenged the Act, arguing that it was inconsistent with the Tenth Amendment because, "[r]ather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, . . . Congress ha[d] impermissibly directed the States to regulate in th[e] field."[192]

The Court addressed New York's Tenth Amendment argument by looking first at the interaction between the amendment and Congress' enumerated powers.[193] The Court recognized that although Congress' enumerated powers have been broadly interpreted to greatly expand the federal government's role in the republic, they are not without limits.[194] The Court felt that the Tenth Amendment serves to limit the powers of Congress by retaining for the states any powers not specifically delegated to Congress, just as the First Amendment—or any other amendment—could serve to limit Congress' powers by its prohibitions on governmental actions.[195]

However, a decision based wholly on the Tenth Amendment would necessarily have involved rearguing the Court's Tenth Amendment differences evident in *Garcia v. San Antonio Metropolitan Transit Authority*.[196] Thus, Justice O'Connor,

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186. Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C.A. §§ 2021b-2021 (West 1994)).

187. *See New York*, 505 U.S. at 150-54 (explaining the history of the "take title" provision).

188. *Id.* at 151.

189. *Id.* at 153-54 (setting forth the text of the take title provision).

190. *Id.* at 181 (discussing the argument that New York had consented to the statute's enactment, and had reaped many benefits from the statute).

191. *Id.* at 154.

192. *Id.* at 154; *see id.* at 160 (explaining New York's argument).

193. *Id.* at 156-57; *see also infra* notes 194-202 and accompanying text (discussing the Court's Tenth Amendment analysis in *New York*).

194. *New York*, 505 U.S. at 157 (stating that the "Tenth Amendment confirms that the power of the Federal Government is subject to limits that may . . . reserve power to the States").

195. *Id.* at 156 (noting that congressional regulation of publishers, although valid under the Commerce Clause, would still be constricted by the First Amendment).

196. 469 U.S. 528 (1985). In *Garcia*, a divided Court held that state employers were subject to the wage and hour provisions of the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West 1998), thus overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had relied on the Tenth Amendment when prohibiting Congress from enforcing the Act against the states in areas of "traditional government function." *Garcia*, 469 U.S. at 556-57. The *Garcia* Court held that the traditional governmental function test had proven

writing for the *New York* Court, seemed to reach for another basis to develop state sovereignty.[197] The Court found such a basis not in any explicit constitutional text, but rather in the structure of the Constitution itself.[198] After considering the intent of the founders, the Court reasoned that congressional powers were intended to operate on individuals directly, not on individuals via the states.[199] The Court asserted that the states "are not mere political subdivisions[,] . . . regional offices[, or] administrative agencies of the Federal Government . . . the Federal Government may not compel the States to enact or administer a federal regulatory program."[200] Thus, the take-title provision, which offered states the "'choice' of either accepting ownership of [low level radioactive] waste or regulating according to the instructions of Congress,"[201] was held unconstitutional because it commandeered the state legislatures by offering them only the "choice between two unconstitutionally coercive regulatory techniques."[202]

In *Printz v. United States*,[203] the Court extended this immunity to state officials when it evaluated whether certain provisions of the Brady Handgun Violence Prevention Act[204] were constitutional.[205] One provision of the Act established an instant background check to be conducted by the federal government on all handgun purchasers.[206] Until the federal system could be implemented, interim provisions were enacted which directed state and local officials to conduct background checks on the prospective gun purchasers.[207] The Court found that the provisions enlisted

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unworkable as a way of divining state immunity. *See id.* at 538-47 (analyzing judicial attempts at reviewing which state activities were protected traditional governmental functions and thus immune from federal encroachment, and which were not). Justice Rehnquist, dissenting in *Garcia*, predicted that the federalism principles of *National League* would once "again command the support of a majority of this Court." *Id.* at 580 (Rehnquist, J., dissenting). However, in *New York*, Justice O'Connor, writing for the majority, quickly distinguished *Garcia* and a host of other Tenth Amendment cases on the grounds that the *New York* case was not one "in which Congress ha[d] subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

197. *Cf. New York*, 505 U.S. at 188 (leaving open the question of where the "outer limits" of state sovereignty protected by the Tenth Amendment reside).

198. *See id.* (basing the Court's holding on the Constitution generally, as opposed to any specific amendment).

199. *See id.* at 163-66 (quoting an array of statements by the Constitution's framers to support this proposition).

200. *Id.* at 188.

201. *Id.* at 175.

202. *Id.* at 176.

203. 521 U.S. 898 (1997).

204. Pub. L. No. 103-159, 107 Stat. 1536 (1993); *see id.* (amending the Gun Control Act of 1968, 18 U.S.C.A. §§ 921-930 (West 1974 and Supp. 1999).

205. *See infra* note 207 (explaining which provisions of the Act were examined in the *Printz* case).

206. *See* Printz, 521 U.S. at 902-04 (discussing the provisions of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)).

207. Local law enforcement officials would have been required under the interim provisions to receive information forms from gun dealers regarding persons who were seeking to purchase handguns, and check the background of those proposed purchasers by conducting research into designated record-keeping systems. 18 U.S.C.A. § 922(s)(2) (West Supp. 1999). If the proposed sale would be unlawful—i.e., the would-be purchaser could not lawfully possess a handgun—the official was not required by the statute to take any specific action. *See*

the aid of state officials, without compensation, into the enforcement of a federal program.[208] The Court then extended the immunity drawn in *New York* and found some of the interim provisions unconstitutional.[209] The Court reasoned that Congress cannot compel the states to enforce a federal regulatory program or directive,[210] either by compelling the states to make laws,[211] or by "conscripting the State's officers directly."[212]

Because the commandeering immunity is found in the structure of the Constitution, as opposed to any enumerated power, the immunity may exist in the area of foreign affairs.[213] The next section examines the State Department's Consular Access Program, which proposes "instructions" to state and local law enforcement officials on how to implement Article 36 of the Vienna Convention in their jurisdictions.[214]

D. The Current Method of Implementing Article 36: Utilizing State Officials to Carry out the Article's Provisions

1. The State Department's Consular Notification and Access Program

Consular notification procedures, as outlined in the State Department's *Consular Notification and Access* handbook,[215] place on local officials burdens

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Printz, 521 U.S. at 904-05 (opining that the reason an official was not required by the Brady Act to take any action if a transfer would be unlawful was presumably because the official would be required under state law to take action). However, the official could, if he or she so chose, notify the dealer that the transaction would be unlawful. *See id.* at 903 ("The Act does not require the CLEO to take any particular action of he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so."). If notification was made to the dealer, the official, upon request, would be required to provide the rejected purchaser with a written explanation of the reason for the sale having been deemed unlawful. 18 U.S.C.A. § 922(s)(6)(C) (West Supp. 1999). If the official determined that the sale would be lawful, he or she would be required to destroy the records in his or her possession relating to the application. 18 U.S.C.A. § 922(s)(6)(B)(i) (West Supp. 1999).

208. *See Printz*, 521 U.S. at 899 (arguing that the power of the federal government is increased immeasurably, and unconstitutionally, if the federal branch is "able to impress into its service—and at no cost to itself—the police officers of the 50 States").

209. In the end, the Court only struck down the background check and receipt-of-forms requirements. *Id.* at 935. The Court reasoned that the additional requirements would only apply if an official had voluntarily conducted a background check, and because neither of the *Printz* petitioners had done so, the provisions were inoperative as to the petitioners, and therefore were not considered. *Id.* at 933-34.

210. *Id.* at 935.

211. *See id.* (reaffirming *New York*).

212. *Id.*

213. *See* HENKIN, *supra* note 20, at 166-67 (recognizing that it is not settled whether the state immunity drawn in *New York v. United States*, 505 U.S. 144 (1992), would apply in the area of foreign affairs regulations).

214. *See infra* Part III.D.2 (analyzing the State Department program under the doctrine set forth in *Printz* and *New York*).

215. *Supra* note 27.

nearly as onerous as the Brady Act's requirements.[216] Local officials must take several actions to ensure that consular notification obligations are fulfilled when a foreign national is detained.[217] First, "[i]n all cases, the foreign national must be told of the right to consular notification and access."[218] To comply with the notification requirement, the official may need to advise the national of the availability of consular assistance in the national's native language.[219] Keeping written records of the notification so as to counter any claims that the national was not notified is strongly recommended by the Department.[220] Second, the official must determine whether notification of the national's consulate is mandatory, or at the national's option.[221] This involves determining whether or not the national's home country has entered into a bilateral agreement with the United States, apart from the Vienna Convention, that makes notification of the national's consulate mandatory.[222] Finally, if notification of the national's consulate is necessary, then, either by request of the national or because of a mandatory notification requirement, the nearest consulate must be located and notified.[223] Keeping records of the notification is also suggested by the instructions.[224] The obligations of Article 36

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216. *Compare* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 13-15 (giving "Detailed Instructions on the Treatment of Foreign Nationals"), *with* Printz, 521 U.S. 898, 902-06 (1997) (detailing the Brady Act's requirements).

217. *See generally* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 13-15 (discussing the consular notification procedure).

218. *Id.* at 13.

219. *See id.* at 20 (referring officials to Part Four of the instructions where translations of the notification of consular access statement are given in several foreign languages).

220. *See id.* at 14 (stating that "[l]aw enforcement agencies should keep written records sufficient to show compliance with the above notification requirements").

221. Article 36 requires consular notification at the foreign national's option. *See supra* Part II.B (discussing the history of Article 36, which calls for notification at the national's option rather than mandatory notification in all cases). However, the United States has entered into several bilateral treaties with other countries that call for mandatory notification of the consulate regardless of the national's wishes. *See* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 13-14 (explaining that the United States has entered into some bilateral agreements with other countries where notification of the consulate is mandatory instead of at the national's option).

222. *See* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 14 (discussing mandatory notification requirements). The State Department included a list of mandatory-notification countries in the State Department publication. *Id.* at 5; *see also id.* at 47-49 (reproducing the text of all of the mandatory notification provisions). Presumably, when the list of mandatory-notification countries changes, the Department would send an updated list to state officials so as to prevent the officials from making mistakes regarding whether a country is a mandatory- or optional-notification country. Examples of mandatory-notification countries are: China, Costa Rica, Nigeria, Russia (and other successor states of the former Soviet Union), and the United Kingdom. *Id.*

223. *See id.* at 60-72 (listing the telephone and facsimile numbers of all consulates in the United States).

224. *See id.* at 14 (discussing the records local officials should keep in order to rebut claims of breaches of consular access obligations).

are fulfilled once the consulate is notified.[225] The consulate will then determine whether, and to what extent, it will assist the national.[226]

The legal authority for imposing consular notification duties upon the states is set forth by the Department in the "Basis for Implementation" section of the instructions.[227] That section states that "[t]he obligations of consular notification are binding on states and local governments, primarily by virtue of the Supremacy Clause."[228] The section also states that where no treaty directly addressing consular notification exists between the United States and the national's country, then the obligation to notify will still arise because of customary international law, which is also binding on the states.[229] The section also contains suggestions for implementation of the obligations, such as using the Department's booklet directly, issuing directives to subordinates, incorporating the instructions into police manuals, and distributing the booklet's "detailed instructions" section directly to law enforcement officers.[230]

2. *Consideration of the State Department's Program Under* Printz v. United States

The State Department's program may be similar enough to the Brady Act requirements to warrant review of the program to determine whether it unconstitutionally commandeers state officials.[231] Like the Brady Act's interim provisions, the State Department's instructions require state actors to perform administrative functions to ensure a federal policy is upheld.[232] Thus, the State

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225. *Cf.* Vienna Convention, *supra* note 26, art. 36 (setting forth no additional requirements other than notification "without delay").

226. *See* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 22 (describing what actions a consular officer may take when he or she is contacted regarding a detained national).

227. *See id.* at 44 (citing the Supremacy Clause, case law, and customary international law as authority for the proposition that the obligations are binding upon state and local officials). The Supremacy Clause of the United States Constitution mandates that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

228. *See id.* (quoting the Supremacy Clause and citing *United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982), for the proposition that the obligation of consular notification is binding upon the states).

229. *See id.* (directing states to notify the consuls in the absence of a treaty on point, because consular notification is customary in international law); *see also* HENKIN, *supra* note 20, at 233 (relating that "[i]nternational law is law for the United States[,]. . . . binding . . . on state legislatures and state officials, down to the lowest official of city, town or village . . . .").

230. *Id.*

231. *See supra* notes 203-12 and accompanying text (discussing the facts and reasoning of *Printz v. United States*, 521 U.S. 898 (1997), where the Supreme Court found that certain provisions of the Brady Handgun Violence Prevention Act unconstitutionally commandeered state law enforcement officers).

232. *See supra* Part III.D.1 (discussing the State Department's Consular Notification and Access Program).

Department's instructions enlist the aid of state and local officials to carry out federal law.[233] Both programs require the use of, or reference to, federally prepared or approved sources of information in order for the officials to come to a conclusion on what action they must take.[234] In this way, the federal government not only directs the officials to act, but also commands which steps each actor must take to comply with the law. By asserting that state officials are bound under the Constitution and international law to comply with consular notification obligations, without offering federal assistance in carrying out these obligations, the Department compels state and local officials to carry out federal law.[235]

There are, of course, several ways in which the State Department's program can be distinguished from that involved in the *Printz* case. First, the burden on the states might fall somewhere between the onerous Brady Act requirements and the "ministerial reporting requirements" that the concurring Justice O'Connor felt were not declared invalid under *Printz*.[236] Second, the State Department's program may not be an official "directive," but may instead be merely a command that states "consider" federal standards, like the federal regulations that were approved in *FERC v. Mississippi*,[237] and affirmed in *Printz*.[238] Third, the promulgation of the

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233. Although the State Department's program is couched in permissive terms, without a federal program in place to monitor alien arrests and detentions and notify consulates, the duty to carry out obligations under the treaty necessarily must fall upon the states.

234. In *Printz*, the chief law enforcement officers (CLEO) of individual states were required to do "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." Printz v. United States, 521 U.S. 898, 903 (1997); *see also id.* (discussing the actions CLEO's must take to comply with the Brady Act). Under the State Department Consular Notification Access program, officials seeking to comply with the treaty will, in most cases, need to refer to some source of information concerning the United States' treaty obligations if the official wishes to ensure that he or she is in full compliance with the obligation. Currently the information needed by a state official is contained in the State Department Publication. *See generally* CONSULAR ACCESS PUBLICATION, *supra* note 27, *passim* (setting forth the requirements to be followed if the United States' consular notification obligations are to be met).

235. *Cf. supra* note 227-30 and accompanying text (detailing the legal basis that the State Department has offered for its instructions).

236. *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (pointing out that the Court "refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid"); *id.* (O'Connor, J. concurring) (citing a federal law requiring state and local authorities to report missing children to the Department of Justice as an example of a program not declared invalid).

237. 456 U.S. 742 (1982); *see id.* at 765 (approving a federal program which "simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals").

238. Whether the State Department's "instructions" amount to a directive, or a request that states consider federal law, is an arguable point. The "instructions" suggest that the Convention "should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials' competence." State Department CONSULAR ACCESS PUBLICATION, *supra* note 27, at 1. The publication then cites the Supremacy Clause and case law as authority for why the aforementioned officials should comply with the Convention. *Id.* at 13; *see also id.* at 19 (answering the hypothetical question "[w]hy are state and local government officials expected to provide such notification?" with the answer that the officials must comply because the "obligations are embodied in treaties that are the law of the land under the Supremacy Clause of the United States Constitution").

State Department's program may be considered an exercise of the Executive's authority to "take Care that the Laws be faithfully executed"[239] rather than an exercise of Congress' Commerce Clause or Necessary and Proper Clause powers.[240] However, these distinctions are shallow ones that only serve to shift the focus from the real issue: whether the delegation of broad authority to the federal government in the area of foreign affairs also implies the right of the government to compel state actors to carry out international duties.

E. Does the Commandeering Immunity Extend to Foreign Affairs?

Consider *Missouri v. Holland*[241] for a moment. There, the government had enacted laws protecting migratory birds pursuant to a treaty enacted between the United States and Great Britain.[242] This treaty was only enacted after similar domestic legislation had been declared unconstitutional when defended only on Commerce Clause grounds.[243] This consideration begs a question—would the Brady Act's interim provisions be valid if they had been enacted pursuant to a treaty, instead of pursuant to Congress' Commerce Clause Power? Or, would the *Holland* Court have reached the same conclusion if the Migratory Bird Treaty Act had relied on state game wardens to enforce its provisions instead of federal wardens? These are the questions posed by the Vienna Convention requirements. The question is whether the federal government may rely on state officials to administer Article 36 of the Convention.

If the Court considers this question, it will be making one ultimate decision—it will decide whether the attribute of state sovereignty found in *New York v. United States*[244] and *Printz v. United States*[245] extends to the area of foreign affairs. Under *New York*, the immunity exists due to the method by which the government itself must function—the federal government must act upon individuals, not states.[246] Therefore, this attribute of sovereignty would seem to have only structural

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239. U.S. CONST. art. II, § 3.

240. This distinction is especially shaky given that the gist of *New York* and *Printz* was that the federal government could not conscript state legislatures or actors without emphasizing whether the legislative or executive branch of the government was doing the conscripting. Additionally, dicta in *Printz* may actually strengthen a case for unconstitutionality by pointing out that delegating responsibility for the implementation of a federal program to the states directly removes executive control over the federal program. *See* Printz, 521 U.S. at 922 (questioning implicitly whether "meaningful Presidential control is possible without the power to appoint and remove").

241. 252 U.S. 416 (1920).

242. *Id.* at 431.

243. *Id.* at 432.

244. 505 U.S. 144 (1992); *see supra* notes 197-202 and accompanying text (setting forth the Supreme Court's reasoning regarding state sovereignty in the *New York* case).

245. 521 U.S. 898 (1997); *see supra* notes 203-12 and accompanying text (presenting the main reason for the Court's holding in the *Printz* case).

246. *See supra* notes 193-203 and accompanying text (discussing the reasoning of *New York*).

boundaries as opposed to boundaries based on which enumerated power of the federal government the Court was considering.[247] However, to find that the immunity does extend to foreign affairs would require rejection of the reasoning of the Court in its *United States v. Curtiss-Wright Export Corp.*[248] decision.[249] In *Curtiss-Wright*, the Supreme Court reasoned that the states had never possessed any attributes of sovereignty with respect to foreign affairs.[250] To find now that the states do retain an attribute of sovereignty—freedom from federal commandeering of the state's officials—and that this attribute extends to the area of foreign affairs, would necessarily infringe upon the reasoning of *Curtiss-Wright*.

However, this author believes concluding that federal reliance on the states to implement the nation's consular notification duties is an unconstitutional commandeering of states officials would be incorrect. First, the State Department's program is not designed simply to meet the "crisis of the day."[251] Instead, the ability of nations to assist their nationals when detained or arrested in foreign countries is time-honored, customary international law, which must be followed by all nations.[252] In the United States, not every arrest or detention occurs at the hands of the federal government.[253] Therefore, as long as the states have the power to arrest or detain foreign nationals, the states must comply with international rules regarding the proper procedure to follow when arresting those nationals.[254] Thus, even if the states are not "mere political subdivisions of the United States,"[255] and are instead to be considered a sovereign branch of a dualist government,[256] they must comply with the same rules to which all other sovereigns are bound.[257]

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247. These structural boundaries would necessarily be broader than powers based on an enumerated power because they encompass the operation of the national government itself, instead of the powers of the government. *Cf. supra* Part III.C (discussing the reasoning of *New York* and *Printz*).

248. 299 U.S. 304 (1936).

249. *See supra* notes 158-64 and accompanying text (evaluating the reasoning of *Curtiss-Wright*).

250. *See supra* notes 158-64 and accompanying text (same).

251. *New York*, 505 U.S. at 187; *see id.* (discussing the necessity of the division of power between state and federal governments to ensure that power is not excessively concentrated in either sovereign simply to solve the current political crisis); *see also Printz*, 521 U.S. at 932-33 (reaffirming the above-mentioned proposition from *New York*).

252. *See supra* Part II.A-B (discussing the history and legal basis for consular assistance).

253. Many arrests, obviously, are made by state and local officials.

254. *See supra* Part III.B (outlining the legal basis for broad federal foreign affairs powers). *But see* Bradley & Goldsmith, *supra* note 145, at 679 (arguing that despite the "conventional wisdom" that the national foreign affairs power overrides competing state concerns, "foreign relations concerns are but one component of the national interest to be weighed against, and sometimes overriden by, other concerns").

255. *New York*, 505 U.S. at 188.

256. *See supra* Part III.C (discussing the federalist structure of the government as explained by the Supreme Court in recent cases).

257. *See supra* Part II.A-B (discussing the United States' consular notification obligations arising from its many consular agreements); *see also* CONSULAR ACCESS PUBLICATION, *supra* note 27, at 44 (noting that consular notification obligations may also be customary international law which would theoretically bind all sovereign nations regardless of whether or not they are party to an international agreement embodying the obligation).

It is also premature to conclude that *Printz* and *New York* set down a bright-line rule that could be transplanted into the area of foreign relations. The nature of the current Supreme Court's analysis is not one of line-drawing.[258] Instead, the Court attempts to give the Constitution the proper application in each case by utilizing only subtle extensions or retractions of the law where necessary.[259] The current Court also has a great respect for precedent.[260] As discussed above, vast precedent exists which supports the proposition that national foreign policy must prevail over inconsistent state law or policy.[261] Extending this immunity into matters involving foreign affairs would require undermining that precedent.

Only the Court can decide whether to extend the newly devised "commandeering" immunity to the area of foreign affairs. Both the broad foreign affairs power and state immunity from federal commandeering have formidable historical support,[262] and both are implied in the structure and text of the Constitution itself.[263] Both also have precedential support.[264] Perhaps this dilemma is one of the reasons the Court has not felt inclined to open the debate on the issue of state violations of the Vienna Convention thus far.

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258. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9-11 (1999) (arguing that the analytical heart of the current Court—comprised of Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter—tries to avoid broad rulings, and instead prefers to decide cases narrowly based on the specific facts at hand); 1 CHARLES D. KELSO, MATERIALS ON CONSTITUTIONAL LAW 12-17 (1998) (not formally published) (on file with the *McGeorge Law Review*) (discussing the decision-making style of Supreme Court jurists).

259. *See generally* KELSO, *supra* note 258, at x-xiii (explaining the constitutional decision-making policy that seems to guide each member of the current Court to account for why the Court decides cases narrowly).

260. *See id.* at xi-xii, 13-14 (proposing that five modern Jurists—Breyer, Ginsburg, Kennedy, O'Connor, and Souter—are natural law justices, whose decision making style is characterized by, among other things, respect for precedent).

261. *See supra* Part III.B (explaining the development of the federal government's broad foreign affairs powers). For a historical and legal perspective of the broad federal foreign affairs powers, see Hauenstein v. Lynham, 100 U.S. 483, 488-89 (1879) (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), for the proposition that "[a] treaty cannot be *the supreme law of the land* . . . if any act of a State legislature can stand in its way"); *id.* at 489 (commenting that although the Court may not concur entirely with the *Ware* opinion, the Court does believe that opinion shows "the views of a powerful legal mind . . . when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country").

262. *Compare, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 62-69 (1941) (presenting historical evidence supporting the "supremacy of the national power in the general field of foreign affairs"), *with* New York v. United States, 505 U.S. 144, 155-59 (1992) (offering historical evidence in support of the theory that federal laws were to affect individuals, not states).

263. *Compare supra* Part III.B and accompanying text (discussing the origin of the federal foreign affairs powers), *with New York*, 505 U.S. at 155-59 (analyzing the constitutional structure of the United States government).

264. *E.g.*, Printz v. United States, 521 U.S. 898 (1997); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

IV. A PROPOSED METHOD FOR ENFORCING ARTICLE 36 WITHIN THE STATES

Because of the importance of consular notification in international affairs, Congress should not wait for this area of law to develop on a case-by-case basis. The seriousness with which nations take their consular notification rights is illustrated by the fact that two nations, Paraguay and Germany, have brought actions against the United States in the International Court of Justice for violations of Article 36.[265] Although Paraguay subsequently dropped its action, the same is not likely to happen with Germany, because at least three German nationals are currently on death row awaiting execution.[266] Furthermore, a policy of merely advising the states of the government's obligations under the Convention, with no other method for assuring other nations that the United States is attempting to comply with the treaty, may not gain international acceptance.[267] With only this procedure in place, the United States' frequent apologies for violations of the Convention must seem to other countries to be shallow.[268] Stricter legal measures may help remedy this international concern.

Two limits must be considered when fashioning any plan for the Convention's enforcement. The first is a politically practical consideration. Legislation granting too-severe rights to criminal defendants would simply not pass in Congress. Therefore, a per se exclusionary rule for evidence gained in violation of the Convention is unrealistic.[269] The second consideration is the constitutional one, and is the focus of this Comment. Legislation that would utilize law enforcement officials directly, or require legislatures or state executives to implement procedures to comply with the treaty, would meet head-on with the immunity developed in *Printz v. United States*[270] and *New York v. United States*.[271] Although this legislation may be the ideal way to resolve the question discussed in this Comment, it also seems unlikely that Congress, or the courts, would add a Miranda-like requirement

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265. *See supra* note 12 (citing the cases brought by Germany and Paraguay in the International Court of Justice).

266. *See* Shaffer, *supra* note 13, at A1 (noting that two other German brothers, Rudi and Michael Apelt, are also on death row in Arizona, and another German is on death row in Florida); *see also* Warren, *supra* note 16, at 3 (listing the Apelt brothers' execution date as "June 1999").

267. This may be especially true if the number of violations continues to grow.

268. *Cf.* Mary Beth Warner & Jerry Kramer, *Germans Knock U.S. Justice: Media, Citizens Decry Death as Form of Punishment, Criticize Hull*, ARIZ. REPUBLIC, Mar. 4, 1999, at A2, *available in* 1999 WL 4155717 (reporting that German "government officials were lamenting the fact that the United States was about to conduct another execution even as Secretary of State Madelaine Albright was in China, complaining of human rights violations there"); *id.* (describing the concern of German citizens that Governor Hull was "acting for purely political motives, to show how tough she is").

269. For example, one district court refused to utilize the exclusionary rule, stating that treaty rights are important, but "should not be cloaked with the 'nontextual and unprecedented remedy.'" United States v. $69,530 in United States Currency, 22 F. Supp.2d 593, 595 (W.D. Tex. 1998); *see id.* (refusing to utilize the exclusionary rule in a civil forfeiture case arising out of a possible Vienna Convention violation).

270. 521 U.S. 898 (1997).

271. 505 U.S. 144 (1992); *see supra* Part III.C (discussing the commandeering immunity).

to the current Miranda requirements that are already so widely criticized.[272] A Miranda-like requirement would have an additional practical difficulty: It would necessitate the advising and training of the nation's vast corps of law enforcement officials regarding the rights and remedies of the Vienna Convention.

However, a viable compromise exists that will take consideration of both the rights of other nations and the political and legal considerations of the United States.[273] This compromise would utilize state and federal courts to ensure Article 36 compliance within the states. Legislation can be enacted which would require both federal and state courts to ascertain at every defendant's initial hearing whether the defendant is a foreign national, and, if so, whether the national was informed of Article 36 rights.[274] The format of the notification could parallel the advisement of rights typically given to criminal defendants.[275] All defendants would be asked at their initial appearance whether they are a national of a foreign country. The court would then take measures to ensure that foreign defendants are properly advised of their consular notification rights.[276]

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272. *See generally* RICHARD A. LEO & GEORGE C. THOMAS III, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (1998) (compiling an array of articles and essays on the Miranda warnings).

273. Both *New York* and *Printz* recognized other methods by which the federal government may constitutionally compel state action. Congress can condition the state's receipt of federal funds upon compliance with certain requirements, so long as the requirements bear a relationship with the funds. *New York*, 505 at 167. Congress may also "offer States the choice between regulating . . . according to federal standards or having state law pre-empted by federal regulation." *Id.*; *see* Printz v. United States, 521 U.S. 898, 926 (1997) (affirming this proposition). Finally, under the Supremacy Clause of the Constitution, "federal law is enforceable in state courts and [the] federal courts may in proper circumstances order state officials to comply with federal law . . . ." *New York*, 505 U.S. 179; *Printz*, 521 U.S. at 898-99 (recognizing that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions"). *But see id.* at 907 (clarifying that "early statutes imposing obligations on state courts [do not] imply a power of Congress to impress the state executive into its service").

274. *See* Missouri v. Holland, 252 U.S. 416, 433-35 (1920) (holding that Congress has the power, under the necessary and proper clause, to enact legislation pursuant to a treaty); *see also* TRIBE, *supra* note 29, § 4-5, 227 (discussing the ability of Congress to enact legislation pursuant to a treaty). *Cf.* Warren, *supra* note 16, at "Full Compliance in New Jersey?" (reporting that New Jersey is implementing a plan to inform foreign nationals of their rights at the first initial hearing).

275. *See, e.g.*, FED. R. CRIM. P. 5(c), 58 (mandating that defendants be advised of certain rights, such as the right to counsel and the right not to incriminate oneself, at the defendant's initial appearance before a magistrate); FED. R. CRIM. P. 5(a) (requiring that persons arrested be brought "without unnecessary delay" before a magistrate for an initial appearance).

276. A sample procedure could be: First, the court would ask the defendant whether he or she is a foreign national. The national would then be asked what country he or she is from and whether he or she has been informed of his or her right to contact his or her nation's consul. If he or she has not, the court shall ascertain whether the nation is a mandatory or permissive notification nation. The court shall then order the prosecutor to inform the defendant or the defendant's counsel of the defendant's consular notification rights and shall direct the prosecutor to notify the defendant's consulate if the defendant so chooses or if such notification is mandatory. To make compliance with these duties less cumbersome upon the courts, the federal government could undertake the duty to maintain a database of phone numbers and locations of embassies and consular officers, and provide the same to courts in writing yearly, or as otherwise required.

Using the courts to enforce Article 36 in the states has several benefits. Perhaps the strongest benefit is that such use is presumably constitutional.[277] First, constitutional authority for the imposition of federal law upon state judges is found in the Supremacy Clause, which mandates that "the Judges in every State shall be bound [by the laws of the United States]."[278] Additionally, in *Printz v. United States*,[279] the Court recognized the principle that the "Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[280] The Court explained that federal imposition on state courts was understandable because courts apply "the law of other sovereigns all the time."[281] Under this reasoning, advising criminal defendants of their legal rights is a power that is profoundly appropriate for the judicial branch.

There are also several practical reasons why using the courts to enforce Article 36 would be superior to relying on law enforcement officials. First, advising the judiciary, as opposed to all states' law enforcement bureaucracies, of the requirements of the Vienna Convention would be more technically manageable.[282] Second, explicitly delegating the duty to one branch of the justice system, to be enforced at a specific time in the justice process, is likely to promote consistency in the notification process. Third, implementing concrete laws addressing the nation's notification duties may make the United States' apologies for violations of the Convention more acceptable to other countries, if the nation can show that it is making a good-faith effort to comply with the Convention. Finally, the possibility of courts excluding evidence because of Vienna Convention violations will undoubtedly encourage some law enforcement agencies, or perhaps state legislatures, to implement procedures for ensuring compliance with Article 36.[283]

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277. *See infra* notes 278-81 and accompanying text (explaining that the Supreme Court has held that federal laws are enforceable in state courts).

278. U.S. CONST. art. VI, cl. 2; *see also Printz*, 521 U.S. at 907 (explaining that "[t]he principle underlying [the] so-called 'transitory' causes of action [which state judges must enforce under the Supremacy Clause] was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce").

279. 521 U.S. 898 (1997).

280. *Id.* at 907; *see id.* at 928-29 (reaffirming the holding in *Testa v. Katt*, 330 U.S. 386 (1947), that federal laws are enforceable in state courts).

281. *Id.* at 907.

282. Obviously, there are far fewer judges than law enforcement officials, and the judges presumably will understand and adhere to their constitutional duties.

283. This possibility assumes that law enforcement agencies would be more likely to implement notification procedures if a clear legal duty to enforce the Convention exists, with remedies for departure from that duty.

Under this plan, two types of Article 36 claims might arise.[284] The first involves claims that an individual national's right of notification was violated because he or she was not notified of the right "without delay," as is required by the Convention.[285] In these cases, nationals would be arguing that notification must be given immediately, by law enforcement officials, instead of a few days later at the initial hearing. While these claims should be allowed, the burden should fall upon the national to raise and prove them.[286] If in fact a human rights or legal rights violation did occur during this period, then the national's claim should prevail, and his or her Convention rights would be given full effect.[287]

The second type of claim could arise when notification is not given at the initial hearing, after the implementation of the initial hearing rule.[288] In these cases, if the national claims that prejudice resulted because of a lack of notification, the burden should fall on the government to prove that the failure to notify did not prejudice the defendant. The reason for shifting the burden in these cases is clear. Devising a plan whereby the court notifies the national is simply a safeguard to ensure compliance with the treaty, although jurists could order any state officials in their jurisdiction to give notification earlier. However, if the law enforcement official, prosecutor, and court each fail to notify the national of his or her rights, the

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284. A third type of claim would be based upon notification breaches that occurred before this law would be implemented, such as the claims raised by Faulder, Breard, and LaGrand. *See supra* notes 7-15 and accompanying text (summarizing the Faulder, Breard, and LaGrand situations). Discussing the problems that result from granting remedies for violations that occurred long ago is outside the scope of this Comment, but may truly be a diplomatic, rather than a legal, problem, as the Supreme Court suggested in *Breard*. *See* Breard v. Greene, 523 U.S. 371, 378 (1998) (noting in dicta that no case allows the Supreme Court to force the Governor of Virginia to wait for the decision of the International Court of Justice in Breard's case, because the Court thought that whether to wait for the decision or not was essentially a diplomatic decision). However, when involved in diplomatic discussions regarding prior violations of the Convention, the ability of American diplomats to point to solid efforts to prevent new violations of the Convention from occurring may ease international concerns that the United States is not doing enough to ensure compliance with its international obligations. *See infra* notes 289-91 and accompanying text (discussing the international outcry over the United States' handling of consular notification cases).

285. Vienna Convention, *supra* note 26, art. 36. The precise meaning of the words "without delay" is unclear. The United States, while protesting Convention violations that have resulted in notification not having been given to Americans detained for 28 or 32 hours in other countries, does advise its consular officers that they are not to act as attorneys or assume legal responsibility for the nationals. LEE, *supra* note 25, at 148-49. They are, however, to ensure that no violations of human and legal rights occur. *Id.* at 148 (quoting the testimony of a Department of State administrator advising a House Committee about the duties of consular officers).

286. Placing the burden on the defendant to allege and prove these claims would be consistent with the prevailing prejudice analysis used by the courts, which places the burden on the defendant. *See supra* notes 108-15 and accompanying text (discussing the use of a prejudice analysis by the courts in consular notification cases).

287. *Cf.* Colorado v. Mata-Medina, No. 97 CR 307, at 4 (Co. Dist. Ct. May 7, 1998) (visited Jan. 7, 1999) <http://www.state.co.us/gov_dir/pdef_dir/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html> (suggesting that a court must examine the totality of the circumstances when deciding whether or not to suppress evidence gained via a Vienna Convention violation). Although *Mata-Medina* obviously did not arise under the program suggested in this section, presumably human rights violations, or violations of other legal rights, would factor heavily in the defendant's favor during any totality-of-the-circumstances analysis.

288. *See supra* notes 274-76 and accompanying text (suggesting that foreign nationals be advised of their Article 36 rights at their initial appearances).

effect of the legislation is nullified. To prevent this, a higher burden should be placed on the government when the national is not notified at his or her initial appearance.

V. CONCLUSION

There is growing sentiment in the international arena that, as the world's only superpower, the United States is acting as if it were above international law.[289] It must confound the nation's allies when, at the same time the nation calls upon them to support its efforts to maintain international peace and security, the nation holds that it cannot do more to ensure that foreign nationals receive the full protections of international law in the nation's courts.[290] To truly lead the world toward greater protection of economic and personal liberties, the United States must lead by example, not by sheer economic and military might.[291]

The United States can set an international example by making a diligent effort to ensure nationwide compliance with Article 36. This Comment proposes a workable and simple method of notifying detained foreign nationals of the availability of consular assistance. Consular notification at a criminal defendant's initial appearance would meet the demands of the Convention while also alleviating the legal and practical difficulties of relying on state law enforcement officials to enforce Article 36. Forward-looking thought in this area could put an end to the nation's current reliance on backward apologies for its violations of international law.

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289. *Cf. Many Countries Alienated by Workings of U.S. Courts*, ARIZ. DAILY STAR, Mar. 7, 1999, at 4B (detailing several countries' belief that the United States sees itself as being above international law).

290. *Cf. German Press Slams US Execution of Convicted Killer*, AGENCE FRANCE-PRESSE, Mar. 5, 1999, *available in* 1999 WL 2558332 (providing several excerpts from German newspapers chastising the United States' inconsistent practice with regard to international law). For instance, one newspaper argued that the United States:

> '[A]ccepts international law when it serves its own interests. The same goes for its relation with international organizations. They are used when the cost-benefit relationship seems to be right. They are shunned when (the US) needs a free hand....'

Id. (quoting a daily German newspaper, the *Frankfurter Allgemeine Zeitung*).

291. *See* Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 462 (1998) (concluding that "[a] reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post-Cold War world").