

NOTES

PROTECTING U.S. CITIZENS ABROAD AND BRINGING THE UNITED STATES INTO COMPLIANCE WITH THE VIENNA CONVENTION POST-MEDELLIN

Margaret Anne Christie *

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* J.D. Candidate, University of Georgia School of Law, 2018; B.A. Clemson University, 2015.

I. INTRODUCTION

The United States leads the world in making treaties and in publicly holding other countries accountable when they fail to fully comply with treaty obligations.¹ Nonetheless, the United States sometimes fails to satisfy its obligations under binding international agreements. Due to the actions of numerous states, the United States is in violation of its treaty obligations under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention).² Article 36 of the Vienna Convention governs the “communications and contact with nationals of the sending State” requiring the country who has incarcerated a non-citizen to notify the non-citizen’s consulate “without delay.”³ Many states in the United States fail to notify a non-citizen’s consulate after incarceration, and post *Medellin*,⁴ the United States has been unable to rectify this failure in instances where foreign nationals may have procedurally defaulted on their claims. Multiple nations are disgusted with the manner in which the United States has handled the situation. For example, Mexico has written to several U.S. representatives in Congress and reprimanded the United States’ behavior at international forums.⁵

The primary concern with the United States’ failure to comply with the Vienna Convention is the treatment that incarcerated U.S. citizens are receiving abroad. After the Supreme Court’s ruling in *Medellin I*, there have been numerous instances and high profile stories of Americans imprisoned or arrested in foreign nations.⁶ If the United States is not honoring foreign

¹ See U.S. DEP’T OF STATE, TREATIES IN FORCE 2014/2015 – SUPPLEMENT, http://0-heinonline.org.gavel.law.uga.edu/HOL/Page?handle=hein.ustreaties/tif2015&div=2&start_page=1&collection=weaties&set_as_cursor=1&men_tab=srchresults (identifying hundreds of treaties in force between the United States and other countries on a variety of subjects).

² See generally *Cardenas v. Stephens*, 820 F.3d 197 (5th Cir. 2016); *Ramos v. Davis*, No. 08-70044, 2016 U.S. App. LEXIS 12091 (5th Cir. June 30, 2016) (discussing foreign detainees’ criminal appeals based on the alleged U.S. violation of consular notification under the Vienna Convention).

³ Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. In this Note, the state in which a person is arrested is called the receiving state, since it receives a consul of another state, while the national’s home state is called the sending state, since it sends its consul.

⁴ *Medellin v. Texas (Medellin I)*, 552 U.S. 491 (2008).

⁵ See, e.g., Letter from Eduardo Medina Mora, Ambassador to Mexico, to Bob Goodlatte, Chairman of House Judiciary Committee (July 10, 2014), <https://www.documentcloud.org/documents/3037224-Letter-from-Ambassador-of-Mexico-to-Bob-Goodlatte.html>.

⁶ See, e.g., Rachel Donadio, *American Testifies in Her Murder Trial in Italy*, N.Y. TIMES, (June 12, 2009), <http://www.nytimes.com/2009/06/13/world/europe/13italy.html> (reporting on the murder trial of American student Amanda Knox, who was studying abroad in Italy, and her testimony at the trial); Nazila Fathi & Mark Landler, *In Turnabout, Iran Releases U.S.*

visitors' rights to contact their consulates after they have been arrested or detained, why should other countries offer U.S. citizens the same rights? The truth is that often those countries do not offer U.S. citizens such rights.⁷

As U.S. citizens increase their travel abroad, providing assistance and protection to Americans should be a top priority for the U.S. government.⁸ But nothing has yet been done to ensure every state in the United States is required to honor the nation's obligations under the Vienna Convention. It is the position of this Note that the only way the United States can begin to patch its relations with other nations and protect U.S. citizens travelling abroad is through sufficient legislation passed by Congress ensuring that all fifty states comply with Article 36 of the Vienna Convention. First, this Note will discuss the historical development of consular relations and effects of the Vienna Convention on Consular Relations in the United States. Next, it will address why past proposed legislation and other proposed solutions to fix America's non-compliance with the Vienna Convention have failed. Finally, this Note will analyze the past proposed legislation and suggest legislation for the U.S. Congress to implement, or state legislation in the alternative, in order to remedy this very serious problem.

II. THE HISTORICAL DEVELOPMENT OF CONSULAR RELATIONS

A. *Brief History and Overview of Consular Relations Law*

Consular relations have existed between sovereign states for centuries, even dating back to ancient Greece.⁹ The scope of the duties of the Greek counterparts to consuls were quite different, but they were nevertheless "responsible for representing the interests of their nationals."¹⁰ Yet, the word

Journalist, N.Y. TIMES (May 11, 2009), <http://www.nytimes.com/2009/05/12/world/middleeast/12iran.html> (reporting on Iranian-American journalist Roxana Saberi's imprisonment in Iran); see also, e.g., Jennifer Steinhauer & Rebecca Cathcart, *An Intimate Homecoming is Played out in Public*, N.Y. TIMES (Aug. 5, 2009), <http://www.nytimes.com/2009/08/06/us/06families.html> (reporting on the release of American journalists Euna Lee and Laura Ling from North Korea).

⁷ See Louis Klarevas, *Locked Up Abroad*, FOREIGN POLICY (Oct. 4, 2011), <http://foreignpolicy.com/2011/10/04/locked-up-abroad-2/> (giving multiple examples of Americans detained abroad and their ignored requests for consulate access).

⁸ See Nat'l Travel & Tourism Office, *U.S. Citizen International Outbound Travel up Eight Percent in 2015* (Mar. 21, 2016), <http://travel.trade.gov/tinews/archive/tinews2016/20160321.asp> (analyzing the increasing percentage of U.S. travel overseas).

⁹ William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 259 (1998).

¹⁰ Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179, 184 (2009).

consul did not come into existence “until the time of the Romans.”¹¹ The term originally signified “chief magistrates appointed in southern European cities,” but by the eleventh century, the definition had extended to magistrates sent to foreign cities as well.¹² The growth of trade between nations promoted the development of the consular system.¹³ Nations began sending their own consulates to other nations in order “to supervise their commerce, protect national interests, and adjudicate disputes between merchants.”¹⁴ This increase in consular relations promoted trade, but when centralized state authority began asserting direct control over the relations, “confusion over the exact status” of the consulate officials ensued.¹⁵ The lack of clear guidance prompted many nations to create treaties on the matter.¹⁶ Therefore, by the middle of the twentieth century, the rules governing consular relations derived from bilateral treaties and the customary international law that developed from such agreements.¹⁷

The United States has recognized the importance of providing protection to nationals abroad through consulates for the past two-hundred years.¹⁸ But it was not until the mid-1950s that the entire international community identified “the need to codify the existing rules and practices governing consular relations.”¹⁹ Accordingly, the General Assembly of the United Nations (U.N.) tasked the International Law Commission with drafting a multilateral convention that would bring more uniformity to the laws governing consular relations.²⁰ The International Law Commission eventually adopted the Draft Articles on Consular Relations on July 7, 1961.²¹ Subsequently, the Conference on Consular Relations met in Vienna, Austria from March 4 until April 22, 1963 to prepare an international agreement on consular relations.²² There were over ninety countries and several international organizations in attendance, and on April 24 of 1963,

¹¹ *Id.*

¹² *Id.*

¹³ LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 5 (George W. Keeton & Georg Schwarzenberger eds., 1961).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6. The first treaty specifically referencing the functions, privileges, and immunities of consuls was the Franco-Spanish Convention of Pardo of March 13, 1769.

¹⁷ Kolesnikov, *supra* note 10, at 185.

¹⁸ Cindy Galway Buys, Scott D. Pollock & Ioana Navarette Pellicer, *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 *DUKE J. COMP. & INT'L L.* 461, 462 (2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Aceves, *supra* note 9, at 263.

²² *Id.*

the Conference adopted the final text of the Vienna Convention and the Optional Protocol Concerning Compulsory Settlement of Disputes.²³ However, the Vienna Convention did not enter into force until March 19, 1967.²⁴ Currently, this multilateral treaty has over 170 parties to it²⁵ and is considered by most scholars and countries to be a codification of customary international law, which all nations, not only the Parties to the treaty, need to follow.²⁶

B. General Provisions of the Vienna Convention on Consular Relations

As iterated above, the Vienna Convention marked the first international attempt to systemize existing consular practices in international law. The preamble of the Vienna Convention recognizes the historical significance of consular practices, stating that the Parties have agreed to the treaty, while “[r]ecalling that consular relations have been established between peoples since ancient times . . . [and] [b]elieving that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations. . . .”²⁷ The articles of the Vienna Convention also codify many of the consular functions nations historically assumed. For instance, Article 5 describes the basic functions of the consulate. Generally, consular functions encompass “protecting and facilitating the interests of a State and its nationals in the territory of another State.”²⁸ The provisions of Article 5 were noncontroversial when adopted and continue to be relevant in international relations today.²⁹

On the other hand, the provisions of Article are at the center of international debate. Titled “Communication and contact with nationals of the sending State,” Article 36 reads:

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

²³ *Id.*

²⁴ *Id.*

²⁵ U.N. Treaty Collection, Vienna Convention on Consular Relations, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280050686> (last visited Oct. 3, 2016).

²⁶ Kolesnikov, *supra* note 10, at 186.

²⁷ Vienna Convention on Consular Relations, *supra* note 3, at Preamble.

²⁸ Buys, Pollock & Pellicer, *supra* note 18, at 462–63.

²⁹ Nicole M. Howell, *A Proposal for U.S. Implementation of the Vienna Convention's Consular Notification Requirement*, 60 UCLA L. REV. 1324, 1335 (2013).

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, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this 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.³⁰

On first impression, the notification and access requirements of Article 36 seem to be fairly simple. Under Article 36(1)(a), consulate officials have the right to speak freely with foreign nationals, and foreign nationals have the right to speak freely with their consulate, despite any detention or incarceration. Article 36(1)(b) requires the receiving State to notify the consulate of the sending State without delay if a national of that State has been arrested. Article 36(1)(c) requires the receiving State to allow consular contact with the foreign national. Lastly, Article 36(2) asserts that the rights provided for in the article must be exercised in conformity with the laws of

³⁰ Vienna Convention on Consular Relations, *supra* note 3.

the receiving State, but the laws and regulations cannot nullify the rights in question.

C. The Vienna Convention and the International Court of Justice

Under the United Nations Charter, the International Court of Justice (ICJ) is the “principal judicial organ of the United Nations.”³¹ Nonetheless, like most international courts, the ICJ only has jurisdiction over cases where all parties have consented to the court’s jurisdiction to resolve a particular dispute.³² Nations may provide consent to ICJ jurisdiction in three different ways: “*ante hoc* (in advance of a dispute), *ad hoc* (once a dispute has arisen), or *post hoc* (expressed after the case has been brought before the Court by the other party).”³³ Separate treaties are one way to consent *ante hoc*, and the Optional Protocol Concerning Compulsory Settlement of Disputes (Optional Protocol) is one example of such a treaty. The Optional Protocol is a voluntary agreement incorporated into the Vienna Convention, which requires the parties to the agreement to submit to the jurisdiction of the ICJ for disputes arising from the Vienna Convention.³⁴

Once the ICJ has jurisdiction over the case, its final decisions are binding on the nations that are parties to the dispute.³⁵ Under the U.N. Charter, “each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”³⁶ Considering the strong language of the provision, the U.N. Charter presumes that all parties have an international obligation to comply with the rulings of the ICJ. The United States ratified the U.N. Charter in 1945, but the United States Senate did not expressly allocate the “domestic responsibility for implementing ICJ decisions.”³⁷ Congress did delegate some power to the President, including the power to send congressionally approved officers to represent the United States before the ICJ and the power to appoint representatives to the U.N.’s principal organs.³⁸ Nonetheless, Congress’s failure to assign responsibility to implement ICJ decisions has created uncertainty about how to comply with the U.N. Charter domestically.

³¹ U.N. Charter art. 92.

³² Kolesnikov, *supra* note 10, at 187.

³³ *Id.*

³⁴ Joshua J. Newcomer, *Messing with Texas? Why President Bush’s Memorandum Order Trumps State Criminal Procedure*, 79 TEMP. L. REV. 1029, 1032–33 (2006).

³⁵ *Id.* at 1033.

³⁶ U.N. Charter art. 94, para. 1.

³⁷ Newcomer, *supra* note 34, at 1033.

³⁸ *Id.* at 1033–34.

III. HISTORY OF THE VIENNA CONVENTION IN THE UNITED STATES

A. *United States' Ratification of the Vienna Convention*

In 1963, at the time of the United Nations Conference on Consular Relations, the United States had enacted bilateral treaties with twenty-eight different countries regarding consular notification and access upon arrest of a foreign citizen.³⁹ Nonetheless, these treaties did not always have the mechanisms necessary to ensure compliance.⁴⁰ The United States had to seek an alternative weapon against such ineffective bilateral treaties in order to protect American nationals. Consequently, the United States signed the Vienna Convention on April 24, 1963 along with the Optional Protocol.⁴¹ However, the Vienna Convention was not immediately approved by the Senate. President Nixon wrote on May 5, 1969 urging the Senate to “give early and favorable consideration” to the Vienna Convention.⁴² Subsequently, the Senate approved the Vienna Convention on October 22, 1969, and President Nixon ratified it on November 12, 1969.⁴³ The Convention officially entered into force for the United States on December 24, 1969.⁴⁴

Despite the fact that the Convention is a binding international agreement that was duly ratified by the United States, the United States has failed to fully comply with its obligations. Within the last decade, the prominence of the United States' failure has been recognized by the international community. The issue has stemmed from the way treaties become law in the United States. First, for a treaty to be deemed binding upon each state in the United States under U.S. law, the treaty provision must be self-executing or implemented by Congress in federal legislation.⁴⁵ If a treaty provision is self-executing, it has the same authority on all states as a law implemented by Congress. If a treaty provision is non-self-executing, the treaty provision merely creates a U.S. obligation and is not directly enforceable on the individual states. But, a non-self-executing treaty provision can become domestic law through enactment of federal legislation codifying the treaty.⁴⁶

³⁹ Howell, *supra* note 29, at 1332.

⁴⁰ *Id.*

⁴¹ Aceves, *supra* note 9, at 267.

⁴² Letter from President Richard Nixon to U.S. Senate (May 5, 1969), <http://www.presidency.ucsb.edu/ws/?pid=2036>.

⁴³ Aceves, *supra* note 9, at 268.

⁴⁴ *Id.* at 269.

⁴⁵ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 505 (2008).

⁴⁶ *See* U.S. CONST. art. I, §7.

For decades, the Vienna Convention had been understood as self-executing in the United States.⁴⁷ However, the U.S. Supreme Court avoided the question about the self-execution of Article 36 of the Vienna Convention. Instead, the Supreme Court held in *Medellin I* and *Medellin II* that the ICJ's *Avena* judgment (which implemented Article 36) created an international obligation on part of the United States, but none of the relevant treaty sources (Optional Protocol, the U.N. Charter, or the ICJ Statute) "creates binding federal law in the absence of [Congress] implementing legislation."⁴⁸ In 1967, the United States did promulgate regulations in order "to establish a uniform procedure for consular notification when nationals of foreign countries are arrested by officers of the Department of Justice" in 28 C.F.R. Section 50.5.⁴⁹ However, these regulations only guarantee compliance by federal officers within the Department of Justice. As it stands, the Vienna Convention is still not enforceable at the state level.

B. The Application of the Vienna Convention in the United States

Since the United States failed to comply with its obligations under Article 36 of the Vienna Convention, three different cases have been filed against the United States in the ICJ.⁵⁰ Because the United States was a party to the Optional Protocol of the Vienna Convention, the United States had no choice but to consent to the jurisdiction of the court. The ICJ found in all three cases that the United States had failed to fulfill its obligations under the Vienna Convention with respect to the consular notification and access requirements of Article 36.⁵¹ Since the United States consistently failed to follow the ICJ's ruling, the ICJ took increased measures towards the United States with each case brought before them. The ICJ first issued provisional measures to the United States, but then it issued final, severe judgments.⁵²

In its 2004 *Avena* decision, the ICJ discussed the United States' violations of the Vienna Convention on a larger scale than ever before. Each of the previous cases that came before the ICJ, concerning the United States and the

⁴⁷ Howell, *supra* note 29, at 1354.

⁴⁸ *Medellin I*, 552 U.S. at 506; *Medellin v. Texas (Medellin II)*, 554 U.S. 759, 760 (2008).

⁴⁹ Aceves, *supra* note 9, at 273.

⁵⁰ See, e.g., *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 466 (June 27); *Vienna Convention on Consular Relations (Para. v. U.S.)*, Judgment, 1998 I.C.J. 248 (Apr. 9).

⁵¹ *Mex. v. U.S.*, 2004 I.C.J. at 71; *Ger. v. U.S.*, 2001 I.C.J. at 515; *Para. v. U.S.*, 1998 I.C.J. at 249.

⁵² See *Mex. v. U.S.*, 2004 I.C.J. at 71–72 (holding the United States had breached Article 36 of the Vienna Convention and the Judgment should be applied to other foreign nationals similarly situated in the United States, not only the fifty-one Mexican nationals in the case).

Vienna Convention, concerned the denied right of consular access to one individual. But, within *Avena*, the ICJ was asked to rule on whether the rights of fifty-one Mexican nationals were violated by the United States' failure to inform the detainees of their right to consular notification and access.⁵³ In its decision, the ICJ held Article 36 of the Vienna Convention confers individual rights; the United States violated those rights with respect to the fifty-one Mexican nationals; and as a remedy for these violations, the United States was required to provide the Mexican nationals with review and reconsideration of their convictions.⁵⁴ Additionally, the ICJ found the United States had violated Article 36 by not informing the Mexican consulate about its detained nationals, which prevented the consulate from providing legal assistance.⁵⁵

Since the ICJ was tired of hearing disputes brought against the United States under the Vienna Convention, the Court in *Avena* decided to elaborate on its expectations for the United States in their Judgment. For instance, the ICJ clarified the actual meaning of "review and reconsideration," which it had first discussed in *LaGrand*. The ICJ stated that "review and consideration" should consider the violation of the rights set forth in Article 36 of the Vienna Convention, should be of both convictions and sentences, and should happen within the overall judicial proceedings of each specific defendant.⁵⁶ The ICJ likewise concluded that the United States' procedural default rule⁵⁷ could not be applied in a way to prohibit the full effect of the purpose of Article 36 and could not interfere with proper "review and reconsideration."⁵⁸ Generally, ICJ judgments are only binding with regard to the particular case, but the ICJ expected its *Avena* ruling to "apply to other foreign nationals finding themselves in similar situations in the United States" and not only to the fifty-one Mexican nationals whose rights were at issue.⁵⁹

After the *Avena* decision, it appeared that the U.S. federal government, at least the Executive Branch, seemed ready to comply with the ICJ's ruling. President Bush's actions following the *Avena* decision illustrated not only his

⁵³ Mex. v. U.S., 2004 I.C.J. at 23.

⁵⁴ *Id.* at 65–66.

⁵⁵ *Id.* at 71–72.

⁵⁶ *Id.* at 65–66.

⁵⁷ Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1166 (2005) (noting "[t]he procedural default doctrine holds that a habeas petitioner must first present his federal law argument to the state courts in compliance with state procedural rules. . . . [and] [f]ailure to do so will bar any attempt to present that argument to the federal courts on collateral review.").

⁵⁸ Mex. v. U.S., 2004 I.C.J. at 57.

⁵⁹ *Id.* at 70.

frustration with the country's failure to honor its obligations under Article 36 of the Vienna Convention but also his recognition of the importance of complying with the consular notification and access requirements of Article 36. On February 28, 2005, President George W. Bush issued a memorandum demanding that all fifty states give effect to the ICJ's decision in *Avena*:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States of America*) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.⁶⁰

The President clearly made an effort to comply with the ICJ's order, even though he had no power to make the order enforceable.⁶¹ President Bush believed that he had the independent authority to implement *Avena* and overrule any state-level procedural rules that might prevent "review and reconsideration" of the fifty-one individuals named in the decision.⁶² Arguably, since the *Avena* decision stated that its ruling should "apply to other foreign nationals finding themselves in similar situations in the United States,"⁶³ the United States would have to comply with the "review and reconsideration" order with more prisoners than the fifty-one Mexican nationals. Still, it is clear that the courts of the United States could not possibly comply with the order for every similarly situated foreign prisoner.⁶⁴ Both federal and state courts can barely handle the cases placed on their dockets now.

⁶⁰ Memorandum from President George W. Bush to the U.S. Att'y Gen. (Feb. 28, 2005), http://www.brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

⁶¹ Nancy Alexander, Comment, *Saved by the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon's Rescue*, 15 LEWIS & CLARK L. REV. 819, 833-834 (2011). See also *Medellin I*, 552 U.S. at 525-26.

⁶² Newcomer, *supra* note 34, at 1038.

⁶³ *Mex. v. U.S.*, 2004 I.C.J. at 70.

⁶⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS (2011) (finding there were over 55,000 criminal aliens in the U.S. federal prison system alone in 2010 and over 296,000 in state prison systems and local jails in 2009).

President Bush was not alone in his efforts to get the states to comply with the *Avena* ruling. The Attorney General and the Secretary of State sent letters to the state courts, including multiple letters to the State of Texas, urging the courts to comply and provide “review and reconsideration.”⁶⁵ The U.S. government also filed amicus briefs and orchestrated “high level diplomatic discussions to find alternative approaches for ‘review and reconsideration’ ” in the alternative.⁶⁶ As noted by several scholars, “these actions show that the United States recognized the importance of compliance with the judgment to ‘smooth out U.S. relations with Mexico,’ help repair U.S. international integrity with respect to Article 36, and to encourage compliance with respect to U.S. citizens abroad.”⁶⁷

Despite these measures to support the *Avena* decision, on March 7, 2005, Secretary of State Condoleezza Rice sent a letter to the U.N. to inform it that the United States had formally withdrawn from the Optional Protocol.⁶⁸ “As a consequence of this withdrawal,” Secretary Rice wrote, “the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.”⁶⁹ The international community interpreted the letter as an immediate withdrawal from the Optional Protocol, which brought forth concerns about the United States’ commitment to its reciprocal, international obligations that the Protocol embodied.⁷⁰ The State Department elaborated that “the administration was troubled by foreign interference in the domestic capital system but intended to fulfill its obligations under international law.”⁷¹ This statement did not curtail the international criticism that followed.

C. *The Supreme Court and the Vienna Convention*

Meanwhile, a case concerning Jose Ernesto Medellin, one of the Mexican nationals from the *Avena* decision, was making its way to the U.S. Supreme

⁶⁵ Scott W. Lyons, *Symposium: Treaties and Domestic Law after Medellín v. Texas: Breach Without Remedy in the International Forum and the Need for Self-help: The Conundrum Resulting from the Medellín Case*, 13 LEWIS & CLARK L. REV. 73, 83 (2009).

⁶⁶ *Id.*

⁶⁷ Alexander, *supra* note 61, at 833. See also Lyons, *supra* note 65, at 83 (noting multiple U.S. actions that reflected a determination to remedy the U.S.’s breach of the VCCR).

⁶⁸ Howell, *supra* note 29, at 1352.

⁶⁹ Letter from Condoleezza Rice, U.S. Sec’y of State, to Kofi A. Annan, Sec’y-Gen. of the U.N. (Mar. 7, 2005), <http://www.state.gov/documents/organization/87288.pdf>.

⁷⁰ See generally Charles Lane, Editorial, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01; Howell, *supra* note 29, at 1353–54.

⁷¹ Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES (Mar. 10, 2005), <http://www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-body.html>.

Court. But before Medellín's case, in *Sanchez-Llamas v. Oregon*, "issued after *Avena* but involving individuals who were not named in the *Avena* judgment," the Supreme Court held "that, contrary to the ICJ's determination, the Vienna Convention did not preclude the application of state default rules."⁷² Therefore, the entire international community was on edge, questioning whether the U.S. Supreme Court would make an exception to its previous ruling for the fifty-one nationals involved in the *Avena* decision. The *Medellin* case helped to answer this question.

Jose Ernesto Medellín was convicted for capital murder and sentenced to death by a Texas state court for the gang rape and massacre of two teenagers. After his sentence, in his first application for state post-conviction relief, Medellín raised a claim based on the violation of his rights under the Vienna Convention. The state court rejected the claim on two bases: the claim was procedurally defaulted because Medellín had failed to raise it earlier and the claim failed to show any prejudice arising from the violation.⁷³ Medellín's *habeas corpus* petition in the federal district court was denied on the same grounds. The Fifth Circuit also denied a certificate of appealability.⁷⁴ The Fifth Circuit concluded that there are no individually enforceable rights under Article 36 of the Vienna Convention.⁷⁵ Even though the ICJ ruled in *LaGrand*, and reiterated in *Avena*, that procedural default rules could not bar a petitioner's claim, the Fifth Circuit held that it could "not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims."⁷⁶

Nevertheless, the U.S. Supreme Court granted certiorari.⁷⁷ Before oral argument could occur, the President issued his memorandum, discussed above, so Medellín filed another application for relief in Texas state court.⁷⁸ Since the Supreme Court believed that Medellín may be provided with the review and reconsideration he requested within the state court system, and because his federal relief claim may have otherwise been barred, the Supreme Court dismissed the petition for certiorari.⁷⁹ The Texas Court of Criminal Appeals subsequently dismissed Medellín's second application for relief.⁸⁰ The Texas court held that neither the *Avena* decision nor the President's memorandum constituted binding federal law that could serve as

⁷² *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 498 (2008).

⁷³ *Id.* at 502–03.

⁷⁴ *Medellin v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

⁷⁵ *Id.* at 280.

⁷⁶ *Id.*

⁷⁷ *Medellin v. Dretke*, 544 U.S. 660, 661 (2005).

⁷⁸ *Medellin I*, 552 U.S. at 503.

⁷⁹ *Medellin*, 544 U.S. at 664.

⁸⁰ *Ex parte Medellin*, 223 S.W. 3d 315, 352 (Tex. Crim. App. 2006).

a legal basis for Medellín's second writ.⁸¹ As a result, the Supreme Court again granted certiorari.⁸²

Ultimately, in *Medellin v. Texas*, the Supreme Court had two fundamental questions to answer. First, the Supreme Court needed to decide whether the "ICJ's judgment in *Avena* [is] directly enforceable as domestic law in a state court in the United States."⁸³ Second, the Supreme Court had to decide whether the "President's Memorandum independently require[s] the States to provide review and reconsideration of the claims of the fifty-one Mexican nationals named in *Avena* without regard to state procedural default rules."⁸⁴ Chief Justice Roberts wrote the majority opinion for the Court.

The Supreme Court first analyzed Medellín's argument that the Optional Protocol, U.N. Charter, and ICJ Statute together constituted relevant authority to give the *Avena* judgment binding effect on all domestic courts in the United States.⁸⁵ The Optional Protocol, as previously noted, is merely a bare grant of jurisdiction to the ICJ, and the treaty is silent about the effect of an ICJ decision.⁸⁶ Instead, the U.N. Charter provides the mechanism for compliance with ICJ decisions in Article 94.⁸⁷ As a result, the Supreme Court found that the U.N. Charter did not "contemplate the automatic enforceability of ICJ decisions in domestic courts."⁸⁸ Additionally, the Supreme Court noted that the ICJ Statute itself provided further confirmation for its finding.⁸⁹ Ultimately, the *Avena* decision creates an international obligation on the part of the United States, but it does not of its own force constitute binding federal law.

The Supreme Court then analyzed whether the ICJ's judgment in *Avena* is binding on state courts by virtue of President Bush's February 28, 2005

⁸¹ *Id.*

⁸² *Medellin I*, 552 U.S. at 504.

⁸³ *Id.* at 498.

⁸⁴ *Id.*

⁸⁵ *Id.* at 506–14.

⁸⁶ *Id.* at 507–08. Article 94(1) of the U.N. Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." (emphasis added). U.N. Charter art. 94, ¶ 1.

⁸⁷ *Medellin I*, 552 U.S. at 508. Article 94(2) provides,

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

U.N. Charter art. 94, ¶ 2.

⁸⁸ *Medellin I*, 552 U.S. at 509.

⁸⁹ *Id.* at 511. Article 59 of the statute states that "[t]he decision of the [ICJ] has *no binding force* except between the parties and in respect of that particular case." (emphasis added). Medellín cannot be considered a party to the *Avena* decision since the ICJ decides disputes between nations only.

Memorandum. Arguably, since the President acted pursuant to his powers authorized by the Optional Protocol and U.N. Charter acquiesced by Congress, the President had the authority to implement the *Avena* judgment.⁹⁰ The Court disagreed, relying on the text of the U.S. Constitution which gives Congress the power to make laws and not the President.⁹¹ Further, since the treaties were ratified as non-self-executing, the President could not unilaterally make them self-executing.⁹² The Court also found that the Executive's power to settle international disputes does not extend as far as the unprecedented directive in President Bush's Memorandum, which affected state's police powers.⁹³ And the President could not rely on his Take Care power in the Constitution since the *Avena* decision is not domestic law.⁹⁴ In sum, the Supreme Court concluded 6–3 that neither *Avena* nor the President's Memorandum constituted directly enforceable federal law that would pre-empt state limitations on filing of successive habeas petitions.⁹⁵

Justice Breyer wrote the sole dissenting opinion of *Medellin I*, joined by Justices Souter and Ginsburg, in which he used a seven-step test to show why “the United States’ treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in [domestic] court[s].”⁹⁶ First, Justice Breyer attacked the majority's emphasis on the phrase “undertakes to comply” as proof that ICJ decisions are not self-executing.⁹⁷ The majority looked at precedent where the Court previously found treaty provisions self-executing, but they could not find any clear language.⁹⁸ Justice Breyer argued that the majority did not find such plain language because many of the treaties ratified by the United States must allow different nations to implement the treaties by their own practice.⁹⁹ Not all countries have the convenience the Supremacy Clause provides to the United States.¹⁰⁰

⁹⁰ *Id.* at 525.

⁹¹ *Id.* at 526. See U.S. CONST. art. I, § 1.

⁹² *Medellin I*, 552 U.S. at 527. By definition, non-self-executing treaties do not have domestic effect of their own force.

⁹³ *Id.* at 532.

⁹⁴ *Id.*

⁹⁵ *Id.* at 498–99.

⁹⁶ *Id.* at 562 (Breyer, J., dissenting).

⁹⁷ *Id.* at 551.

⁹⁸ *Id.* at 547–48.

⁹⁹ *Id.* at 548.

¹⁰⁰ *Id.* For example, Britain takes “the view that the British Crown makes treaties but Parliament makes domestic law, [which] virtually always requires parliamentary legislation.” By contrast, the Netherlands, like the United States, “directly incorporates many treaties concluded by the executive into its domestic law even without explicit parliamentary approval of the treaty.”

Thus, in Justice Breyer's opinion, the relevant treaties (i.e., U.N. Charter, Optional Protocol, and ICJ Statute) suggest that the drafters intended for ICJ decisions to be automatically enforceable in domestic courts.¹⁰¹ The Optional Protocol gives compulsory jurisdiction over Vienna Convention disputes to the ICJ, whose proceedings are binding.¹⁰² The United States has ratified seventy treaties with similar ICJ dispute resolution provisions and has interpreted those treaties as self-executing.¹⁰³ There is no reason to treat the Optional Protocol provisions differently.¹⁰⁴ Further, Justice Breyer argues that enforcement of the *Avena* decision is best suited for courts experienced in criminal law and procedures rather than by legislative enactment.¹⁰⁵ Finally, President Bush favored direct judicial enforcement, and Congress had expressed no reservation to it.¹⁰⁶ Therefore, since the treaty is self-executing, the *Avena* ruling should be enforceable in domestic courts without congressional action per the Supremacy Clause of the Constitution.

Unfortunately for Medellín, Justice Breyer was on the losing side of this decision, but Medellín was not going to give up easily. On his scheduled execution day, Medellín again brought his case before the U.S. Supreme Court to ask for a stay of execution. He based his case on the theory that either Congress or the Texas state legislature might implement the ICJ's decision that violations of the Vienna Convention are grounds for reconsideration and review.¹⁰⁷ Neither the President nor the Texas governor had represented to the Supreme Court that legislative action was likely. Congress had not progressed past the introduction of a bill in the four years since the *Avena* decision and four months since the Supreme Court's decision in *Medellin I*.¹⁰⁸ Thus, the Supreme Court determined that the possibilities Medellín relied on were "too remote to justify an order" to stay "the sentence imposed by the Texas courts."¹⁰⁹ Additionally, Medellín did not have the necessary ground to ask for a stay of execution because he failed to prove that his conviction was obtained unlawfully.¹¹⁰ Ultimately,

¹⁰¹ *Id.* at 551.

¹⁰² *Id.* at 539.

¹⁰³ *Id.* at 541.

¹⁰⁴ *Id.* at 541–42.

¹⁰⁵ *Id.* at 563.

¹⁰⁶ *Id.* at 538–39.

¹⁰⁷ *Medellin v. Texas (Medellin II)* 554 U.S. 759, 759 (2008).

¹⁰⁸ *Id.* at 759–60.

¹⁰⁹ *Id.* at 759.

¹¹⁰ *Id.* at 760.

the state of Texas proceeded with the execution, and Medellín was pronounced dead by lethal injection at 9:57 p.m. on August 5, 2008.¹¹¹

More recently in *Garcia v. Texas*, the U.S. Supreme Court case ruled on U.S. violations of the Vienna Convention.¹¹² Humberto Leal Garcia, another Mexican national named in the *Avena* decision, was convicted and sentenced to death by a Texas court.¹¹³ After multiple failed petitions and requests for relief in both state and federal courts, Garcia sought a stay of execution from the Supreme Court in order to allow Congress time to enact legislation implementing the *Avena* decision.¹¹⁴ However, “the Supreme Court justices split 5–4 along conservative-liberal lines in denying a stay of execution.”¹¹⁵

In its per curiam opinion, the Supreme Court first disposed of Garcia’s due process claim that Texas could not execute him while proposed legislation was under consideration.¹¹⁶ Next, the Court rejected the government’s argument that Garcia’s stay of execution should be granted in support of future jurisdiction which would arise once the impending legislation was enacted.¹¹⁷ The Court highlighted, “[o]ur task is to rule on what the law is, not what it might eventually be.”¹¹⁸ But, even if the Court could issue a stay on the basis of unenacted legislation, Garcia’s case would not be the appropriate vehicle.¹¹⁹ The Court, alluding to its statement in *Medellin II*, noted that Congress obviously did not view legislation implementing the Vienna Convention as a priority.¹²⁰ Additionally, the government refused to concede that Garcia had been prejudiced from his lack of consular access, which, as noted, is a prerequisite for any stay of execution.¹²¹ Accordingly, Garcia was executed and pronounced dead at 7:21 p.m. on July 7, 2011.¹²²

¹¹¹ Allan Turner & Rosanna Ruiz, *Medellin Executed for Rape, Murder of Houston Teens*, HOUSTON CHRON. (Aug. 5, 2008), <http://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php>.

¹¹² *Garcia v. Texas*, 564 U.S. 940 (2011).

¹¹³ See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 25 (Mar. 31).

¹¹⁴ *Garcia*, 564 U.S. at 940–41.

¹¹⁵ Bill Mears, *Mexican National Executed in Texas*, CNN (July 7, 2011), <http://www.cnn.com/2011/CRIME/07/07/texas.mexican.execution/>.

¹¹⁶ *Garcia*, 564 U.S. at 942.

¹¹⁷ *Id.* at 941.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 942.

¹²⁰ *Id.* At the time of this opinion, it had been seven years since *Avena*’s decision and three years since the Supreme Court’s ruling in *Medellin I*.

¹²¹ *Id.* at 942–43.

¹²² Mears, *supra* note 115.

Again, Justice Breyer authored the dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, which adopted the government's position that permitting Texas to execute Garcia amounted to a breach of the United States' international obligations.¹²³ Like the previous administration, President Obama failed to urge the Court to delay Garcia's execution.¹²⁴ After the decision, Sandra Babcock, the lead appellate attorney expressed her concern with the United States' inaction.¹²⁵ She emphasized, "[t]he execution of Mr. Leal [Garcia] violates the United States' treaty commitments, threatens the nation's foreign policy interests, and undermines the safety of all Americans abroad."¹²⁶ Today, her words still ring truthfully for the United States' predicament.

IV. PAST PROPOSALS

A. Failed Attempts at Legislative Reform

Even though the Supreme Court ruled that the *Avena* decision and the President's Memorandum did not constitute enforceable law on the states, it noted that "Congress could elect to give [the Vienna Convention] wholesale effect . . . through implementing legislation, as it regularly has" with other non-self-executing treaties.¹²⁷ As a result, three different bills have been proposed in order to bring the United States into compliance with its obligations under the Vienna Convention. Alas, none of the bills have managed to pass congressional approval.

First, the *Avena* Case Implementation Act of 2008 (*Avena* Act) was introduced on July 14, 2008 by Howard Berman (D-CA) and Zoe Lofgren (D-CA).¹²⁸ The *Avena* Act was in response to the Supreme Court's ruling in *Medellin I*. The *Avena* Act sought "[t]o create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States" under the Vienna Convention and the Optional Protocol.¹²⁹ It provided that "any person whose rights are infringed by a violation by any nonforeign governmental authority of [A]rticle 36 of the Vienna Convention" may

¹²³ *Garcia v. Texas*, 564 U.S. 940, 943–44 (2011).

¹²⁴ Mears, *supra* note 115.

¹²⁵ *Id.* Sandra said, "The need for congressional action to restore our reputation and protect our citizens is more urgent than ever."

¹²⁶ *Id.*

¹²⁷ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 520 (2008).

¹²⁸ *Avena* Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008), <https://www.congress.gov/bill/110th-congress/house-bill/6481/text>.

¹²⁹ *Id.*

obtain relief by civil action.¹³⁰ In section 2(b), the Avena Act further defined appropriate relief as:

any declaratory or equitable relief necessary to secure the rights; and . . . in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.¹³¹

The Avena Act would have applied to past violations.¹³² However, it never made it out of the House Committee of the Judiciary.

On June 14, 2011, Senator Patrick Leahy (D-VT) renewed the effort to bring the United States into compliance with the Vienna Convention by introducing the Consular Notification Compliance Act of 2011 (CNCA).¹³³ The CNCA was considerably more detailed than the failed Avena Act.¹³⁴ After its introduction, Senator Leahy received such favorable support that he announced on June 29, 2011 that he planned to hold a hearing on the bill in July.¹³⁵ The CNCA's stated purpose was "[t]o facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and for other purposes."¹³⁶ Essentially, the CNCA directly incorporated the language of Article 36 into legislation by reaffirming that the obligations under the Vienna Convention are federal law and apply to all foreign nationals arrested or detained in the United States.¹³⁷ Further, the

¹³⁰ *Id.* § 2(a).

¹³¹ *Id.* § 2(b).

¹³² *Id.* § 2(c).

¹³³ 157 CONG. REC. S3779 (daily ed. June 14, 2011) (introducing the CNCA legislation and letters of support); *see also* Press Release, Patrick Leahy, U.S. Senate, Leahy Renews Effort To Bring U.S. Into Compliance With International Consular Notification Treaty (June 14, 2011), <https://www.leahy.senate.gov/press/leahy-renews-effort-to-bring-us-into-compliance-with-international-consular-notification-treaty> [hereinafter Leahy CNCA Press Release].

¹³⁴ Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/senate-bill/1194?q=%7B%22search%22%3A%5B%22S.+1194%22%5D%7D&resultIndex=3>.

¹³⁵ 157 CONG. REC. S4215 (daily ed. June 29, 2011) (noting "favorable commentary the bill has generated, including multiple editorials in major newspapers and numerous letters of support from across the political spectrum").

¹³⁶ S. 1194, 112th Cong. § 2(a) (2011).

¹³⁷ *See id.* § 3(a). Section 3(a) provides,

[I]f an individual who is not a national of the United States is detained or arrested by an officer or employee of the Federal Government or a State or local government, the arresting or detaining officer or employee, or other

CNCA provided limited post-conviction relief by giving federal courts the jurisdiction “to review cases of foreign nationals currently on death row in the United States, who did not receive consular access.”¹³⁸ But, in order for those foreign nationals to obtain relief, they would have to establish not only a violation of their consular notification rights but also that the violation resulted in “actual prejudice.”¹³⁹ Senator Leahy adequately summarized the bill’s three main purposes as protecting American citizens abroad, fulfilling the United States’ legal obligations, and removing an impediment to cooperation with international allies.¹⁴⁰ The CNCA was not a perfect solution for bringing the United States into complete compliance with the Vienna Convention, but it was a step in the right direction.

Without a doubt, the CNCA had numerous supporters and was given much more consideration than the Avena Act.¹⁴¹ The CNCA is the only proposed legislation concerning the Vienna Convention that had a hearing on its contents, which occurred on July 27, 2011. Senator Leahy had multiple, qualified witnesses testify on behalf of the CNCA at the hearing before the Senate Judiciary Committee.¹⁴² The witnesses stressed how continued failure to give effect to Article 36 of the Vienna Convention in the United States would invite foreign nations to reciprocate by disregarding the rights of U.S. citizens arrested or detained in their countries.

One witness, however, spoke in opposition to the legislation at the hearing. The witness argued that the CNCA raised constitutional issues which weighed against its enactment.¹⁴³ In his view, enactment of the CNCA would not be within Congress’ power under the Constitution. The federal government has certain enumerated powers and the rest are left to the states. The witness argued that the CNCA encroached on the states’ police powers by commandeering state officials to carry out federal obligations.¹⁴⁴ The witness did not disagree that the policies the bill promoted were

appropriate officer or employee of the Federal Government or a State or local government, shall notify that individual without delay that the individual may request that the consulate of the foreign state of which the individual is a national be notified of the detention or arrest.

¹³⁸ Leahy CNCA Press Release, *supra* note 133; *see* S. 1194, 112th Cong. § 4(a)(1) (2011).

¹³⁹ S. 1194, 112th Cong. § 4(a)(3) (2011).

¹⁴⁰ 157 CONG. REC. S4216 (daily ed. June 29, 2011).

¹⁴¹ *See generally Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing on S. 1194 Before the S. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *Hearings*].

¹⁴² *Id.* at 5–31. The witnesses included two esteemed lawyers, a freelance journalist, the Under Secretary for Management, and the Deputy Assistant Attorney General.

¹⁴³ *Id.* at 24.

¹⁴⁴ *Id.* at 25 (noting “[t]hese limitations are plain and well described in Supreme Court case law, including such seminal cases as *New York v. United States* and *Printz v. United States*”).

worthwhile; he merely felt that its constitutional concerns took precedent over its passing.

Nonetheless, the CNCA had widespread support. The Obama Administration supported the legislation, along with the Department of Justice, the Department of Defense, the Department of Homeland Security, and the Department of State.¹⁴⁵ Multiple letters, articles, and statements from different entities were attached to the end of the hearing record in order to convey further support for the proposed legislation. Despite the overwhelming amount of support, the CNCA never reported out into the Senate for a vote.

On May 24, 2012, Senator Leahy attempted a different approach to bring the United States into compliance with the Vienna Convention. He placed the relevant provision into the Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2013 (S. 3241).¹⁴⁶ As usual, the media had moved on to the next topic, but Senator Leahy had not yet given up on bringing the United States into compliance with the Vienna Convention. Section 7090 of S. 3241 was very similar to the CNCA, but it was not identical. The Senate Appropriations Committee's Report on the bill noted the key differences from the CNCA. For example, Section 7090 omitted Section 3 of the CNCA, "which set forth practical guidance for compliance with U.S. consular notification and access obligations."¹⁴⁷ The Committee felt the section was unnecessary since the Vienna Convention is self-executing, and it wanted to encourage the work already being done by the Judicial Conference's Committee on Rules of Practice and Procedure and the Uniform Law Commission (ULC).¹⁴⁸ The Committee also added several provisions which were absent from the CNCA. Section 7090 described the effect of prior adjudication¹⁴⁹ and gave the federal courts a timeline to render

¹⁴⁵ Leahy CNCA Press Release, *supra* note 133.

¹⁴⁶ Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2013, S. 3241, 112th Cong. § 7090 (2012), <https://www.congress.gov/bill/112th-congress/senate-bill/3241/text>.

¹⁴⁷ S. REP. NO. 112-72, at 68–69 (2012), <https://www.gpo.gov/fdsys/pkg/CRPT-112srpt172/pdf/CRPT-112srpt172.pdf>.

¹⁴⁸ *Id.* at 69. The Judicial Conference's Committee on Rules of Practice and Procedure was working on updating the Federal Rules of Criminal Procedure to facilitate compliance with consular notification and access requirements. The ULC promotes uniformity of law among the several states in the U.S. on subjects as to which uniformity is desirable and practicable. Thus, the ULC was trying to create model legislation implementing the consular notification requirements as well.

¹⁴⁹ *Id.*; *see also* S. 3241, 112th Cong. § 7090(a)(3)(B) (2012) (noting "[a] petition for review under this subsection shall not be granted if the claimed violation . . . has previously been adjudicated . . . unless the adjudication of the claim resulted in a decision that was based on an unreasonable determination").

a judgment.¹⁵⁰ It also clarified that a federal court could refer a petition for review to a federal magistrate.¹⁵¹

The key difference between the CNCA and Section 7090 of S. 3241 was the manner in which a foreign defendant could request review of his or her conviction. As noted by Senator Leahy, the CNCA would permit “foreign nationals who have been convicted and sentenced to death to ask a court to review their cases and determine if the failure to provide consular notification led to an unfair conviction or sentence.”¹⁵² On the other hand, Section 7090 of S. 3241 required a petition to make an initial showing before the case could even qualify for review.¹⁵³ Both bills still required the foreign defendant to make a showing of “actual prejudice” in order to obtain relief.¹⁵⁴ Like other efforts to bring the United States into compliance with the Vienna Convention, Section 7090 of S. 3241 did not receive congressional approval.

In 2013, Congress continued to consider legislation that would facilitate compliance with the *Avena* ruling. The previous failed legislation, S. 3241 Section 7090, was placed into a Senate Appropriations Act.¹⁵⁵ The House rejected the Senate provision, and a related House bill became public law instead on January 17, 2014, without any provisions concerning the Vienna Convention.¹⁵⁶

Senator Leahy’s most recent attempt to bring the United States into compliance with the Vienna Convention was a bill he introduced on June 19, 2014.¹⁵⁷ With this attempt, Senator Leahy tried a third time to place the relevant provision into an appropriations act.¹⁵⁸ Nevertheless, the relevant

¹⁵⁰ S. 3241, 112th Cong. § 7090(a)(3)(E) (2012) (giving the Federal Court one year to render a final determination and issue a final judgment after the date on which a petition was filed).

¹⁵¹ *Id.* § 7090(a)(5).

¹⁵² 157 CONG. REC. S3779 (daily ed. June 14, 2011).

¹⁵³ S. 3241, 112th Cong. § 7090(a)(3)(A) (2012) (explaining that a petition must show a violation occurred and if the violation had not occurred, the individual’s consulate would have provided assistance to him).

¹⁵⁴ *See* S. 1194, 112th Cong. § 4(a)(3) (2011); S. 3241, 112th Cong. § 7090(a)(3)(a) (2012).

¹⁵⁵ CONSULAR AND JUDICIAL ASSISTANCE AND RELATED ISSUES, 2013 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 2, § A(1) at 26; *see also* Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2014, S. 1372, 113th Cong. § 7083 (2013), <https://www.congress.gov/bill/113th-congress/senate-bill/1372?q=%7B%22search%22%3A%5B%22S.+1372%22%5D%7D&resultIndex=2>.

¹⁵⁶ *See* Consolidated Appropriations Act, Fiscal Year 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014).

¹⁵⁷ Department of State, Foreign Operations, and Related Programs Appropriations Act, 2015, S. 2499, 113th Cong. § 7085 (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2499>.

¹⁵⁸ *Id.*

section did not become law.¹⁵⁹ The House rejected the Senate provision, and a related House bill was enacted instead on December 16, 2014, without any provisions concerning the Vienna Convention.¹⁶⁰ Progress, however, was made towards bringing the United States into compliance with its consular notification and access obligations this legislative session through an update in the *Federal Rules of Criminal Procedure*.¹⁶¹ The new Rules took effect on December 1, 2014, and require a federal magistrate judge to inform a foreign defendant charged with a federal crime at his or her initial appearance that he or she “may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant’s country of nationality that the defendant has been arrested. . . .”¹⁶² The advisory committee on this amendment noted that the arresting officers still have the primary responsibility to notify a defendant’s consulate upon notice from the defendant, but this addition was to serve as “additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.”¹⁶³ Although a step in the right direction, the amendment does not reduce the need for legislation which would bring the nation into full compliance with Article 36 of the Vienna Convention. And, regrettably, the United States currently has no passed (or pending) legislation towards that goal.

Why has every attempt at implementing the Vienna Convention failed at the federal level? None of the proposed legislation since the first attempt to place a Vienna Convention provision in an appropriations bill has had any documented discussion. It can be inferred from the lack of debate that such efforts have failed for a variety of reasons. One possibility is the lack of media attention towards the topic since *Medellin I*. Despite the production of shows like “Locked Up Abroad,” the American public has viewed the issue with apathy. Another possibility could be the jarring nature of politics. The United States’ non-compliance with the Vienna Convention was brought to light by cases involving the death penalty, a topic which has a clear, divisive line between liberals and conservatives. Both sides seem to view

¹⁵⁹ Press Release, Patrick Leahy, U.S. Senate, Statement of Senator Patrick Leahy on the Omnibus Appropriations Bill (Dec. 11, 2014), <https://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-on-the-omnibus-appropriations-bill1>.

¹⁶⁰ *Id.*; see also Consolidated and Further Continuing Appropriations Act, Fiscal Year 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

¹⁶¹ See generally Press Release, Marie Harf, Deputy Department Spokesperson, U.S. Dep’t of State Office of the Spokesperson, Updates to Federal Rules of Criminal Procedure Facilitate Compliance with Consular Notification and Access Obligations (Dec. 2, 2014), <http://www.state.gov/r/pa/prs/ps/2014/12/234612.htm>.

¹⁶² FED. R. CRIM. P. 58(b)(2)(H).

¹⁶³ *Id.* at advisory committee’s note on 2014 amendments.

implementation of the Vienna Convention as an affirmative step towards dismantling the death penalty. Even though it is not necessarily the truth, the concern definitely hovers over Vienna Convention legislation. This combination of little media attention and discord among political parties makes passing legislation extremely difficult.

B. Various Proposals for Compliance

Considering the United States has been in violation of Article 36 of the Vienna Convention for at least twelve years, scholars have developed an array of approaches to improve America's compliance with consular notification and access, but none have been adopted. Before *Avena* and the Supreme Court's decision in *Medellin I*, William Aceves recognized the consequences if the United States failed to improve its compliance under the Vienna Convention. As a result, he made several recommendations.¹⁶⁴ Aceves suggested the United States increase its monitoring with federal agencies through the State Department, cooperate with foreign governments to develop procedures to improve compliance, and induce law enforcement agencies to identify foreign nationals shortly after detention.¹⁶⁵ He also suggested Congress enact legislation to allow foreign governments to sue in federal courts for treaty violations, or in the alternative, the U.S. federal government should sue on behalf of foreign governments to challenge treaty violations.¹⁶⁶

Aceves' recommendations were based on a sense of reciprocity, but these suggestions do not create mandatory regulations for state or federal agencies. For example, the U.S. State Department has prepared and circulated training materials throughout the nation to inform local law enforcement agencies about the Vienna Convention. U.S. State Department experts even travel around the country to provide in-person training on consular notification and access. Recently, in August 2016, the State Department released its fourth edition of *Consular Notification and Access*.¹⁶⁷ In 2009, the U.S. State Department sent 200,000 consular notification and training materials to law enforcement agencies across the United States.¹⁶⁸ But since the State Department cannot ensure the training is undertaken or followed, violations

¹⁶⁴ Aceves, *supra* note 9, at 313.

¹⁶⁵ *Id.* at 314–16.

¹⁶⁶ *Id.* at 316–17.

¹⁶⁷ See U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS (4th ed. 2016), https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_September_2017.pdf.

¹⁶⁸ Consular and Judicial Assistance and Related Issues, 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 2, § A(1)(b) at 22.

continue to occur. Alternatively, it would be very difficult for Congress to allow foreign governments access to U.S. courts through legislation since the Supreme Court has continually reiterated that U.S. states are immune from suit under the Eleventh Amendment.¹⁶⁹ It would be impractical for the U.S. government to sue on behalf of other nations for all state and local violations of the Vienna Convention; the U.S. has enough cases to handle on its own.

After the Avena Case Implementation Act of 2008 failed, Edward Duffy argued that the “federal government could use the Spending Power to fashion conditional grants to the states, contingent on their satisfaction of Vienna Convention obligations.”¹⁷⁰ He viewed this option as the most viable considering the constraints placed on the federal government through both the Constitution and political processes.¹⁷¹ Nevertheless, Duffy’s solution is not the most ideal. It would require an incentive for Congressional officials to encourage states to comply. As of now, it does not appear that such an incentive actually exists.¹⁷² The United States has been criticized by the ICJ for its Vienna Convention violations, and since its withdrawal from the Optional Protocol, the United States has consistently received criticism from the international community for its ongoing failure to comply with its legal obligations. This failure places U.S. citizens at risk when traveling abroad, because other nations are less likely to honor their obligations under the Vienna Convention when the United States fails to provide consular notification and access to foreign nationals. Despite this risk, the majority of states have not complied on their own accord. There is no stronger incentive that could arise than protecting the lives’ of U.S. citizens.

In 2013, Nicole Howell proposed the “United States seek bilateral modification of the Vienna Convention to limit its application to noncitizen capital offenses and exclude the minor offenses that make U.S. compliance with Article 36 unrealistic.”¹⁷³ Bilateral modification of an international treaty can occur when two or more countries agree to modify the terms of the treaty as between themselves alone. Modification of the Vienna Convention is allowed and governed by Article 41 of the Vienna Convention on the Law of Treaties, which describes how Parties to a multilateral treaty may modify the treaty’s terms.¹⁷⁴ Howell stresses that the United States could prioritize the modification with those countries whose citizens are incarcerated most

¹⁶⁹ See U.S. CONST. amend. XI.

¹⁷⁰ Edward W. Duffy, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights after Medellin*, 98 GEO. L.J. 795, 808 (2010).

¹⁷¹ *Id.* at 796–97.

¹⁷² Howell, *supra* note 29, at 1363.

¹⁷³ *Id.* at 1368.

¹⁷⁴ Vienna Convention on the Law of Treaties art. 41, May 23, 1969, 1155 U.N.T.S. 331.

often in the United States like Mexico and China.¹⁷⁵ Her solution would place a considerably lighter burden on U.S. law enforcement officials, especially since she proposes that a second responsible party be created to provide consular notification, such as defense counsel or judges.¹⁷⁶

Even though the Vienna Convention may be modified, Howell's suggestion would not solve the issue, but rather complicate matters further. The U.S. parties responsible for giving consular notification could change depending on each bilateral agreement, and each bilateral agreement could alter the parties' obligations. Such agreements would create more confusion than a uniform application of the Vienna Convention for all foreign criminals. Plus, as Howell acknowledged, modification of a treaty requires advice and consent by the Senate.¹⁷⁷ The international community wants the United States to comply with their Vienna Convention obligations; thus, many countries would likely seek such modification. However, the Senate would be unenthusiastic about approving so many bilateral agreements since it already ratified the Vienna Convention. Finally, Howell's proposal does not address the main problem: how to ensure that every state in the United States follows the obligations under the Vienna Convention or her suggested bilateral agreements. For these reasons, Howell's proposal is not a viable solution.

The most basic proposal, as made by Justice Breyer in his dissent in *Medellin I*, is that the treaty obligation to comply with the *Avena* ICJ judgment is self-executing and part of federal law.¹⁷⁸ If so, *Avena* should be enforceable in domestic courts without further congressional action.¹⁷⁹ Although Supreme Court decisions are not easily overturned and lower courts have an obligation to follow their holdings, states can choose to view the United States treaty obligations as self-executing or pass legislation that reflects this interpretation. Interpreting the consular notification requirements of the Vienna Convention as self-executing would provide an individual cause of action for foreign nationals arrested or detained in the United States.

C. Individual U.S. States' Attempts at Compliance

As of now, four states have enacted legislation to ensure compliance with the Vienna Convention within their jurisdiction. California led the way in

¹⁷⁵ Howell, *supra* note 29, at 1375.

¹⁷⁶ *Id.* at 1377–78.

¹⁷⁷ U.S. CONST. art. 2, cl. 2.

¹⁷⁸ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 562 (Breyer, J., dissenting).

¹⁷⁹ *Id.*

1999 after the first wave of Vienna Convention litigation. The statute provides that, “every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country.”¹⁸⁰ Nonetheless, it is unclear whether a violation of the statute would have any real impact on the outcome of a case. In Oregon, law enforcement officials who detain a foreigner on grounds of mental illness are required to “inform the person of the person’s right to communicate with an official from the consulate of the person’s country.”¹⁸¹ No similar provision exists for criminal arrests, except for a general duty of police officers to understand the rights of foreign nationals provided by the Vienna Convention.¹⁸² Yet, the statute imposes no penalty for officers who fail to comply.

Florida was the third state to enact this type of legislation. In its current form since 2004, Florida’s statute requires the state protocol officer to “[e]stablish a system of communication to provide all state and local law enforcement agencies with information regarding proper procedures relating to the arrest or incarceration of a foreign citizen.”¹⁸³ In another statute, Florida clarifies that “[f]ailure to provide consular notification . . . shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.”¹⁸⁴ Illinois is the most recent state to enact legislation to better implement consular notification and access. The law clarified who was responsible in the Illinois criminal justice system for providing consular notice to arrested or detained foreigners, when such notice must be given, and what happens if notice was not given.¹⁸⁵ But like the other state legislations, the Illinois law failed to create any new right or remedy.

The California, Florida, Illinois, and Oregon legislatures have good intentions for encouraging compliance with the Vienna Convention, but their efforts are likely in vain. If the President of the United States, the Supreme Court, and the international community cannot encourage local law enforcement to comply with the Vienna Convention, state statutes that provide no repercussion for non-compliance or remedy for foreign nationals

¹⁸⁰ CAL. PENAL CODE § 834c(a)(1) (enacted 1999).

¹⁸¹ OR. REV. STAT. § 426.228(9)(a) (2016).

¹⁸² OR. REV. STAT. § 181A.470 (2015). The statute was renumbered in 2015, but no substantive changes were made.

¹⁸³ FLA. STAT. § 288.816(2)(f) (2016).

¹⁸⁴ FLA. STAT. § 901.26 (2016).

¹⁸⁵ 725 ILL. COMP. STAT. 5/103-11(b-5) (2016). The legislation went into effect on January 1, 2016.

whose rights have been violated will have no force. As previously noted, the only way to bring the United States into compliance with the Vienna Convention is to actually implement legislation which will force law enforcement officials to provide foreign nationals with consular notification and access. Legislation would be best implemented at the national level in order to assure uniform compliance across the nation, but state legislation could be helpful. However, the state legislation needs to have some type of enforcement mechanism. Codified encouragements will not be successful; such laws are just symbolic and merely persuade instead of enforce, punish, or prevent.

V. A WORKABLE SOLUTION

The most efficient way to bring the entire United States into compliance with Article 36 of the Vienna Convention is through federal legislation. Federal legislation implementing the Vienna Convention would ensure that every state follows the obligations the United States agreed to when it signed the treaty in 1963. With the increase of Americans traveling abroad, it is time that the political parties place their differences aside to create adequate legislation to afford foreign criminals consular notification and access. The safety of Americans abroad depends on other nations' reciprocity, which will be nonexistent if the U.S. government does not force compliance with the Vienna Convention.

Apart from political arguments, the only potential argument against codifying the Vienna Convention is that such legislation may be unconstitutional. The U.S. federal government has particular enumerated powers. The rest of the powers are residual powers left to the states to police the health, wealth, and morals of its citizens.¹⁸⁶ In *Printz*, the U.S. Supreme Court analyzed the history and federalist structure of the Constitution and found two specific limits on the federal government's necessary and proper power in regards to infringing on state sovereignty.¹⁸⁷ The Court held that one, the federal government could not make a state enact law and regulations, and two, the federal government could not require a state officer to implement federal law without the state's consent.¹⁸⁸

Arguably, legislation implementing the Vienna Convention could be viewed as commandeering state officials to enforce federal law, but there is a key distinction between this legislation and the law at issue in *Printz*. In Article VI, Clause 2 of the U.S. Constitution, treaties made under the

¹⁸⁶ See U.S. CONST. amend. X.

¹⁸⁷ *Printz v. United States*, 521 U.S. 898 (1996).

¹⁸⁸ *Id.* at 935.

authority of the United States are the supreme law of the land.¹⁸⁹ It would logically follow that federal legislation executing a treaty would be enforceable on the states. Such legislation would not encroach on the states' police powers since the states agreed to the treaty's conditions upon its ratification. In other words, the states implicitly consented to having their state law enforcement officers implement the scheme of the Vienna Convention when it was signed into law under the authority of the United States. Additionally, in *Medellin I*, the Supreme Court held the *Avena* judgment created an international obligation on part of the United States, but none of the relevant treaty sources (Optional Protocol, the UN Charter, or the ICJ Statute) "create binding federal law in the absence of Congressional implementing legislation."¹⁹⁰ Thus, the Supreme Court left open the option for Congress to pass legislation to make the *Avena* judgment implementing Article 36 of the Vienna Convention binding federal law. Therefore, if Congress decides to pass a law implementing the Vienna Convention, it appears that the Supreme Court would uphold such a law as constitutional.

Congress thus far has not been able to create a comprehensible piece of legislation capable of passing both Houses. The *Avena* Act, the first law in response to *Avena*, only created a civil action for foreign defendants who had their consular notification and access rights violated.¹⁹¹ Since the law did not provide an adequate remedy for foreign criminal defendants, it inevitably failed to pass legislation implementing the Vienna Convention. Plus, the law's function seemed to be unprecedented in the criminal context. For instance, if an officer has violated a defendant's Miranda rights, the prosecutor cannot use, for most purposes, anything the suspect says as evidence against the suspect at trial. The defendant does not have to seek a civil remedy for the violation of his Miranda rights. The *Avena* Act would have applied to past violations as well.¹⁹² While this type of application would be ideal, its chance of passing into law is slim. Legislatures would receive political backlash for flooding the courts with criminal defendants. Thus, despite this moral failure to amend past wrongs, legislation would be more likely to pass both the House and the Senate if it applied only to cases after the law was ratified. Considering these flaws, without any discussion or debate on the matter, the *Avena* Act failed to exit the House Committee of the Judiciary.

¹⁸⁹ U.S. CONST. art. VI, cl. 2.

¹⁹⁰ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 506 (2008).

¹⁹¹ H.R. 6481, 110th Cong. (2008).

¹⁹² *Id.* § 2(c).

The CNCA, introduced by Senator Leahy, was the second law attempting to implement Article 36 of the Vienna Convention.¹⁹³ This law did a good job of incorporating the specific language of the treaty into legislation. The statute also provided limited relief to defendants on death row if they could prove that the violation of their Article 36 rights resulted in prejudice.¹⁹⁴ Of all the past proposed legislation, the CNCA was the closest to directly implementing the Vienna Convention and the ICJ's *Avena* decision. *Avena* required the United States to provide review and reconsideration for fifty-one Mexican nationals on death row and held that it expected the United States to provide such a remedy to foreign defendants similarly situated.¹⁹⁵ This legislation was not a direct application of *Avena* since it required the defendants to show that the violation resulted in actual prejudice before they could obtain relief. The CNCA also placed more limitations on who could seek relief since a defendant's habeas petition had to be filed within one year of the statute's enactment or on the date the government's impediment to filing the petition was removed, whichever was later in time.¹⁹⁶ Unlike the *Avena Act*, this statute did not apply retroactively.¹⁹⁷

Despite the positives of the CNCA, this act never reported out into the Senate for a vote. This piece of legislation accommodated both sides of the political aisle. It called for consular notification and access to be given to all foreign detainees; yet, for violations it limited the relief to death row defendants and further limited the time-frame available for relief. It appeared to be an adequate compromise.¹⁹⁸ It is possible that the legislation failed to go for a vote due to outside circumstances. Leal Garcia, a foreign defendant who was convicted of kidnapping, raping, and killing a teenage girl, sought a stay of execution on account of the violation of his rights under the Vienna Convention.¹⁹⁹ The stay was denied by the Supreme Court on July 7, 2011, in a 5–4 decision across conservative-liberal lines.²⁰⁰ The hearing on the CNCA was held twenty days later.²⁰¹ After such a politically and emotionally charged case, it is not surprising that the CNCA failed to go for a vote. Conservative constituents likely viewed such legislation as unjust for allowing violent criminals relief based on what they perceived to be mere

¹⁹³ S. 1194, 112th Cong. (2011).

¹⁹⁴ *Id.* § 4(a)(3).

¹⁹⁵ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 65–66 (Mar. 31).

¹⁹⁶ S. 1194, 112th Cong. § 4(a)(4) (2011).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* § 4.

¹⁹⁹ *See Garcia v. Texas*, 564 U.S. 940 (2011).

²⁰⁰ *Id.* at 943.

²⁰¹ *See Hearings*, *supra* note 141. The hearing was held on July 27, 2011.

technicalities. As a result, the legislation failed and Senator Leahy had to try a different route.

One year later, suitable legislation was placed into the Senate appropriations act.²⁰² The provision was basically the CNCA with some revisions. As noted above, the provision set aside the Vienna Convention definition since the committee viewed the Vienna Convention as self-executing.²⁰³ The provision additionally described the effect of prior adjudication, allowed federal courts one year to respond to petitions, allowed cases to be referred to federal magistrates, and required defendants to make an initial showing to qualify for review.²⁰⁴ The revisions were likely made in response to criticisms of the CNCA, but as noted, there is no documented discussion of this provision. The alterations to the CNCA restricted a defendant's ability to petition for review even further by requiring an initial showing, but it also demanded the cases be handled within a specific time. The one-year limitation seems short considering the number of cases already on the federal docket, but it reiterates that review of these cases should be top priority. Nonetheless, this provision also failed to pass into law. It was too restrictive on the number of foreign defendants who could receive relief, and it demanded an implausible time line for review.

In 2013, the exact legislation was again placed in the Senate's appropriations bill, but the House removed the provision.²⁰⁵ In 2014, the same thing occurred; the provision was placed in the Senate's appropriations bill and rejected by the House.²⁰⁶ The *Federal Rules of Criminal Procedure*, however, were updated in 2014 to aid in the nation's cause for bringing the United States into full compliance with its international obligations.²⁰⁷ The changes to the Rules were relieving for those who have been pushing for compliance for over a decade, but those amendments were not enough. They only ensured a foreign defendant is notified of his right to contact his consulate if he appears before a federal magistrate judge. Such notification is certainly an improvement, but it leaves thousands of foreign defendants in the same situation: detained without any knowledge about their rights to receive consular assistance from their home country.

Since the *Federal Rules of Criminal Procedure* were updated in 2014, there has not been any proposed federal legislation to bring the United States

²⁰² S. 3241, 112th Cong. § 7090 (2012).

²⁰³ S. REP. NO. 112-72, at 68–69 (2012), <https://www.gpo.gov/fdsys/pkg/CRPT-112srpt172/pdf/CRPT-112srpt172.pdf>.

²⁰⁴ S. 3241, 112th Cong. § 7090(a) (2012).

²⁰⁵ S. 1372, 113th Cong. § 7083 (2013).

²⁰⁶ S. 2499, 113th Cong. § 7085 (2014).

²⁰⁷ FED. R. CRIM. P. 58(b)(2)(H).

into compliance. Whether Senator Leahy has given up or is working on a new piece of legislation, the necessity of such legislation grows stronger. It is important for Congress to realize that this bill should not be controversial amongst party lines. This piece of legislation is needed to ensure the entire nation's legitimacy in the eyes of the international community, and most importantly, it is essential to ensure safety for American citizens by protecting their reciprocal rights abroad. Out of every piece of legislation proposed, the CNCA comes the closest to bringing the United States into compliance. Therefore, this Note recommends that Congress reconsider and pass legislation, like the CNCA, now that the American public's climate of opinion is not as heated as it was about Leal Garcia. Once Americans are able to comprehend that this legislation will help protect them abroad, there is no reason it should not pass into law.

The only valid alternative to a congressional act would be that each state create their own legislation. It would be more beneficial to the nation's interests even if only some of the states could make it possible. Any number is better than zero. However, the state laws presently in place are not strong enough to bring the United States into compliance with Article 36 of the Vienna Convention. If the only option is to leave the task up to the individual states, the states should try to follow the outlined federal scheme as closely as possible. Unfortunately, state legislatures may be the only path because of deadlock in Congress. Nobody can know with certainty the likelihood that all fifty states would pass legislation.

Cases will continue to be appealed, and review and reconsideration as demanded by *Avena* will continue to be denied until something is sealed into law. The United States would not stand for other countries to treat its citizens in this manner. It is time for America to take a stand and give foreign defendants the rights our nation agreed to when it signed the Vienna Convention almost half a century ago.

VI. CONCLUSION

To conclude, the United States needs to make all efforts possible to comply with its obligations under Article 36 of the Vienna Convention. Consular relations between nations have been around for centuries, and the importance has become even more apparent as technology has made international travel easier. Nothing is worse than being detained or arrested in another country where one does not speak the language or understand the laws. The United States needs to make an example for other nations to follow. Americans have elected senators and congressman into office to put forth legislation in the people's best interest, and this legislation is necessary.

The only way the United States can begin to patch its relations with other nations and protect U.S. citizens traveling abroad is through sufficient legislation passed by Congress, which will ensure all fifty states comply with Article 36 of the Vienna Convention.