U.S. Department of Justice
Washington, DC 20530

Supplemental Statement
Pursuant to Section 2 of the Foreign Agents Registration Act of 1938, as amended

OMB NO.1124-0002

For Six Month Period Ending ~~10/31/2009~~ 4/30/2010
(Insert date)

I - REGISTRANT

1. (a) Name of Registrant
The Raben Group, LLC

(b) Registration No.
5932

(c) Business Address(es) of Registrant
1640 Rhode Island Ave NW Ste 600
Washington DC 20036

2. Has there been a change in the information previously furnished in connection with the following:

(a)	If an individual:			
	(1) Residence address(es)	Yes ☐	No ☐	
	(2) Citizenship	Yes ☐	No ☐	
	(3) Occupation	Yes ☐	No ☐	
(b)	If an organization:			
	(1) Name	Yes ☐	No ☒	
	(2) Ownership or control	Yes ☐	No ☒	
	(3) Branch offices	Yes ☐	No ☒	

(c) Explain fully all changes, if any, indicated in items (a) and (b) above.

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IF THE REGISTRANT IS AN INDIVIDUAL, OMIT RESPONSE TO ITEMS 3, 4 AND 5(a).

3. If you have previously filed Exhibit C[1], state whether any changes therein have occurred during this 6 month reporting period.
Yes ☐ No ☒

If yes, have you filed an amendment to the Exhibit C? Yes ☐ No ☐

If no, please attach the required amendment.

1 The Exhibit C, for which no printed form is provided, consists of a true copy of the charter, articles of incorporation, association, and by laws of a registrant that is an organization. (A waiver of the requirement to file an Exhibit C may be obtained for good cause upon written application to the Assistant Attorney General, National Security Division, U.S. Department of Justice, Washington, DC 20530.)

4. (a) Have any persons ceased acting as partners, officers, directors or similar officials of the registrant during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Position	Date connection ended

(b) Have any persons become partners, officers, directors or similar officials during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Residence address	Citizenship	Position	Date assumed

5. (a) Has any person named in item 4(b) rendered services directly in furtherance of the interests of any foreign principal? Yes ☐ No ☐ Inapplicable

If yes, identify each such person and describe his service.

(b) Have any employees or individuals, who have filed a short form registration statement, terminated their employment or connection with the registrant during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Position or connection	Date terminated

(c) During this 6 month reporting period, has the registrant hired as employees or in any other capacity, any persons who rendered or will render services to the registrant directly in furtherance of the interests of any foreign principal(s) in other than a clerical or secretarial, or in a related or similar capacity? Yes ☐ No ☒

If yes, furnish the following information:

Name	Residence address	Citizenship	Position	Date assumed

6. Have short form registration statements been filed by all of the persons named in Items 5(a) and 5(c) of the supplemental statement? Yes ☐ No ☐ Inapplicable

If no, list names of persons who have not filed the required statement.

II - FOREIGN PRINCIPAL

7. Has your connection with any foreign principal ended during this 6 month reporting period?
Yes ☐ No ☒

If yes, furnish the following information:

Name of foreign principal | Date of termination

8. Have you acquired any new foreign principal[2] during this 6 month reporting period?
Yes ☐ No ☒

If yes, furnish the following information:

Name and address of foreign principal | Date acquired

9. In addition to those named in Items 7 and 8, if any, list foreign principals[2] whom you continued to represent during the 6 month reporting period.

Carlos Quesnel, Head of Section, Legal Affairs, Embassy of Mexico
Carlos Sada, Head of Section, Congressional Affairs, Embassy of Mexico
Cristina Oropeza, Legal Affairs, Embassy of Mexico

10. **EXHIBITS A AND B**

(a) Have you filed for each of the newly acquired foreign principals in Item 8 the following:

Exhibit A[3] Yes ☐ No ☐ Inapplicable
Exhibit B[4] Yes ☐ No ☐ Inapplicable

If no, please attach the required exhibit.

(b) Have there been any changes in the Exhibits A and B previously filed for any foreign principal whom you represented during the 6 month period? Yes ☐ No ☒

If yes, have you filed an amendment to these exhibits? Yes ☐ No ☐ Inapplicable

If no, please attach the required amendment.

2 The term "foreign principal" includes, in addition to those defined in Section 1(b) of the Act, an individual organization any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign government, foreign political party, foreign organization or foreign individual. (See Rule 100(a) (9).) A registrant who represents more than one foreign principal is required to list in the statements he files under the Act only those principals for whom he is not entitled to claim exemption under Section 3 of the Act. (See Rule 208.)

3 The Exhibit A, which is filed on Form NSD-3 (Formerly CRM-157), sets forth the information required to be disclosed concerning each foreign principal.

4 The Exhibit B, which is filed on Form NSD-4 (Formerly CRM-155), sets forth the information concerning the agreement or understanding between the registrant and the foreign principal.

III - ACTIVITIES

11. During this 6 month reporting period, have you engaged in any activities for or rendered any services to any foreign principal named in Items 7, 8, and 9 of this statement? Yes ☒ No ☐

If yes, identify each such foreign principal and describe in full detail your activities and services:

Attachment A

12. During this 6 month reporting period, have you on behalf of any foreign principal engaged in political activity[5] as defined below? Yes ☒ No ☐

If yes, identify each such foreign principal and describe in full detail all such political activity, indicating, among other things, the relations, interests and policies sought to be influenced and the means employed to achieve this purpose. If the registrant arranged, sponsored or delivered speeches, lectures or radio and TV broadcasts, give details as to dates and places of delivery, names of speakers and subject matter.

Attachment B

13. In addition to the above described activities, if any, have you engaged in activity on your own behalf which benefits any or all of your foreign principals? Yes ☐ No ☒

If yes, describe fully.

5 The term "political activities" means any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

IV - FINANCIAL INFORMATION

14. (a) **RECEIPTS -MONIES**

During this 6 month reporting period, have you received from any foreign principal named in Items 7, 8, or 9 of this statement, or from any other source, for or in the interests of any such foreign principal, any contributions, income or money either as compensation or otherwise? Yes ☒ No ☐

If no, explain why.

If yes, set forth below in the required detail and separately for each foreign principal an account of such monies[6].

Date	From whom	Purpose	Amount
Attachment C			

$ 90,295.52
Total

(b) **RECEIPTS – FUND RAISING CAMPAIGN**

During this 6 month reporting period, have you received, as part of a fund raising campaign[7], any money on behalf of any foreign principal named in items 7, 8, or 9 of this statement? Yes ☐ No ☒

If yes, have you filed an Exhibit D[8] to your registration? Yes ☐ No ☐ Inapplicable

If yes, indicate the date the Exhibit D was filed. Date _____

(c) **RECEIPTS – THINGS OF VALUE**

During this 6 month reporting period, have you received any thing of value[9] other than money from any foreign principal named in Items 7, 8, or 9 of this statement, or from any other source, for or in the interests of any such foreign principal? Yes ☐ No ☒

If yes, furnish the following information:

Name of foreign principal	Date received	Description of thing of value	Purpose

6, 7 A registrant is required to file an Exhibit D if he collects or receives contributions, loans, money, or other things of value for a foreign principal, as part of a fund raising campaign. (See Rule 201(e).)

8 An Exhibit D, for which no printed form is provided, sets forth an account of money collected or received as a result of a fund raising campaign and transmitted for a foreign principal.

9 Things of value include but are not limited to gifts, interest free loans, expense free travel, favored stock purchases, exclusive rights, favored treatment over competitors, "kickbacks," and the like.

15. (a) **DISBURSEMENTS – MONIES**
During this 6 month reporting period, have you

(1) disbursed or expended monies in connection with activity on behalf of any foreign principal named in Items 7, 8, or 9 of this statement? Yes ☒ No ☐

(2) transmitted monies to any such foreign principal? Yes ☐ No ☒

If no, explain in full detail why there were no disbursements made on behalf of any foreign principal.

If yes, set forth below in the required detail and separately for each foreign principal an account of such monies, including monies transmitted, if any, to each foreign principal.

Date	To whom	Purpose	Amount
Attachment D			

Total

(b) **DISBURSEMENTS – THINGS OF VALUE**

During this 6 month reporting period, have you disposed of anything of value[10] other than money in furtherance of or in connection with activities on behalf of any foreign principal named in Items 7, 8, or 9 of this statement?

Yes ☐ No ☒

If yes, furnish the following information:

Date disposed	Name of person to whom given	On behalf of what foreign principal	Description of thing of value	Purpose

(c) **DISBURSEMENTS – POLITICAL CONTRIBUTIONS**

During this 6 month reporting period, have you from your own funds and on your own behalf either directly or through any other person, made any contributions of money or other things of value[11] in connection with an election to any political office, or in connection with any primary election, convention, or caucus held to select candidates for political office?

Yes ☒ No ☐

If yes, furnish the following information:

Date	Amount or thing of value	Name of political organization	Name of candidate
05/05/2009	$500.00	Martin Heinrich for Congress	Martin Heinrich
05/19/2009	$500.00	Clyburn for Congress	Jim Clyburn
05/04/2009	$201.50	To Your Taste Catering	Barney Frank
05/21/2009	$ 56.61	Bagels & Baguettes	Dan Maffei
05/14/2009	$182.50	To Your Taste Catering	Sheldon Whitehouse
05/04/2009	$250.00	Evan Bayh for Senate	Evan Bayh
07/12/2009	$5,000.00	Dem. Cong. Campaign Committee	DCCC
07/22/2009	$300.00	Congressman Peter Welch	Peter Welch
07/29/2009	$300.00	Anthony Woods for Congress	Anthony Woods
09/08/2009	$1,225.00	Bobby Clark	Bobby Clark
09/12/2009	$500.00	Marhta Coakley for Senate	Martha Coakley
09/30/2009	$100.00	Rick Minor (Florida State)	Rick Minor
09/30/2009	$250.00	Dan Maffei (New York Federal)	Dan Maffei
09/30/2009	$200.00	Mark Kean	Mark Kean
09/30/2009	$150.00	Greg Werkheiser (VA State)	Greg Werkheiser
07/07/2009	$403.00	To Your Taste Catering	Deval Patrick (For Gov Mass)
07/21/2009	$ 50.00	Bagels & Baguettes	Adam Schiff for Congress
07/22/2009	$176.00	To Your Taste Catering	Barbara Boxer
09/15/2009	$ 87.53	To Your Taste Catering	Hank Johnson
09/17/2009	$105.00	Corner Bakery	Chris Craft
09/25/2009	$ 60.29	Bagels & Baguettes	Raj Goyle

10, 11 Things of value include but are not limited to gifts, interest free loans, expense free travel, favored stock purchases, exclusive rights, favored treatment over competitors, "kickbacks" and the like.

V - INFORMATIONAL MATERIALS

16. During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials[12]?
Yes ☒ No ☐

IF YES, RESPOND TO THE REMAINING ITEMS IN SECTION V.

17. Identify each such foreign principal.
Embassy of Mexico

18. During this 6 month reporting period, has any foreign principal established a budget or allocated a specified sum of money to finance your activities in preparing or disseminating informational materials? Yes ☐ No ☒

If yes, identify each such foreign principal, specify amount, and indicate for what period of time.

19. During this 6 month reporting period, did your activities in preparing, disseminating or causing the dissemination of informational materials include the use of any of the following:

☐ Radio or TV broadcasts ☐ Magazine or newspaper articles ☐ Motion picture films ☒ Letters or telegrams
☐ Advertising campaigns ☐ Press releases ☐ Pamphlets or other publications ☐ Lectures or speeches
☐ Internet ☐ Other (specify) _____

20. During this 6 month reporting period, did you disseminate or cause to be disseminated informational materials among any of the following groups:

☐ Public officials ☐ Newspapers ☐ Libraries
☒ Legislators ☐ Editors ☐ Educational institutions
☐ Government agencies ☐ Civic groups or associations ☐ Nationality groups
☐ Other (specify) _____

21. What language was used in the informational materials:

☒ English ☐ Other (specify) _____

22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period? Yes ☐ No ☒ Attached

23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?
Yes ☒ No ☐

12 The term informational materials includes any oral, visual, graphic, written, or pictorial information or matter of any kind, including that published by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or any means or instrumentality of interstate or foreign commerce or otherwise. Informational materials disseminated by an agent of a foreign principal as part of an activity in itself exempt from registration, or an activity which by itself would not require registration, need not be filed pursuant to Section 4(b) of the Act.

VI – EXECUTION

In accordance with 28 U.S.C. §1746, the undersigned swear(s) or affirm(s) under penalty of perjury that he/she has (they have) read the information set forth in this registration statement and the attached exhibits and that he/she is (they are) familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her (their) knowledge and belief, except that the undersigned make(s) no representation as to the truth or accuracy of the information contained in the attached Short Form Registration Statement(s), if any, insofar as such information is not within his/her (their) personal knowledge.

(Date of signature)	(Type or print name under each signature[13])
05/24/2010	Robert Raben, President

13 This statement shall be signed by the individual agent, if the registrant is an individual, or by a majority of those partners, officers, directors or persons performing similar functions, if the registrant is an organization, except that the organization can, by power of attorney, authorize one or more individuals to execute this statement on its behalf.

UNITED STATES DEPARTMENT OF JUSTICE
FARA REGISTRATION UNIT
NATIONAL SECURITY DIVISION
WASHINGTON, D.C. 20530

NOTICE

Please answer the following questions and return this sheet in triplicate with your Supplemental Statement:

1. Is your answer to Item 16 of Section V (Informational Materials – page 8 of Form NSD-2, formerly Form CRM-154 Supplemental Statement):

YES YES or NO_____

(If your answer to question 1 is "yes" do not answer question 2 of this form.)

2. Do you disseminate any material in connection with your registration:

YES_____ or NO_____

(If your answer to question 2 is "yes" please forward for our review copies of all material including: films, film catalogs, posters, brochures, press releases, etc. which you have disseminated during the past six months.)

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CRM/ISS/REGISTRATION UNIT

Signature

5/28/2010
Date

Robert Raben
Please type or print name of
Signatory on the line above

President
Title

Attachment A, Activities

Date	Participants	Venue	Description
11/20/2009	Katharine Huffman, Sarah Cleveland, Counselor on International Law (Office of the Legal Adviser, US State Department)	Washington,	Phone call regarding strategy for introduction and movement of Avena implementation legislation
11/20/2009	Robert Raben, Katharine Huffman, Kimberly Goulart, Keenan Keller, Counsel, Perry Apelbaum, Staff Director/Chief Counsel, Jesselyn McCurdy, Counsel, Bobby Vassar, Chief Counsel, Tom Jawetz, Counsel, Ur Jaddou, Chief Counsel (House Judiciary Committee), Julia Massimino, Chief of Staff (Rep. Berman), Daniel Silverberg, Counsel (House Foreign Affairs Committee)	Washington,	In-person meeting regarding strategy for introduction and movement of Avena implementation legislation
11/20/2009	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Phone call regarding strategy for introduction and movement of Avena implementation legislation
12/1/2009	Katharine Huffman, Patty First, Kimberly Goulart, Juan Valdivieso, Counsel and Anya McMurray, Counsel (Sen. Leahy)	Washington,	Email regarding strategy for introduction and movement of Avena implementation legislation, and regarding response to Seate inquiry letter to the Administration
12/4/2009	Katharine Huffman, Patty First, Kimberly Goulart, Tracy Jacobson, Counsel (Rep. Delahunt)	Washington,	In-person meeting regarding strategy for introduction and movement of Avena implementation legislation
12/11/2009	Katharine Huffman, Sarah Cleveland, Counselor on International Law (Office of the Legal Adviser, US State Department)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
1/12/2010	Katharine Huffman, Karen Stevens, (Civil Division, DOJ)	Washington,	Phone call regarding response to Senate inquiry letter to the Administration
2/19/2010	Katharine Huffman, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding relevant hearing and strategy on Avena implementation legislation
2/23/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
2/25/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
2/25/2010	Patty First, Kimberly Goulart, Julia Massimino, Chief of Staff (Rep. Berman), Davida Walsh, Counsel and Tracy Jacobson, Counsel (Rep. Delahunt), Jesselyn McCurdy, Counsel (Rep. Conyers)	Washington,	Email regarding response to Senate inquiry letter to the Administration

Attachment A, Activities

2/25/2010	Patty First, Kimberly Goulart, Dan Restrepo (NSC, Administration)	Washington,	Email regarding response to Senate inquiry letter to the Administration
2/25/2010	Patty First, Davida Walsh, Counsel (Rep. Delahunt)	Washington,	Email regarding strategy for introduction and movement of Avena implementation legislation
3/8/2010	Katharine Huffman, Robert Raben, Mona Sutphen (White House)	Washington,	Phone call regarding response to Senate inquiry letter to the Administration
3/10/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/17/2010	Katharine Huffman, Sarah Cleveland, Counselor on International Law (Office of the Legal Adviser, US State Department) and Kathleen Hooke (? US State Department)	Washington,	Email regarding response to Senate inquiry letter to the Administration.
3/17/2010	Katharine Huffman, Brian Egan, Deputy Legal Adviser (US State Department) and Mariano-Florentino Cuellar, Special Assistant to the President for Justice and Regulatory Policy (Domestic Policy Council)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
3/19/2010	Kimbely Goulart, Juan Valdivieso, Counsel (Sen. Leahy)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/19/2010	Kimberly Goulart, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/24/2010	Patty First, Lara Flint, Counsel (Sen. Feingold)	Washington,	Email regarding response to Senate inquiry letter to the Administration.
3/26/2010	Kimberly Goulart, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/26/2010	Kimberly Goulart, Juan Valdivieso, Counsel (Sen. Leahy)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/26/2010	Katharine Huffman, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation

Attachment A, Activities

4/5/2010	Katharine Huffman, Patty First, Kimberly Goulart, Keenan Keller, Counsel, Perry Apelbaum, Staff Director/Chief Counsel, Jesselyn McCurdy, Counsel, Bobby Vassar, Chief Counsel, Tom Jawetz, Counsel, Ur Jaddou, Chief Counsel, Ted Kalo, General Counsel, Reuben Goetzl, Staff Assistant, David Lachmann, Chief of Staff (House Judiciary Committee), Julia Massimino, Chief of Staff (Rep. Berman), Daniel Silverberg, Counsel (House Foreign Affairs Committee)	Washington,	Email regarding DOJ's response to the Senate inquiry letter and strategy on Avena implementation legislation.
4/8/2010	Katharine Huffman, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/8/2010	Katharine Huffman, Karen Stevens, Counsel to the Assistant Attorney General (Civil Division, DOJ)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/8/2010	Katharine Huffman, Ron Weich, Assistant Attorney General (DOJ)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/19/2010	Katharine Huffman, Kimberly Goulart, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/19/2010	Katharine Huffman, Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Phone call regarding response to Senate inquiry letter to the Administration.
4/23/2010	Katharine Huffman, Kimberly Goulart, Marni Karlin, Counsel (Sen. Kohl)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
4/23/2010	Katharine Huffman, Jesselyn McCurdy, Counsel, David Lachmann, Chief of Staff, Keenan Keller, Counsel (House Judiciary Committee)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
4/26/2010	Katharine Huffman, Kimberly Goulart, Lara Flint, Counsel (Sen. Feingold)	Washington,	Email regarding State Department's response to the Senate inquiry letter and strategy on Avena implementation legislation
4/26/2010	Katharine Huffman, Kimberly Goulart, Kerri Talbot, Counsel (Sen. Menendez)	Washington,	Phone call regarding the DOJ/State Department responses to the Senate inquiry letter and strategy on Avena implementation legislation.

Attachment B, Political Activities

Date	Participants	Venue	Description
11/20/2009	Robert Raben, Katharine Huffman, Kimberly Goulart, Keenan Keller, Counsel, Perry Apelbaum, Staff Director/Chief Counsel, Jesselyn McCurdy, Counsel, Bobby Vassar, Chief Counsel, Tom Jawetz, Counsel, Ur Jaddou, Chief Counsel (House Judiciary Committee), Julia Massimino, Chief of Staff (Rep. Berman), Daniel Silverberg, Counsel (House Foreign Affairs Committee)	Washington,	In-person meeting regarding strategy for introduction and movement of Avena implementation legislation
11/20/2009	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Phone call regarding strategy for introduction and movement of Avena implementation legislation
12/1/2009	Katharine Huffman, Patty First, Kimberly Goulart, Juan Valdivieso, Counsel and Anya McMurray, Counsel (Sen. Leahy)	Washington,	Email regarding strategy for introduction and movement of Avena implementation legislation, and regarding response to Seate inquiry letter to the Administration
12/4/2009	Katharine Huffman, Patty First, Kimberly Goulart, Tracy Jacobson, Counsel (Rep. Delahunt)	Washington,	In-person meeting regarding strategy for introduction and movement of Avena implementation legislation
2/19/2010	Katharine Huffman, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding relevant hearing and strategy on Avena implementation legislation
2/23/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
2/25/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
2/25/2010	Patty First, Kimberly Goulart, Julia Massimino, Chief of Staff (Rep. Berman), Davida Walsh, Counsel and Tracy Jacobson, Counsel (Rep. Delahunt), Jesselyn McCurdy, Counsel (Rep. Connyers)	Washington,	Email regarding response to Senate inquiry letter to the Administration
2/25/2010	Patty First, Kimberly Goulart, Dan Restrepo (NSC, Administration)	Washington,	Email regarding response to Senate inquiry letter to the Administration
2/25/2010	Patty First, Davida Walsh, Counsel (Rep. Delahunt)	Washington,	Email regarding strategy for introduction and movement of Avena implementation legislation
3/8/2010	Katharine Huffman, Robert Raben, Mona Sutphen (White House)	Washington,	Phone call regarding response to Senate inquiry letter to the Administration

Attachment B, Political Activities

3/10/2010	Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/17/2010	Katharine Huffman, Brian Egan, Deputy Legal Adviser (US State Department) and Mariano-Florentino Cuellar, Special Assistant to the President for Justice and Regulatory Policy (Domestic Policy Council)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
3/19/2010	Kimbely Goulart, Juan Valdivieso, Counsel (Sen. Leahy)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/19/2010	Kimberly Goulart, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/24/2010	Patty First, Lara Flint, Counsel (Sen. Feingold)	Washington,	Email regarding response to Senate inquiry letter to the Administration.
3/26/2010	Kimberly Goulart, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/26/2010	Kimberly Goulart, Juan Valdivieso, Counsel (Sen. Leahy)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
3/26/2010	Katharine Huffman, Alvaro Bedoya, Counsel (Sen. Franken)	Washington,	Email regarding relevant hearing and strategy on Avena implementation legislation
4/5/2010	Katharine Huffman, Patty First, Kimberly Goulart, Keenan Keller, Counsel, Perry Apelbaum, Staff Director/Chief Counsel, Jesselyn McCurdy, Counsel, Bobby Vassar, Chief Counsel, Tom Jawetz, Counsel, Ur Jaddou, Chief Counsel, Ted Kalo, General Counsel, Reuben Goetzl, Staff Assistant, David Lachmann, Chief of Staff (House Judiciary Committee), Julia Massimino, Chief of Staff (Rep. Berman), Daniel Silverberg, Counsel (House Foreign Affairs Committee)	Washington,	Email regarding DOJ's response to the Senate inquiry letter and strategy on Avena implementation legislation.
4/8/2010	Katharine Huffman, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/8/2010	Katharine Huffman, Ron Weich, Assistant Attorney General (DOJ)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.
4/19/2010	Katharine Huffman, Kimberly Goulart, Lara Flint, Counsel (Sen. Feingold)	Washington,	Phone call regarding DOJ's response to the Senate inquiry letter.

Attachment B, Political Activities

4/19/2010	Katharine Huffman, Kimberly Goulart, Andrew Keller, Dep. Chief Counsel (Sen. Kerry)	Washington,	Phone call regarding response to Senate inquiry letter to the Administration.
4/23/2010	Katharine Huffman, Kimberly Goulart, Marni Karlin, Counsel (Sen. Kohl)	Washington,	In-person discussion regarding strategy on Avena implementation language and response to Senate inquiry letter to the Administration
4/26/2010	Katharine Huffman, Kimberly Goulart, Lara Flint, Counsel (Sen. Feingold)	Washington,	Email regarding State Department's response to the Senate inquiry letter and strategy on Avena implementation legislation
4/26/2010	Katharine Huffman, Kimberly Goulart, Kerri Talbot, Counsel (Sen. Menendez)	Washington,	Phone call regarding the DOJ/State Department responses to the Senate inquiry letter and strategy on Avena implementation legislation.

Attachment C
The Raben Group, #5932
Receipts

The Raben Group has a formal written contract (see Exhibit B) with kuykendall & Associates, who directs and supervises our efforts on behalf of the foreign principal. The Raben Group is compensated for its services by funds provided to Kuykendall & Associates by the Government of Mexico.

Name of Foreign Principal	Date	Purpose	Amount
Kuykendall & Associates	11/24/2009	Legislative Services	15,000.00
		Taxis, 15 Trips	249.75
Kuykendall & Associates	12/17/2009	Legislative Services	15,000.00
Kuykendall & Associates	01/20/2010	Legislative Services	15,000.00
		Taxis, 16 Trips	196.00
Kuykendall & Associates	02/24/2010	Legislative Services	15,000.00
		Taxi, 1 Trip	13.00
Kuykendall & Associates	03/17/2010	Legislative Services	15,000.00
		Taxis, 5 Trips	45.27
Kuykendall & Associates	04/29/2010	Legislative Services	15,000.00
		Taxi, 1 Trip	15.00
Total			**90,519.02**

Attachment D
The Raben Group, #5932
Disbursements

The Raben Group has a formal written contract with kuykendall & Associates, who directs and supervises our efforts on behalf of the foreign principal. The Raben Group is compensated for its services by funds provided to Kuykendall & Associates by the Government of Mexico.

Name of Foreign Principal	Date	Purpose	Amount
Kuykendall & Associates	06/01/2009	Meal, 4/14, Katharine Huffman	4.02
Kuykendall & Associates	06/01/2009	Taxis, 15 Trips	249.75
Kuykendall & Associates	06/01/2009	Taxis, 16 Trips	196.00
Kuykendall & Associates	06/01/2009	Taxi, 1 Trip	13.00
Kuykendall & Associates	06/01/2009	Taxi, 5 Trips	45.27
Kuykendall & Associates	07/08/2009	Taxi, 1 Trip	15.00
			523.04

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hillary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We write to express our deep concern over the ongoing failure of the United States to abide by the decision of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, and to urge you to promote congressional passage of legislation implementing that binding judgment. As you know, the ICJ concluded in *Avena* that the United States must provide effective "review and reconsideration" of the convictions and sentences of a group of Mexican nationals who were denied their consular treaty rights, in order to determine in each case if the denial of access to consular assistance was prejudicial. Five years after this binding decision, it is unconscionable that the United States continues to ignore its obligations under *Avena* – particularly after assuring the ICJ more than a year ago that it fully intends to meet those requirements.

When the United States unconditionally ratified the Vienna Convention on Consular Relations (VCCR) forty years ago, it promised to inform all detained foreign nationals of their rights to consular notification and communication "without delay" and to facilitate timely consular access to them. At the same time, the United States voluntarily consented to the ICJ's jurisdiction to adjudicate any disputes over non-compliance by ratifying the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes. These obligations were applicable at the time of the ICJ's *Avena* decision; there should be little debate about the unremarkable proposition that the United States must abide by its international commitments if it expects other nations to do so. Adhering to the international rule of law requires, quite simply, abiding by our treaty obligation to give full effect to the compulsory decision of the ICJ in the *Avena* case.

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

President George W. Bush commendably attempted to enforce the *Avena* requirement of "review and reconsideration," recognizing that it was clearly in the national interest to comply with the ICJ's compulsory decision. However, the Supreme Court subsequently held in *Medellín v. Texas* that the Optional Protocol is not a self-executing treaty that would have binding effect in the domestic courts and that the President did not have the authority to enforce the ICJ decision unilaterally. The Supreme Court further held that the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. We wholeheartedly agree with the *Medellín* Court that the grounds for full U.S. compliance with the requirements of *Avena* are plainly compelling. Because only Congress can give domestic effect to the *Avena* Judgment, we encourage you in the strongest terms to propose legislation to Congress that would accomplish this goal without further delay.

Throughout your careers you have both been leaders in preserving the rule of law and protecting human rights, and we welcome the Administration's reinvigoration of the United States' commitment to abide by its international obligations. We firmly believe that one of the most clear – and pressing – ways of demonstrating that commitment is by working with Congress to enact legislation giving full effect to the *Avena* decision.

Thank you for your immediate attention to this crucially important concern, and we look forward to your timely response.

Sincerely,

Advocates for Human Rights

American Civil Liberties Union

Amnesty International USA

The Constitution Project

Human Rights Defense Center

Human Rights First

Human Rights Watch

International Community Corrections Association

International CURE
(Citizens United for Rehabilitation of Errants)

Justice Now

Leadership Conference on Civil Rights

National Association of Criminal Defense Lawyers

National Death Row Assistance Network of CURE

Prison Legal News

Safe Streets Arts Foundation

EMBAJADA DE MÉXICO

Washington, DC
July 7, 2009

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20515

Dear Majority Leader Reid,

I write to share a serious concern that the Government of Mexico has regarding the United States' ongoing failure to meet its international legal obligation to remedy denials of prompt consular notification and access to arrested Mexican nationals as established under Article 36 of the Vienna Convention on Consular Relations (VCCR). Specifically, we are troubled by the failure to abide by the International Court of Justice's (ICJ) determination, known as the *Avena Judgment,* that the U.S. must provide review and reconsideration of the convictions and sentences of certain Mexican nationals, whose consular rights were violated.

The government of Mexico does not call into question the heinous nature of the crimes attributed to these defendants. However, the Avena judgment is about two fundamental principles: due process and due compliance with international law. As such, giving effect to it would also be a win-win for all, given that it would enable the US to ensure the safety of its nationals and interests abroad, by precluding other parties from invoking non-compliance as justification for ignoring their own international obligations.

As you know, the United States ratified the VCCR without reservations in 1969. Article 36 of this Convention requires signatory countries to provide detained foreign nationals with access to timely consular assistance, informing them "without delay" of their rights under Article 36, notifying the relevant consulate at the request of the detainee, and facilitating consular visits so that the consulate may assist foreign nationals with their legal representation. Moreover, in 1969 the U.S. voluntarily consented to the ICJ's compulsory jurisdiction to adjudge disputes regarding the interpretation or application of Article 36 when it ratified the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes.

The Government of Mexico acknowledges and appreciates the efforts of the US Executive Branch to comply with the *Avena* Judgment, mainly through the Memorandum issued on February 28, 2005, stating that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principals of comity." However, the U.S. Supreme Court, in *Medellin v. Texas*, 552 U.S. _____ (2008), held that the Executive did not have the authority to enforce ICJ decisions arising under the Optional Protocol domestically, as it was not a self-executing treaty. The Court further determined that the "responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." At the same time, the Supreme Court observed that the Executive's attempt to seek domestic implementation of *Avena* in order to "vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" was "plainly compelling".

Therefore, as only the United States Congress has the authority to give domestic effect to the ICJ's determination and in light of the forceful reasons for it to do so, the Government of Mexico respectfully requests your support so that Congress can enact legislation providing effective judicial "review and reconsideration," to determine in each case whether any of the Mexican nationals named in *Avena* suffered prejudice as a result of the failure of the detaining authorities to comply with their binding obligations under Article 36 of the VCCR.

The people of Mexico and the United States of America share a long history and a close bond. Today, our governments are working cooperatively more than ever before on critical issues of mutual interest, including curbing illegal drug and firearms trafficking and violence on our shared border. I have no doubt that if the US Congress were to act on this issue concerning Article 36 of the VCCR, it would not only comply with the Supreme Court's decision and lead the way to implementing Avena but it would send a clear message of the US commitment to fulfill its obligations as a key member of the international community.

I would like to take this opportunity to renew to you the assurances of my high esteem.

Sincerely,

Arturo Sarukhan
Ambassador of Mexico

This information is provided on behalf of the Embassy of Mexico.

The New York Times

July 18, 2009
Op-Ed Contributor

Lawlessness North of the Border

By JOHN B. BELLINGER III

Washington

PRESIDENT OBAMA has rightly emphasized America's commitment to complying with international law. It is surprising, then, that he has so far taken no steps to comply with decisions of the International Court of Justice requiring the United States to review the cases of 51 Mexicans convicted of murder in state courts who had been denied access to Mexican consular officials, in violation of American treaty obligations.

In contrast to its mishandling of detainees, the Bush administration worked conscientiously in its second term to comply with these rulings, even taking the step of ordering the states to revisit the Mexican cases, a move the Supreme Court invalidated last year. The Obama administration should support federal legislation that would enable the president to ensure that the United States lives up to its international obligations.

The international court's decisions arise from the arrest, conviction and death sentences of more than 50 Mexicans. As a party to the 1963 Vienna Convention on Consular Relations, the United States is required to inform foreigners arrested here of their right to have a consular official from their country notified of their arrest.

Unfortunately, it has proven all but impossible to guarantee that state law enforcement officials observe this obligation in all cases, and nearly all of the Mexicans at issue were never told of their Vienna Convention rights.

In 2003, Mexico filed suit against the United States in The Hague, demanding that the Mexicans' convictions be reviewed to determine whether the absence of consular notice had prejudiced the defendants' ability to hire qualified counsel. The international court sided with Mexico, ruling that the United States had violated the Vienna Convention, and ordered us to reconsider all of the convictions and death sentences.

This decision presented a serious legal and diplomatic challenge for President George W. Bush early in his second term. But Texas strongly opposed acquiescing to an international court, especially in the prominent case of José Medellín, who had been convicted of the rape and murder of two teenage girls.

Secretary of State Condoleezza Rice argued, however, that the United States was legally obligated by the United Nations Charter to follow the international court's decisions, and she emphasized the importance of complying to ensure reciprocal Vienna Convention protections for

Americans arrested overseas. (The United States, for example, took Iran to the international court for violating the Vienna Convention by denying American hostages consular access during the 1979 embassy takeover.) President Bush ultimately issued an order in February 2005 directing state courts to follow the international court's decision.

But Texas challenged the president's order and, in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the president lacked inherent constitutional authority to supersede state criminal law rules limiting appeals and that Congress had never enacted legislation authorizing him to do so.

President Bush's advisers concluded that, in an election year, Congress could not be persuaded to pass legislation extending additional rights to convicted murderers. So instead Secretary Rice and Attorney General Michael Mukasey wrote to Gov. Rick Perry of Texas reminding him of the United States' treaty obligations. Although Governor Perry agreed to support limited review in certain cases, Texas nevertheless proceeded with the execution of José Medellín.

In the meantime, after the Medellín decision, Mexico sought a new ruling from the International Court of Justice that the United States had misinterpreted the court's earlier judgment. In January — in a case I argued — the international court concluded that although the United States clearly accepted its obligation to comply with the decision, our nation had violated international law by allowing Mr. Medellín to be executed. The court reaffirmed that the remaining cases must be reviewed.

President Obama now faces the same challenges as Mr. Bush in 2005: an international obligation to review the cases of those Mexicans remaining on death rows across the country; state governments that are politically unwilling or legally unable to provide this review; and a Congress that often fails to appreciate that compliance with treaty obligations is in our national interest, not an infringement of our sovereignty.

The Obama administration's best option would be to seek narrowly tailored legislation that would authorize the president to order review of these cases and override, if necessary, any state criminal laws limiting further appeals, in order to comply with the United Nations Charter.

From closing Guantánamo to engaging with the International Criminal Court to seeking Senate approval of the Law of the Sea Convention, President Obama is confronting the recurring tension between our international interests and domestic politics. But reviewing the Mexican cases as the international court demands is not insincere global theater. On the contrary, complying with the Vienna Convention is legally required and smart foreign policy. It protects Americans abroad and confirms this country's commitment to international law.

John B. Bellinger III, a lawyer, was the legal adviser to the State Department from April 2005 to January 2009.

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Peter M. Robinson
President & CEO

November 16, 2009

2010 JUN -1 PM 2:56
CRM/ISS/REGISTRATION UNIT

The Honorable Hillary Rodham Clinton
Secretary of State
U.S. Department of State
Harry S. Truman Bldg
2201 C St., NW
Washington, DC 20520-0001

Via Fax: 202-647-2283

Dear Madam Secretary:

I am writing on behalf of the United States Council for International Business (USCIB) to support the request of Senators Leahy, Kerry, Feingold, Cardin, and Franken that you provide the Congress the Administration's recommendations on how to bring the U.S. into compliance with a decision of the International Court of Justice (ICJ) concerning the access of foreign consular officers to their nationals detained under U.S. law.

The Vienna Convention on Consular Relations, a treaty ratified by the U.S. and therefore part of U.S. law, ensures the rights: (1) of foreign nationals to consular assistance without delay, and (2) of consulates to assist their citizens abroad. The U.S. is currently in violation of its international treaty obligations in the case of certain Mexican nationals. The ICJ has determined that the U.S. can remedy these violations by granting judicial hearings to determine whether prejudice resulted from the failure to provide consular access to the Mexican nationals in the *Case Concerning Avena and Other Mexican Nationals.*

As former State Department Legal Advisor John Bellinger III pointed out in a July opinion article in the New York Times, the Bush Administration took the position that it was legally obligated to follow the ICJ's decision and ordered state courts to take such action.

However, as Mr. Bellinger points out:

> "... Texas challenged the President's order, and in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the President lacked inherent constitutional authority to supersede state criminal laws limiting appeals and that Congress had never enacted legislation authorizing him to do so."

1212 Avenue of the Americas
New York, NY 10036-1689
212.703.5046 tel
212.575.0327 fax
www.uscib.org

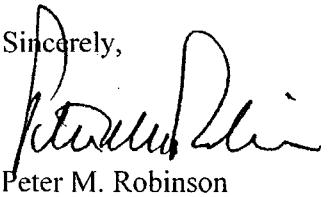
The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention. As recent history has shown, American citizens abroad are at times detained by oppressive or undemocratic regimes, and access to American consular officers may be their lifeline. The U.S. rightly insists that other countries grant American citizens the right to consular access. Overseas employees of the U.S. business community as well as all other Americans traveling or living abroad need this vital safety net. As it stands now, U.S. citizens abroad are at grave risk that other countries may not honor their reciprocal obligations.

We urge the Department of State to recommend to the Congress passage of legislation to bring the U.S. into compliance with the Vienna Convention. The inconvenience to our federal courts of granting judicial review to the Mexican nationals in the *Aventa* case and others is minor in comparison to the very real threat to the security of American businessmen and other U.S. citizens if no action is taken.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

I have sent an identical letter to the Attorney General.

Sincerely,



Peter M. Robinson

This information is provided on behalf of the Embassy of Mexico.

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Peter M. Robinson
President & CEO

November 16, 2009

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, NW
Room 5111
Washington, DC 20530

Via Fax: 202-307-6777

Dear Attorney General Holder:

I am writing on behalf of the United States Council for International Business (USCIB) to support the request of Senators Leahy, Kerry, Feingold, Cardin, and Franken that you provide the Congress the Administration's recommendations on how to bring the U.S. into compliance with a decision of the International Court of Justice (ICJ) concerning the access of foreign consular officers to their nationals detained under U.S. law.

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However, as Mr. Bellinger points out:

> "... Texas challenged the President's order, and in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the President lacked inherent constitutional authority to supersede state criminal laws limiting appeals and that Congress had never enacted legislation authorizing him to do so."

1212 Avenue of the Americas
New York, NY 10036-1689
212.703.5046 tel
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We urge the Department of State to recommend to the Congress passage of legislation to bring the U.S. into compliance with the Vienna Convention. The inconvenience to our federal courts of granting judicial review to the Mexican nationals in the *Aventa* case and others is minor in comparison to the very real threat to the security of American businessmen and other U.S. citizens if no action is taken.

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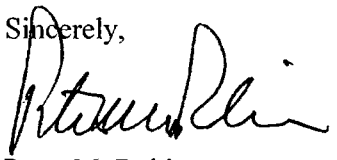
I have sent an identical letter to the Secretary of State.

Sincerely,



Peter M. Robinson

This information is provided on behalf of the Embassy of Mexico.

October 22, 2009

The Honorable John Conyers
Chairman
Committee on the Judiciary
2125 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Howard Berman
Chairman
Committee on Foreign Affairs
2170 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
2322A Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Illeana Ros-Lehtinen
Ranking Member
Committee on Foreign Affairs
B360 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers, Chairman Berman, Ranking Member Smith and Ranking Member Ros-Lehtinen:

United States citizens arrested abroad are guaranteed timely notice of their rights to communicate with a U.S. consular official by Article 36 of the Vienna Convention on Consular Relations (VCCR), a treaty the U.S. ratified without reservation in 1969. These rights help provide legal fairness in a foreign land and are critical to the safety and security of Americans who travel, live and work in other countries around the world: missionaries, Peace Corps volunteers, tourists, business travelers, foreign exchange students, members of the military, U.S. diplomats, and countless others. U.S. consular officials assist detained U.S. nationals in their efforts to navigate an unfamiliar legal system, bridge cultural or language barriers that may exist between the U.S. national and the foreign detaining authority, arrange or recommend competent local legal representation, and coordinate communications to friends and family back in the States.

Americans rely on these rights every day, and the U.S. government routinely insists that other governments provide consular access consistent with their treaty obligations. For example, in 2001 when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding consular visits to the plane's crew. Chinese authorities granted consular visits to the crew members, who were detained in China for 11 days. Throughout the tense standoff, State Department officials repeatedly cited the Convention as the basis for immediate and unobstructed access to the American citizens.

Our ability to insist that other countries provide U.S. nationals with Article 36 consular access is strengthened by our good faith efforts to do the same for arrested foreign nationals. Problematically, the U.S. has failed to comply with the International Court of Justice's (ICJ) determination that the United States must provide judicial review and reconsideration of the cases of certain Mexican nations who did not receive their rights under Article 36 of the VCCR.

See Case Concerning Avena and Other Mexican Nationals, 2004 I.C.J. 128 (March 31). It is imperative that we comply with the ICJ's decision so that we may ensure that American citizens detained abroad may also receive their VCCR rights.

The United States and 171 other countries are parties to the VCCR. Like all treaties, the VCCR is binding federal law. Simply put, Article 36 ensures the rights of foreign nationals to have access to consular assistance without delay and of consulates to assist their citizens abroad. In addition to ratifying the VCCR, the U.S. also ratified the VCCR Optional Protocol, thereby designating the ICJ as the court with jurisdiction to resolve disputes regarding the VCCR.

President Bush, understanding the implications that noncompliance with the ICJ's decision would have for our own citizens and for our relationship with Mexico, attempted to enforce the *Avena* decision through a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision . . . ." (Memorandum from President Bush to the Attorney General, 28 February 2005). However, the U.S. Supreme Court decided that the President did not have the authority to enforce ICJ decisions. The Court held that the "responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Medellin v. Texas*, 552 U.S. _____ (2008).

It is imperative that Congress enact legislation implementing the *Avena* judgment so that other governments do not invoke our non-compliance as justification for ignoring their obligations under the same treaty. Make no mistake; I hold no candle for Mexican nationals who have been convicted of heinous crimes and believe that justice should be swiftly served. That justice, however, must be served in compliance with law, including our unambiguous international agreements. The rule of law dictates that we abide by our undisputed treaty obligations, and I firmly believe doing so will help protect the American abroad detained by foreign authorities.

The minor inconvenience of providing federal judicial review of the remaining Avena cases pales in comparison to the threat to the security of American citizens abroad and the potential damage to our standing as a world leader that would result if the United States breaks its promise to provide consular notification and access. I appreciate your attention to this important issue and wish you the best.

Sincerely,

Lee H. Hamilton

cc: The Honorable Hillary Clinton,
Secretary of State
The Honorable Eric Holder

Attorney General
The Honorable John Kerry, Chairman
Senate Committee on Foreign Relations
The Honorable Richard Lugar, Ranking Member
Senate Committee on Foreign Relations
The Honorable Patrick Leahy, Chairman
Senate Committee on the Judiciary
The Honorable Jeff Sessions, Ranking Member
Senate Committee on the Judiciary

A program of the Bluhm Legal Clinic
Center for International Human Rights

December 14, 2009

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

As professors in the fields of international human rights and public international law, we commend you for scheduling a hearing regarding U.S. Implementation of Human Rights Treaties. In our opinion, this examination of the United States' commitment to treaty implementation is both timely and necessary; indeed, it is long overdue.

As part of this important review, we urge the Subcommittee to consider the United States' continued breach of its obligations under the U.N. Charter to implement the *Avena* Judgment of the International Court of Justice (ICJ).[1] We believe that Congress should promptly enact legislation that would give full effect to the *Avena* Judgment, thereby demonstrating to the world the firm commitment of the United States to implement its treaty obligations.

Respect for human rights is one of the core principles of the United Nations Charter, and the U.S. record of compliance with this instrument will be evaluated by the United Nations Human Rights Council in its Universal Periodic Review process in 2010. And, although not a human rights treaty *per se*, the Vienna Convention on Consular Relations (VCCR) serves to protect the basic human rights of detained foreign nationals worldwide—including American citizens arrested abroad. When the United States ratified this crucially important treaty in 1969, it also consented to the compulsory jurisdiction of the ICJ to resolve disputes over the interpretation or application of the VCCR. And when it ratified the U.N. Charter, the United States undertook "to comply with the decision of the International Court of Justice in any case to which it is a party."[2]

In 2004, the ICJ determined in *Avena* that the United States had violated Article 36 of the VCCR by failing to inform 51 arrested Mexican nationals without delay of their right to consular

[1] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).
[2] U.N. CHARTER, art. 94(1).

Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611-3069 U.S.A.
312.503.8579; fax 312.503.2798
cihr@law.northwestern.edu
www.law.northwestern.edu/humanrights

notification, and by failing to notify consular authorities of their detention. To remedy these violations, the ICJ determined that the United States was required to provide judicial review and reconsideration of the convictions and sentences of these nationals to determine if they were prejudiced by the denial of timely access to consular assistance. Recognizing that the rule of law required the United States to comply with *Avena*, President Bush issued a determination in 2005 that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ] decision in accordance with general principles of comity."[3]

In 2008, the U.S. Supreme Court issued its decision on the constitutionality of the presidential determination and on the judicial enforceability of *Avena*.[4] The Court noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States."[5] While recognizing the "plainly compelling" national interest in complying with the ICJ decision, the Court nevertheless held that the decision did not constitute binding federal law in the absence of Congressional action: "[T]he responsibility for transforming an international obligation . . . into domestic law falls to Congress, not the Executive."[6]

Nearly five years after *Avena*, it is unconscionable that the United States has still failed to comply with its treaty commitments to implement the ICJ decision. We must lead by example if we expect other nations to rely on binding international adjudication for the peaceful settlement of disputes. We urge you and the other Subcommittee members to rectify this failure by enacting legislation that will implement the *Avena* requirement of "review and reconsideration" in the cases addressed by the ICJ decision. Only by those means can the United States give effect to the "supreme Law of the Land" and at the same time safeguard the consular rights of the millions of American citizens who live, work or travel abroad.

Sincerely,

cc: The Honorable Tom Coburn
Ranking Republican Member

---

[3] *Medellin v. Dretke*, 544 U.S. 660, 663 (2005) (quoting George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005)).
[4] *Medellin v. Texas*, 128 S.Ct. 1346 (2008).
[5] *Id.* at 1356.
[6] *Id.* at 1351.

David Scheffer
Mayer Brown/Robert A. Helman Professor of Law
Director, Center for International Human Rights
Northwestern University School of Law

Lori Fisler Damrosch
Henry L. Moses Professor of Law and International Organization, Columbia University
Visiting Professor, Harvard Law School

David Sloss
Professor of Law
Director, Center for Global Law and Policy
Santa Clara University

Arturo J. Carrillo
Professor of Clinical Law
Director, International Human Rights Clinic
The George Washington University Law School

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
Director of Clinical Programs
University of North Carolina-Chapel Hill School of Law

Connie de la Vega
Professor of Law and Academic Director of International Programs
University of San Francisco, School of Law

Deena R. Hurwitz
Associate Professor of Law
Director, International Human Rights Law Clinic and Human Rights Program
University of Virginia School of Law

James Silk
Clinical Professor of Law, Allard K. Lowenstein International Human Rights Clinic
Executive Director, Orville H. Schell, Jr. Center for International Human Rights
Yale Law School

Ariel E. Dulitzky
Clinical Professor of Law and Director, Human Rights Clinic
The University of Texas at Austin, School of Law

Sarah H. Paoletti
Clinical Supervisor and Lecturer
Transnational Legal Clinic
University of Pennsylvania School of Law

Margaret Drew
Professor of Clinical Law
Director of Clinics and Experiential Learning
Director, Domestic Violence and Civil Protection Order Clinic
University of Cincinnati College of Law

Professor Michael Perlin
Director
International Mental Disability Law Reform Project
New York Law School

Kristine A Huskey, Esq.
Clinical Professor of Law
National Security Clinic
University of Texas School of Law

Jules Lobel
Professor of Law
University of Pittsburgh Law School

Martin S. Flaherty
Leitner Family Professor of International Human Rights
Leitner Center for International Law and Justice at Fordham Law School
Visiting Professor
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The Honorable Eric Holder
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hillary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We write to express our deep concern over the ongoing failure of the United States to abide by the decision of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, and to urge you to promote congressional passage of legislation implementing that binding judgment. As you know, the ICJ concluded in *Avena* that the United States must provide effective "review and reconsideration" of the convictions and sentences of a group of Mexican nationals who were denied their consular treaty rights, in order to determine in each case if the denial of access to consular assistance was prejudicial. Five years after this binding decision, it is unconscionable that the United States continues to ignore its obligations under *Avena* – particularly after assuring the ICJ more than a year ago that it fully intends to meet those requirements.

When the United States unconditionally ratified the Vienna Convention on Consular Relations (VCCR) forty years ago, it promised to inform all detained foreign nationals of their rights to consular notification and communication "without delay" and to facilitate timely consular access to them. At the same time, the United States voluntarily consented to the ICJ's jurisdiction to adjudicate any disputes over non-compliance by ratifying the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes. These obligations were applicable at the time of the ICJ's *Avena* decision; there should be little debate about the unremarkable proposition that the United States must abide by its international commitments if it expects other nations to do so. Adhering to the international rule of law requires, quite simply, abiding by our treaty obligation to give full effect to the compulsory decision of the ICJ in the *Avena* case.

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

President George W. Bush commendably attempted to enforce the *Avena* requirement of "review and reconsideration," recognizing that it was clearly in the national interest to comply with the ICJ's compulsory decision. However, the Supreme Court subsequently held in *Medellín v. Texas* that the Optional Protocol is not a self-executing treaty that would have binding effect in the domestic courts and that the President did not have the authority to enforce the ICJ decision unilaterally. The Supreme Court further held that the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. We wholeheartedly agree with the *Medellín* Court that the grounds for full U.S. compliance with the requirements of *Avena* are plainly compelling. Because only Congress can give domestic effect to the *Avena* Judgment, we encourage you in the strongest terms to propose legislation to Congress that would accomplish this goal without further delay.

Throughout your careers you have both been leaders in preserving the rule of law and protecting human rights, and we welcome the Administration's reinvigoration of the United States' commitment to abide by its international obligations. We firmly believe that one of the most clear – and pressing – ways of demonstrating that commitment is by working with Congress to enact legislation giving full effect to the *Avena* decision.

Thank you for your immediate attention to this crucially important concern, and we look forward to your timely response.

Sincerely,

Advocates for Human Rights

American Civil Liberties Union

Amnesty International USA

The Constitution Project

Human Rights Defense Center

Human Rights First

Human Rights Watch

International Community Corrections Association

International CURE
(Citizens United for Rehabilitation of Errants)

Justice Now

Leadership Conference on Civil Rights

National Association of Criminal Defense Lawyers

National Death Row Assistance Network of CURE

Prison Legal News

Safe Streets Arts Foundation

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Attorney General
U.S. Department of Justice
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Tuesday, 2nd February 2010

The Honorable Hillary Rodham Clinton
Secretary of State
U.S. Department of State
Harry S. Truman Building
2201 C Street, NW
Washington, DC 20520-0001

Dear Madam Secretary:

I am writing on behalf of the World Coalition Against the Death Penalty (WCADP) to urge the United States to implement the decision of the International Court of Justice in *Avena and Other Mexican Nationals.* Created in Rome in 2002, WCADP is an alliance of more than 100 NGOs, bar associations, local bodies and unions from 35 nations around the world.

The United States has an unequivocal obligation under the United Nations Charter and other international instruments to comply with *Avena* by providing the Mexican nationals affected by the judgment with review and reconsideration of their convictions and sentences. We are deeply troubled that the United States has thus far failed to implement the judgment, even though nearly six years have passed since the ICJ announced its decision.

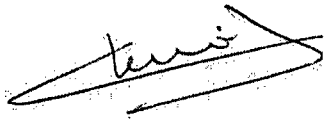
We understand that Senators Leahy, Kerry, Feingold, Cardin, and Franken have asked for the guidance of the Obama Administration regarding the means by which the United States can best comply with *Avena.* Following the decision of the U.S. Supreme Court in *Medellín v. Texas*, legislation is clearly necessary in order to enforce the ICJ's judgment in U.S. courts. We therefore urge the Department of State to recommend to Congress the passage of legislation to bring the U.S. into compliance with *Avena.*

The Mexican nationals affected by the United States' ongoing violation of international law have been convicted of capital crimes, and are deserving of the utmost in due process. One of the *Avena* plaintiffs, José Medellín, was executed without judicial review and reconsideration of his case – an outcome that we strongly condemn. Unless the United States acts quickly and decisively to promote legislation, other executions may follow.

WCADP urges the Obama Administration to exercise leadership on this issue. The international community hopes and expects that the United States will honor its international obligations, particularly when lives are at stake.

Sincerely,

For the World Coalition Against the Death Penalty,



Raphael Chenuil-Hazan,
Executive Secretary of the WCADP

This information is provided on behalf of the Embassy of Mexico.

REPORT

1. Background on the VCCR and Its Optional Protocol

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies many of the rights, privileges, immunities and functions of consulates worldwide.[1] Currently ratified by 172 nations, its provisions are so essential to modern consular functions that the U.S. Department of State views the VCCR as "widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention."[2]

The VCCR addresses a range of matters related to consular function. The Convention establishes a set of protocols for the establishment and conduct of consular relations, while also prescribing specific privileges and immunities that should attach to consular officials.[3] Such provisions are intended to "ensure the efficient performance of functions by consular posts on behalf of their respective States."[4] The Convention itself details some of the various consular functions it aims to further. These functions include, most importantly for present purposes, the protection, in the receiving nation, of the interests of the sending nation and its nationals.[5]

Article 36 of the Convention operates within the scope of this protective function, specifically addressing the consular notification rights of arrested foreign nationals. Consular officers have long possessed the right under international law to assist their co-nationals.[6] Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification and assistance in the cases of nationals detained in a foreign country. Under its terms the detaining authorities must advise the foreign national "without delay" of his rights to consular communication and notification; at the informed request of the detainee, the authorities must then notify the consulate "without delay" that "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 foreign detainee must likewise be "forwarded by the said authorities without delay." Article 36(1)(c) grants consular officers 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." Finally, Article 36(2) provides that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The assistance that consulates provide to their arrested nationals is not confined to arranging for an attorney. As the State Department has instructed U.S. law enforcement, a consular officer may also "monitor the progress of the case, and seek to ensure that the foreign

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[2] Dep't of State Telegram 40298 to the U.S. Embassy in Damascus (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145, Oxford: Clarendon Press (2d ed. 1991).

[3] Vienna Convention on Consular Relations, *supra* n. 1, at ch. I, II.

[4] *Id.* at preamble, cl. 5.

[5] *See id.* at art. V.

[6] *See* Wildenhus's Case, 120 U.S. 1, 4 (1887) (quoting Article 10, Reglements Consulaires, Bruxelles, 1857).

national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial)."[7] Access to timely consular assistance is particularly significant in cases that may result in the death penalty or other severe punishments.[8] Prompt consular involvement serves to ensure that foreign defendants properly understand and exercise their legal rights,[9] bridges cultural barriers to augment the plea agreement process,[10] and results in the development of crucial mitigating evidence available only in the defendant's homeland.[11] In addition, a consulate "can provide critical resources for legal representation and case investigation" or may "file amicus briefs and even intervene directly in a proceeding if it deems that necessary."[12] Thus, prompt consular notification and access to foreigners arrested in the United States "may very well make a difference to a foreign national, in a way that trial counsel is unable to provide."[13]

The United States played a significant role in the development of the language of Article 36. In its draft form the article made notification of the consulate mandatory, with no reference to individual rights beyond a general entitlement to "communicate with and to have access to the competent consulate."[14] The U.S. delegation to the drafting conference objected to this formulation, observing that "[i]n its present form the draft...did not recognize the freedom of action of the detained persons."[15] The United States instead strongly supported the amendments

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[7] U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 22 (Jan. 2003), *available at* <http://travel.state.gov/pdf/CNA_book.pdf> (last accessed May 25, 2009). This Report and Recommendation, as well as the referenced Consular Notification and Access documents referred to herein, can be found at http://www.abanet.org/litigation/nosearch/report2010.html

[8] *See* Torres v. State, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (describing the protection of Mexican nationals facing capital proceedings as a top priority for Mexican consular officials).

[9] *See* State v. Ramirez, 732 N.E.2d 1065, 1070-71 (Ohio App. 3d. 1999) (compliance with Article 36 obligations would have avoided *Miranda* violation by helping foreign national appellant understand nuances of American legal system).

[10] *See* Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001) (consular officer would be able to address "general obstacles presented by cultural barriers" and help foreign national "obtain a greater understanding" of the charges and maximum sentence that would help him when considering plea offers and the presentation of his defense.").

[11] *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (reversing death sentence for trial counsel's failure to seek consular assistance and observing that the court "cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate").

[12] Osagiede v. United States, 543 F.3d 399, 403 (7th Cir. 2008) (citing LEE, CONSULAR LAW AND PRACTICE, *supra* n. 2, at 125-88).

[13] Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001).

[14] Yearbook of the International Law Commission 1961, vol. II, p. 112.

[15] United Nations Conference on Consular Relations, Official Records, vol. I, UN Doc. A/Conf.25/16, p. 38 (para. 21).

requiring consular information followed by notification, in order "to protect the rights of the national concerned."[16]

At the instigation of the United States, the drafting conference also adopted a binding international dispute settlement mechanism for the VCCR, in the form of its Optional Protocol concerning the Compulsory Settlement of Disputes.[17] Article 1 of the Optional Protocol provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Under its Statute, the decisions of the International Court of Justice (ICJ) in cases brought under the VCCR Optional Protocol have "binding force...between the parties" and are "final and without appeal."[18] The UN Charter further requires that 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."[19]

The U.S. signed the Vienna Convention on April 24, 1963, but ratification did not occur for several years. Instead of submitting the treaty to the Senate, the Executive Branch initially chose to rely on bilateral agreements rather than the multilateral Convention.[20] By the late-1960s, however, the Nixon Administration had prioritized ratification, describing the Convention as "an important contribution to the development and codification of international law" that "should contribute to the orderly and effective conduct of consular relations between States."[21]

President Nixon sent the VCCR and the Optional Protocol to the Senate for its advice and consent on May 8, 1969. The Executive's report to the Senate noted that the Article 36 procedure "has the virtue of setting out a requirement that is not beyond the means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad." [22] The Senate was also made aware of the United States' support for a binding dispute settlement mechanism and that the U.S. delegation

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[16] *Id.* p. 337 (para. 39) (quoting U.S. delegate, speaking in support of a proposed amendment that notification of the consulate would occur only at the request of the detainee).

[17] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

[18] Statute of the International Court of Justice, June 26, 1945, arts. 59, 60, 1 U.N.T.S. 16.

[19] Charter of the United Nations, June 26, 1945 art. 94(1), 1 U.N.T.S. 16. The Statute of the International Court of Justice is an annex to the United Nations Charter and forms an "integral part thereof." U.N. Charter, art. 92. The Charter and the Statute have both been ratified by the United States. 59 Stat. 1031, 1055, T.S. No. 993.

[20] William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (citing 115 Cong. Rec. 30, 953 (1969)).

[21] *Id.* (quoting Ex. E, 91st Cong., 1st Sess., at VII (Statement of Secretary of State William Rogers) (1969)).

[22] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 60.

had voted against a proposal that would have significantly weakened the "compulsory jurisdiction" clause in the VCCR Optional Protocol.[23]

In hearings before the Senate Foreign Relations Committee, the State Department took the position that the VCCR is "entirely self-executive and does not require any implementing or complementing legislation"[24] so that "[t]o the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention, after ratification, would govern" as the supreme law of the land.[25] The VCCR thus falls within the group of U.S. treaties that achieve full domestic legal effect immediately upon ratification and the terms of which are directly enforceable in the United States courts.[26] The Senate subsequently approved the VCCR and the Optional Protocol on October 22, 1969, unanimously and without reservations.[27] Both agreements entered into force for the United States on December 24, 1969.[28] On March 7, 2005, the U.S. sent the U.N. Secretary General a communication with notice of its withdrawal from the Optional Protocol.

2. History of U.S. Compliance with Article 36 Requirements

In the 40 years since its ratification, the United States has consistently relied on the VCCR and its binding enforcement mechanism to safeguard the consular rights of its citizens in other countries. So important is compliance with Article 36 obligations to the functioning of U.S. consulates abroad that "protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas."[29] The State Department has informed Congress that "immediate consular access" to Americans detained abroad "is the linchpin. . . . guaranteeing the

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[23] *See id.* at 73 (describing American rejection of a proposed Yugoslav amendment).

[24] Hearing Before the Senate Comm. on Foreign Rel., S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

[25] *Id.* at 24. *See also* Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (under the Supremacy Clause, "no state can add to or take from the force and effect" of a ratified U.S. treaty establishing the rights of aliens); Charlton v. Kelly, 229 U.S. 447, 468 (1913) (the "construction of a treaty by the political department of the government, while not conclusive upon a court...is nevertheless of much weight.").

[26] *See* Foster v. Neilson, 27 U.S. 253, 314 (1829); Head Money Cases, 112 U.S. 580, 598-99 (1884) (explaining that a self-executing treaty "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.").

[27] 115 CONG. REC. 30,997 (Oct. 22, 1969).

[28] Proclamation of Ratification, 21 U.S.T. 77, 185.

[29] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm (last accessed May 25, 2009).

prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures."[30]

The United States was also the first nation to invoke the VCCR Optional Protocol, following the seizure of the U.S. Embassy in Tehran in 1979.[31] In its submissions to the International Court of Justice, the United States emphasized that Article 36 "establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." [32] The ICJ entered a final judgment in favor of the United States on May 24, 1980. The State Department responded by insisting that Iran must comply with the Court's binding judgment.[33]

At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. For example, German nationals Karl and Walter LaGrand were arrested in Arizona in 1982, but the German consulate was only notified of their cases ten years later "by the LaGrands themselves, who had learnt of their [Article 36] rights from other sources, and not from the Arizona authorities."[34]

The State Department has endeavored to facilitate domestic compliance with the VCCR, and compliance has improved over time. The State Department's efforts began in 1970 with a letter to all U.S. governors advising them that "the initial responsibility for giving effect to the United States Government's rights and obligations under the Vienna Convention will often rest" with state and local officials.[35] While drawing particular attention to Article 36 and other VCCR provisions "regarding consular notification and access," the letter added that the State Department "do[es] not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States."[36] By 1986 the Department was sending periodic notices on Article 36 obligations to major law enforcement agencies nationwide, advising them that the "arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention" and that if "the foreign national asks that such notification be made, you should do so without delay by informing the nearest consulate or embassy."[37] In 1998 the State Department began circulating a comprehensive manual on consular notification and access requirements to domestic law enforcement agencies. The manual advised these agencies to notify detained

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[30] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz).

[31] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).

[32] Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980, p. 174.

[33] *See U.S. Urges the Iranians to Obey Court Decision*, N.Y. TIMES, May 25, 1980, pg. 9.

[34] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (Judgment of Jun. 27), para. 22.

[35] Letter of April 13, 1970, from John R. Stevenson, State Department Legal Adviser, to The Hon. Keith H. Miller, Governor of Alaska, page 1.

[36] *Id.* page 2.

[37] U.S. Dept. of State, *If You Have Detained a Foreign National, Read This Notice* (October 1986), page 1. Essentially identical notices were issued on September 1, 1991 and April 20, 1993

foreign nationals of their consular notification right.[38] Furthermore, it described Article 36 obligations as "binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause."[39]

More recently, the State Department has been engaged in an outreach and training effort directed at federal, state, and local law enforcement officials, counsel, and judges. The Department recently completed a new and significantly expanded edition of the Consular Notification and Access manual which includes guidance on many additional consular notification and access scenarios, draft guidelines and standard operating procedures. The manual will be published early next year. In addition, the State Department has been working with the Department of Justice on a proposal to amend the Federal Rules of Criminal Procedure to make it a requirement that a foreign national defendant be given consular information at first appearance before a magistrate. The Departments of State and Justice hope that states will adopt similar rules, using the revised federal rule as a template.

Even before formal ratification of the VCCR, federal regulations were amended to "establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department [of Justice] on charges of criminal violations."[40] Regulations governing immigration detentions were amended in 1967 to require that "[e]very detained alien" receive notification of his or her right to consular notification.[41] The instructions for a federal agency that most closely conform to Article 36 requirements are found in the Internal Revenue Service manual, which obliges its special agents to "promptly inform" foreign detainees of their right to inform their government and gain consular access and to ensure that "notification is immediately given" to the nearest consulate upon the detainee's request.[42]

Three U.S. states have enacted laws addressing consular notification requirements. The California statute is the most explicit: it requires 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" and that "the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified."[43] In Oregon, police officers who detain a foreigner on grounds of mental illness are required to "inform the person of the person's right to communicate with an

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[38] U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 2 (Jan. 2003), *Summary of Requirements Pertaining to Foreign Nationals.*

[39] *Id.* at 44, *Basis for Implementation.*

[40] Notification of Consular Officers upon the arrest of foreign nationals. 28 C.F.R. 50.5(a) (2008) (32 Fed. Reg. 1040 (1967)).

[41] Apprehension, custody, and detention. 8 C.F.R. § 236.1(e) (2009) (originally enacted as 8 C.F.R. § 242.2(e) (1967) (32 Fed. Reg. 5619 (1967)). See also *United States v. Rangel-Gonzales*, 617 F.2d 529, 532 (9th Cir. 1980) (finding that "[t]he right established by the regulation and in this case by treaty is a personal one.").

[42] U.S. Internal Revenue Service, Internal Revenue Manual §9.4.12.9 (07-30-2004), *Arrest or Detention of Foreign Nationals*, paras. 4-5.

[43] CAL. PENAL CODE section 834(c)(a)(1) (enacted 1999).

official from the consulate of the person's country."[44] No similar provision exists for criminal arrests, except for a general duty of police officers to "[u]nderstand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention."[45] A Florida statute enacted in 1965 required that "the official who makes the arrest or detention shall immediately notify the nearest consul or other officer of the nation concerned,"[46] but this language was amended in 2001 to state only that failure 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."[47]

Somewhat better developed is the growing body of state policy guidelines, court directives and police patrol manuals establishing procedures to inform foreign defendants of their consular rights. For example, the Wisconsin Department of Justice has issued an instruction that "law enforcement is obligated by the VCCR to follow consular notification procedures" of information and notification without delay if "the arrested subject is a foreign national" and requests notification or is from a mandatory notification country [48] The Texas Attorney General's Office has circulated a magistrate's guide to consular notification, advising that when "foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified" and advising that courts of record offer at arraignment "without delay, to notify the foreign national's consular officials of the arrest/detention."[49] A memorandum from the Michigan Supreme Court has advised state "judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR...."[50] Some state and local police forces have already incorporated Article 36 requirements into their standard operating procedures.[51] Meanwhile, the recent decision by the Commission on Accreditation for Law Enforcement Agencies (CALEA) mandating a written procedure "assuring compliance with all consular notification and access requirements"[52] is likely to expand the number of police departments that meet their Article 36 obligations.

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[44] OR. REV. STAT. ch. 426.228 (9)(a) (2007).

[45] OR. REV. STAT. ch. 181.642 (2) (2007).

[46] FLA. STAT. ch. 901.26 (3) (1965), Recognition of International Treaties Act.

[47] FLA. STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.

[48] Wisconsin Dept. of Justice, Guide for Law Enforcement Contacts with Foreign Nationals (Jan. 2008), at 4. *See also* State of Alaska Department of Corrections, Policies and Procedures, Index 811.15 (effective December 1, 1990), at 2 (when a foreign national is "remanded or committed to an institution" the prisoner "must be informed of the right to have his or her government informed of the arrest or detention.")

[49] Office of the Attorney General of Texas, Magistrate's Guide to Consular Notification Under the Vienna Convention (2000), pp. 7-9.

[50] Michigan Supreme Court, SCAO Administrative Memorandum 2002-09 (July 26, 2002), at 2.

[51] See, e.g., Georgia Department of Community Affairs Planning and Management Division, *A Model Law Enforcement Operations Manual* (6th ed. Feb. 1996), S.O.P. 8.1, Arrests of Foreign Nationals; NYPD Patrol Manual, Procedure No. 208-56 (02-28-01), *both available at* <http://users.xplornet.com/~mwarren/compliance.htm> (last accessed May 25, 2009).

[52] CALEA, Standards for Law Enforcement Agencies (5th ed. 2006), Standard 1.1.4.

While there are indications that domestic compliance with Article 36 obligations may be improving, still largely unresolved is the scope of the legal remedies necessary for past and future Article 36 violations. A large body of American legal literature has emerged in the past 15 years that examines this complex issue. Most of the articles fall into one of four broad categories: 1) the importance of accessing consular assistance in serious criminal cases;[53] 2) raising Article 36 claims in litigation;[54] 3) the relationship between international and domestic law,[55] and 4) specific recommendations for remedial action, such as the development of Article 36 advisements akin to *Miranda* warnings and the legislative implementation of U.S. obligations arising under the VCCR Optional Protocol.[56] There is virtual unanimity among legal commentators that the ongoing failure of the United States to provide consistent compliance with Article 36 and meaningful remedies for its violation has profoundly negative consequences, both at home and abroad.[57]

3. Domestic and International Litigation of Article 36 Claims

Despite their consistent recognition of the individual and reciprocal rights conferred under the VCCR, federal authorities have long resisted the creation of judicial remedies for the violations of those rights. In response to other governments' concerns in the early 1990s regarding foreign nationals on death row who had not received consular notification, the Department declared that it "does not believe that the VCCR...require[s] that violations of consular notification obligations be remedied through the criminal justice process."[58] In recent

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[53] See, e.g., S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719 (1995).

[54] See, e.g., Logene Foster & Stephen Dogett, Vienna Convention: New Tool for Representing Foreign Nationals in the Criminal Justice System, THE CHAMPION, Mar. 1997.

[55] See, e.g., Hernan de J. Ruiz-Bravo, Suspicious Capital Punishment: International Human Rights and the Death Penalty, 3 SAN DIEGO JUSTICE J. 379, 386 (1995).

[56] See, e.g., Gregory Dean Gisvold, Note, Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities, 78 MINN. L. REV. 771 (1994) (recommending a uniform Article 36 advisement procedure akin to Miranda warnings); Joshua A. Brook, Note: Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too, 37 U. MICH. J. L. REF. 573 (2004) (suggesting judicial, executive, and legislative remedies); John Quigley, The Law of State Responsibility and the Right to Consular Access, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 39 (2004) (advocating executive enforcement of state violations through lawsuits brought by the Justice Department); Linda E. Carter, Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations, 15 DUKE J. COMP. & INT'L. L. 259 (2005) (suggesting compliance with the ICJ decision in Avena through legislative implementation).

[57] See, e.g., *Medellín v. Texas: A Symposium*, 31 SUFFOLK TRANSNAT'L L. REV. 209 (2008); *Symposium: Treaties and Domestic Law After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 1 (2009).

[58] U.S. Dept. of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, Letter from Legal Adviser David R. Andrews to Assistant Attorney General James K. Robinson of the Criminal Division, Department of Justice, with attachments, filed with the First Circuit Court of Appeals in *United States v. Nai Fook Li*, October 15, 1999, Attachment A, page A-1.

domestic litigation, the United States has continued to take the position that Article 36 "does not provide foreign nationals with a judicially enforceable right that can be asserted to challenge a domestic criminal judgment."[59]

Along with the threshold question of judicially enforceable rights, two other issues have dominated domestic and international litigation of Article 36 claims: the application of procedural default rules to deny review on the merits, and the scope of the remedies available for meritorious claims. The first such case to reach the U.S. Supreme Court was that of Parguayan national Angel Breard, who was sentenced to death in Virginia without any advisement of his consular rights and without the benefit of consular assistance. After the U.S. Fourth Circuit Court of Appeals determined that his Article 36 claim was procedurally defaulted and an execution date was set, Paraguay filed a claim against the United States before the International Court of Justice. The ICJ promptly noted jurisdiction under the VCCR Optional Protocol and issued a provisional measures order requiring that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings...."[60]

It was in this procedural context that the Supreme Court issued its response to Breard's petition for a writ of certiorari. The Court rejected the argument that Article 36 requirements trump federal rules of procedural default, observing that "while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[61] While Article 36 "arguably confers on an individual the right to consular assistance following arrest," the stringent procedural default standard of the recently-amended federal habeas statute made the Article 36 claim "subject to this subsequently enacted rule" and "prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him."[62] Even if the Article 36 claim had been "properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[63] The Court's 5-4 per curiam denial of certiorari in *Breard* set the stage for the international litigation of Article 36 claims that followed.

The ICJ's Avena *Judgment*

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[59] Brief for the United States as Amicus Curiae at 17, Ex parte Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,207).

[60] Breard v. Greene, 523 U.S. 371, 373 (1998) (per curiam).

[61] Breard, 523 U.S. at 375. This determination is in conflict with the conventional international legal rule of *pacta sunt servanda*: that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" and the corollary rule that a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, arts. 26, 27, 1155 U.N.T.S. 331, *entered into force* January 27, 1980.

[62] Breard, at 376.

[63] *Id.* at 377.

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On January 9, 2003, Mexico filed suit in the International Court of Justice (ICJ) on behalf of over 50 Mexican nationals on death row in the United States.[64] In each case, Mexico argued, its nationals had been deprived of their rights to seek consular assistance under Article 36 of the VCCR. Among other issues, the Government of Mexico asked the Court to adjudge and declare that the United States had violated its international legal obligations by failing to comply with Article 36 of the VCCR, and that the convictions and sentences of its nationals should be vacated.

The ICJ issued its final judgment in the *Avena* case on March 31, 2004. By a vote of 14 to one, the Court found that, for 51 Mexican nationals, the United States had failed to inform the detainees of their right to consular notification without delay, in violation of Article 36 (1) (b) of the VCCR. In 49 cases, the Court also found that the United States had violated its corresponding obligation to notify the Mexican consulate of the detention without delay, as well as Mexico's right to communicate and have access to its nationals. In 34 of the cases, the United States was also found to have deprived Mexico of its right to arrange for legal representation of those nationals in a timely manner, in breach of Article 36, paragraph 1 (c). The ICJ also reaffirmed its previous jurisprudence finding that Article 36 of the Vienna Convention gives rise to individual rights.[65]

The *Avena* Court found that, in all 51 cases, the United States was obligated to provide judicial review and reconsideration of the convictions and sentences in light of the violations of Article 36. The Court held that review must be effective, and must give "full weight" to the violation of the rights set forth in Article 36, "whatever may be the actual outcome of such review and reconsideration."[66] The ICJ also unanimously held that the same remedy must be applied to all future cases in which Mexican nationals in the United States are sentenced to "severe penalties" without their Article 36 rights having been respected.[67] Furthermore, the remedy of "review and reconsideration" applies in all of the named or future cases regardless of domestic rules of procedural default.[68] The Court declined to adopt Mexico's position that the convictions and sentences of all 51 nationals must automatically be vacated, while indicating that such remedies could result where the treaty violation was found by the United States courts to be prejudicial.

Responding in dicta to the U.S. argument that it can be extremely difficult to identify foreign nationals, the Court observed that "were each individual to be told upon arrest that, should he be a foreign national, he is entitled to ask for his consular post to be contacted," Article 36 compliance "would be greatly enhanced," adding that this advisement "could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed"[69] under *Miranda*.

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[64] *See* Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), available at <http://www.icj-cij.org/docket/files/139/14582.pdf>.

[65] *See* LaGrand Case (F.R.G. v. U.S.) 2001 ICJ 104.

[66] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 139.

[67] Avena, ¶ 153(11).

[68] *Id.* ¶ 141.

[69] *Id.* ¶ 64.

U.S. Supreme Court's Responses to Avena

In *Sanchez-Llamas v. Oregon*, the Supreme Court granted review in two consolidated cases involving violations of the VCCR. The two foreign national petitioners had unsuccessfully raised Article 36 claims in state court proceedings but were not part of the *Avena* litigation. The Court granted certiorari to resolve the following questions:

> "First, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? Second, does a violation of Article 36 require suppression of a defendant's statements to police? Third, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial?"[70]

A bare majority of the Court bypassed the first and most basic issue, assuming without deciding that Article 36 does confer individually-enforceable rights, but finding it "unnecessary to resolve the question" because the petitioners were not entitled to the requested relief.[71] Addressing the second question, since "neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression" on these grounds, the exclusion of evidence is never an available remedy for an Article 36 violation *per se*. Responding to the third question (which had been briefed largely on the basis of *Avena*), the Court held that "a State may apply its regular procedural default rules to Convention claims"[72] despite the ICJ's decision in *Avena.* The Court held that while the judgments of the International Court of Justice (ICJ) are entitled to "respectful consideration," "nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts."[73]

However, the majority noted that an Article 36 violation *can* be relevant to determining the admissibility of a defendant's statements, and implied that courts were free to craft additional pre-trial remedies for VCCR violations:

> [S]uppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.[74]

While *Sanchez-Llamas* resolved some important questions regarding the interpretation of Article 36, it left unanswered the enforceability of the *Avena* Judgment in those cases to which the ICJ decision expressly applies. In one of those cases, *Medellín v. Dretke,* the Supreme Court granted certiorari to resolve the following questions: (1) whether a federal court is legally bound to apply the *Avena* Judgment notwithstanding procedural default doctrines that would otherwise bar relief; and (2) whether a federal court should give effect to the *Avena* Judgment as a matter of judicial comity and in the interest of uniform treaty interpretation.

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[70] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669, 2674 (2006).

[71] *Sanchez-Llamas*, 548 U.S. at 342-343. The four dissenting justices held that Article 36 does confer individual rights, but divided 3-1 on the availability of the requested remedies.

[72] *Id.* at 354.

[73] *Id.*

[74] *Id.* at 350.

On February 28, 2005, in response to the petitioner's filings in the *Medellín* case, President Bush issued a memorandum to the Attorney General declaring that:

> I have determined, pursuant to the authority vested in me as President by the Constitution and 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 I.C.J. 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.

Shortly before the Supreme Court was scheduled to hear oral arguments in the case, Mr. Medellín and other Mexican nationals on Texas's death row filed successive habeas petitions in the Texas courts. The petitions relied on the *Avena* Judgment and the Presidential determination in seeking review of the consular rights violations found by the ICJ. In a per curiam opinion issued on May 23, 2005, the Supreme Court dismissed the writ of certiorari as improvidently granted "[i]n light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* Judgment and the President's memorandum."[75] The Texas Court of Criminal Appeals (CCA) later dismissed Medellín's subsequent habeas application, finding that it was procedurally barred under the Texas statute governing successive petitions.

The Supreme Court granted certiorari and issued its decision on March 25, 2008. The majority found it undisputed that *Avena* "constitutes an *international* law obligation on the part of the United States,"[76] but held that none of the treaties addressing the enforcement of ICJ decisions are "self-executing," meaning that their requirements cannot be directly enforced by the U.S. courts. Consequently, the Court concluded that "neither Avena nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions," and thus neither *Avena* nor the Presidential memorandum required state courts to provide review and reconsideration of the claims of the 51 Mexican nationals named in the ICJ decision.[77] The Court also held that President Bush lacked the constitutional authority to order the state courts to provide "review and reconsideration" of the Vienna Convention violations in the affected cases.

Three aspects of the *Medellín* decision bear emphasis. First, every member of the Court recognized that the United States has an international legal obligation to comply with *Avena.* Second, every justice acknowledged that the national interest in securing full domestic compliance with *Avena* is "plainly compelling," since that would result in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."[78] Third, the Court determined

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[75] *Medellín v. Dretke*, 544 U.S. 660, 666 (2005) (*per curiam*).

[76] *Medellín v. Texas*, 128 Sup. Ct. 1346, 1356 (2008).

[77] *Medellín*, 128 S. Ct. at 1353.

[78] *Id.* at 1367.

that the responsibility for vindicating these plainly compelling national interests rests not with the courts but with the U.S. Congress.[79]

4. Prior action on this issue by the ABA and peer organizations

For more than a decade, divisions of the ABA have been in the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. At its 1998 annual meeting, the Law Student Division adopted a resolution calling on the ABA to urge "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the "Miranda" standard, advising foreign nationals of their right to consular assistance" and that "this warning be given at the moment of detention and identification of the foreign national by law enforcement authorities". The resolution further called on law enforcement agencies to "adopt the procedures and statements proposed by the Department of State in its handbook titled Consular Notification and Access" and that the ABA should encourage "the Attorney General of the United States, as well as the public defenders and attorneys general of all the States and territories, to work together to disseminate the knowledge and the enforcement of these rights."[80] The resolution was adopted by the ABA House of Delegates in August of 1998.[81]

The ABA House of Delegates also reaffirmed its support for resolving international disputes in the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."[82]

Recognizing the crucial significance of consular assistance to the effective representation of capital defendants, the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* added a new standard to address the issue. Guideline 10.6 requires that counsel "at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, counsel representing a foreign national should "immediately advise the client of his or her right to communicate with the relevant consular office" and obtain the consent of the client to contact the consular office." After obtaining consent, "counsel should immediately contact the client's consular office and inform it of the client's detention or arrest." The Commentary to the Guideline notes that enlisting the consulate's support should be viewed by counsel "as an important element in defending a foreign

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[79] *See, e.g., id.* at 1368 ("[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"); *id.* at 1391 (Breyer, J., dissenting) (majority's holdings "encumber Congress with a task (postratification legislation)").

[80] The full text is available at <www.abanet.org/intlaw/policy/misc/consularassistance.pdf> (last accessed May 26, 2009).

[81] "Urge U.S. law enforcement authorities to comply with the Vienna Convention by advising foreign nationals of Right to Consular Assistance." (98A125) 8/98. Listed on the ABA Section of International Law website *at* <http://www.abanet.org/intlaw/leadership/policy/misc.html>.

[82] *See* Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 2, Medellín v. Dretke, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

national at any stage of a death penalty case" and counsel "should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations."[83]

The ABA has raised concerns over Article 36 violations in individual cases of foreign nationals facing execution. In December of 1998, the ABA President sent a letter to then-Governor George W. Bush of Texas, urging him to grant a reprieve in the case of a Canadian national facing imminent execution despite an undisputed and unremedied violation of his Article 36 rights. The letter emphasized that the ABA's interest in seeking a stay of execution to permit a more thorough clemency review stemmed from "its long-standing support for adherence to the requirements of Article 36(1) (b) of the Vienna Convention on Consular Relations."[84]

The ABA has also been a staunch advocate of individual rights under Article 36 and judicial remedies for its violation. It has submitted a series of *amicus curiae* briefs to the U.S. Supreme Court, arguing among other issues that state rules of procedural default should yield to Article 36 obligations,[85] that the United States is bound under the VCCR Optional Protocol to comply with the ICJ decisions on consular rights and remedies,[86] and that the *Avena* Judgment should be given effect by the domestic courts.[87]

Other domestic legal associations have played prominent roles as supporting *amici* before the Supreme Court on these issues, including the National Association of Criminal Defense Lawyers, the Hispanic National Bar Association, the Mexican American Bar Association, the Mexican American Legal Defense and Educational Fund, and the Constitution Project. International bar associations have also advocated before the Supreme Court for Article 36 rights and remedies, including the Bar Human Rights Committee of England and Wales and the Australian Law Council.[88]

The Union Internationale des Avocats (International Association of Lawyers) has a particularly long history of activity on this issue, beginning with its 1997 *amicus curiae* brief in *Republic of Paraguay v. Allen,* 134 F.3d 622 (4th Cir. 1998), arguing that failure of the federal courts to remedy Article 36 violations would impair worldwide efforts to secure basic human rights and implement the rule of law. Prior to the execution of Jose Medellín, the UIA sent a letter to the Governor of Texas urging him to take immediate steps to commute the death

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[83] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (February 2003), Guideline 10.6, Additional Obligations of Counsel Representing a Foreign National, pp. 73-75.

[84] Letter from Philip S. Anderson President, American Bar Association to The Hon. George W. Bush, Governor of Texas, Dec. 9, 1998, at 1.

[85] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Dec. 22, 2005), 2005 WL 3597819.

[86] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellín v. Dretke, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

[87] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellin v. Texas, 128 S.Ct. 1346 (U.S. 2008) (Jun. 28, 2007), 2007 WL 1886208.

[88] A full collection of the Supreme Court amicus briefs filed by these and other organizations in support of Article 36 rights and remedies is posted on the website of Debevoise and Plimpton LLP, *at* <http://www.debevoise.com/vccr/> (last accessed May 26, 2009).

sentence.[89] Following the execution, the UIA issued a press release in which it "underscore[s] the fact that José Medellín has been executed in violation of international law. It invites the US authorities – both federal as well as Texan – to take the necessary legislative measures to respond appropriately to decisions taken by the ICJ."[90]

Finally, some 60 nations that are parties to the VCCR have stated as *amici* before the U.S. Supreme Court that Article 36 confers legally-enforceable rights and that judicial review is required whenever those rights are violated. In addition, federal laws in countries as diverse as Australia, the UK, Poland, Ecuador, Indonesia and Lithuania "require advising foreign detainees of their consular rights simultaneously with other legal rights."[91]

5. Reasons for Recommendation

Ensuring that foreigners arrested in the United States are promptly notified of their right to consular notification does far more than protect the reciprocal rights of Americans abroad. As a senior federal judge has pointed out, by providing foreign defendants with the means necessary to mount a full defense against serious charges, timely consular assistance enhances the truth-seeking function that lies at the heart of American justice:

> [C]onsular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. . . . Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.[92]

Despite these compelling reasons for ensuring domestic compliance with Article 36 obligations, recent actions have weakened American commitment to the VCCR. The Supreme Court, in *Medellín*, effectively rendered ICJ decisions relating to the VCCR powerless in the absence of implementing congressional legislation. The Bush administration, meanwhile, through a post-*Avena* 2005 letter from Secretary of State Condoleezza Rice to UN Secretary-General Kofi Annan, withdrew from the Optional Protocol, no longer consenting to compulsory ICJ jurisdiction for matters related to the Vienna Convention. Domestic compliance, meanwhile, despite the best efforts of the State Department and numerous other federal, state, and local

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[89] Letter from UIA President Hector Diaz-Bastien to the Hon. Rick Perry (June 3, 2008). *Available at* <http://dlh.uianet.org/uploads/tx_hhuiadlh/UIA_Letter_-Medellin_080603.pdf> (last accessed May 26, 2009).

[90] UIA, Execution of Jose Medellin in Texas (Aug. 28, 2008), *available at* <http://dlh.uianet.org/uploads/tx_hhuiadlh/UIA_CP_Medellin_080827_GB_01.pdf> (last accessed May 26, 2009).

[91] *See* Human Rights Research, *Individual Consular Rights: Foreign Law and Practice*, available at <http://users.xplornet.com/~mwarren/foreignlaw.html> (last accessed May 26, 2009).

[92] U.S. v. Li, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

agencies, remains spotty and inconsistent. As Justice Breyer pointed out in his *Medellín* dissent, such non-compliance increases the risk of "worsening relations" with other nations, especially neighbors like Mexico; furthermore, it could have the effect of "of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach."[93]

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through legal and political action and guidelines designed to facilitate and improve compliance.

Lorna G. Schofield
Chair, ABA Section of Litigation
February 2010

[93] *Medellín*, 128 S.Ct. at 1391 (Breyer, J., dissenting).

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted by: Lorna G. Schofield, Chair

1. Summary of Recommendation.

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36 of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. Since ratifying both the Convention and the Optional Protocol in 1969, the United States has relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The Recommendation affirms the ABA's commitment to the international rule of law and encourages federal, state and territorial authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance.

2. Approval by Submitting Entity.

On October 2, 2009, the Section of Litigation Council approved the Recommendation during a regularly-scheduled meeting, for which the time and agenda had been previously distributed.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In 1994, the House of Delegates adopted a policy recommending that the United States Government present a declaration recognizing that the International Court of Justice has compulsory jurisdiction in all legal disputes concerning a treaty or a question of international law. In 1998, the House of Delegates adopted a resolution advising a set of measures designed to further domestic compliance with Article 36 obligations. Both of these resolutions are more than ten years old; the current proposed Recommendation is consistent with these prior resolutions, and also it builds on them to address more recent events in this area, including recent Supreme Court and Executive Branch actions.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which requires action at this meeting of the House?

As noted in the Report and Recommendation, recent Supreme Court and Executive Branch actions have weakened American commitment to VCCR obligations. In addition, only three states have enacted legislation addressing VCCR consular notification requirements. In light of

recent developments, it is important that the ABA unequivocally affirm its longstanding commitment to the international rule of law and Article 36 compliance.

6. Status of Legislation. (If applicable).

N/A

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation will not result in expenditures.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This Recommendation is being co-sponsored by the following Association entities and Affiliated Organizations:

Section of Criminal Justice
Section of Individual Rights & Responsibilities
Section of International Law
Death Penalty Representation Project
Standing Committee on Legal Aid and Indigent Defendants
Young Lawyers Division
Section of State and Local Government Law
Government and Public Sector Lawyers Division

10. Contact Person. (Prior to the meeting.)

JoAnne A. Epps
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Email: genevieve.cox@mto.com

11. Contact Person. (Who will present the report to the House.)

JoAnne A. Epps
Dean of Temple University Beasley School of Law
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Philadelphia, PA 19122-6094
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EXECUTIVE SUMMARY

1) Summary of the Issue Which the Recommendation Addresses

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. When international delegates met to draft the Convention in the 1960s, the United States successfully lobbied for the inclusion of an Optional Protocol, a binding enforcement mechanism that would grant the International Court of Justice (ICJ) with jurisdiction over claims arising from the VCCR.

Since ratifying both the Convention and the Optional Protocol in 1969, the United States has consistently relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The inconsistent enforcement of the VCCR threatens the individual rights not only of foreign nationals arrested in the United States but also of American citizens detained abroad who rely on reciprocal compliance.

For more than a decade, the ABA has stood at the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. In 1998, the House of Delegates adopted a resolution calling for domestic law enforcement officials to provide foreign nationals with timely notice of their right to consular assistance and advocating the more widespread dissemination of information relating to that right. Four years earlier, the House of Delegates reaffirmed the ABA's commitment to the rule of international law when it recommended that the United States recognize the jurisdiction of the International Court of Justice in any legal dispute concerning a treaty or a question of international law. The ABA has also been, through a series of amicus curiae briefs to the Supreme Court, a staunch advocate of individual rights under Article 36 and judicial remedies for their violation.

Despite these efforts by the ABA, recent actions have weakened American commitment to VCCR obligations. The U.S. Supreme Court, in *Sanchez-Llamas v. Oregon* (2006), contradicted the ICJ in concluding that Vienna Convention claims are subject to the application of state procedural default rules. Subsequently, in *Medellin v. Texas* (2008), the Court held that the nation's treaty obligations under the VCCR, the Optional Protocol, and the U.N. Charter, without implementing congressional legislation, do not make ICJ decisions enforceable in domestic courts. In addition, the Bush Administration recently withdrew from the Optional Protocol.

2) How the Proposed Policy Position Will Address The Issue

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance. The complexity of these issues and the wide array of actors involved demands that we address this crucial concern in a variety of ways, including recommending implementing legislation at the national and state levels, advocating improved compliance procedures for law enforcement agencies, and facilitating the provision of competent and well-informed counsel to arrested foreign nationals.

3) Summary of the Recommendation

The recommendation calls for legislative and executive bodies to take steps to ensure enforceable Article 36 rights in the United States. We urge federal and state legislative bodies to adopt laws implementing Article 36 requirements domestically and preventing procedural default rules from overriding VCCR rights. We further urge the Obama Administration to renew the nation's commitment to the Optional Protocol, thereby making clear the United States' faith in the ICJ to sustain the international rule of law.

The recommendation also builds off the ABA's 1998 recommendations, advising a set of measures designed to further domestic compliance with Article 36 obligations. We urge law enforcement authorities to implement Miranda-like warnings advising foreign nationals of their Article 36 rights as soon as they are detained and identified, and to adopt the State Department's recommended compliance procedures. We urge counsel for accused foreign nationals, in all criminal defense proceedings, to comply with ABA consular notification procedures previously limited to death penalty cases. We urge federal and state public defenders and Criminal Justice Act panels to disseminate knowledge of VCCR rights and appropriate procedures for exercising them to counsel who may represent foreign nationals. And we recommend that the ABA itself provide educational materials and resources to U.S.-based consular officials who may otherwise have difficulty identifying competent local counsel in response to VCCR requests.

4) Summary of Minority Views or Opposition

No opposition or minority views have been expressed.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

The Department, and the Administration as a whole, take very seriously the international legal obligations of the United States. The Department is especially concerned with respect to the Vienna Convention on Consular Relations ("VCCR"), which, as you note in your letter, provides that a non-citizen who has been arrested or detained must be advised that he is entitled to have a consular official from his home country notified of the arrest or detention, as we want to ensure the same protection for United States citizens abroad.

Within the Department, we strive to ensure that our law enforcement officers and prosecutors comply with their obligations under the VCCR. We provide comprehensive guidance and training to all Department prosecutors and law enforcement agents regarding those obligations. They receive materials on the consular notification and access process prepared by the Department of State, which contain notices to foreign nationals translated into foreign languages. Prosecutors and agents also have electronic access to up-to-date listings and contact information for all foreign embassies and consular offices in the United States.

In addition, the Department has submitted to the Advisory Committee on the Criminal Rules a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure (as well as the corresponding Rule 58) which would require Federal courts to inform a defendant in Federal custody, at the initial court appearance, that if he or she is not a citizen of the United States, an attorney for the Government or Federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest. Such an amendment could supplement efforts currently undertaken by Federal law enforcement agents and prosecutors to ensure that foreign defendants arrested pursuant to United States charges receive the notifications

to which they are entitled pursuant to the obligations of the United States under the multilateral VCCR, or other bilateral agreements. *See* 28 C.F.R. 50.5.

With regard to compliance by State and local law enforcement authorities, the Department for many years has included training on VCCR obligations in all of our outreach to our non-Federal partners at regularly scheduled conferences and trainings on general international issues, such as extradition and collection of evidence abroad. We are now examining new ways to communicate the importance of complying with the VCCR. For example, former Deputy Attorney General David W. Ogden spoke to the National Association of Attorneys General ("NAAG") last fall and raised, among other issues, the importance of compliance by State and local law enforcement with our consular notification obligations. And, in addition to the efforts of the Department of Justice, the Department of State provides extensive guidance and training to State and local officials regarding United States obligations under the VCCR.

In the aftermath of the *Medellin* decision, the Department has continued to consider other means to ensure United States compliance with the *Avena* judgment including legislation. The Administration believes legislation would be an optimal way to give domestic legal effect to the *Avena* judgment, and we would welcome the opportunity to discuss various approaches with you.

The Department appreciates your interest in these important issues, and we look forward to working with you to ensure that the United States lives up to its international obligations. Please do not hesitate to contact the Department if we can be of further assistance with regard to this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

IDENTICAL LETTERS SENT TO THE HONORABLE JOHN F. KERRY; THE HONORABLE RUSSELL D. FEINGOLD; THE HONORABLE BENJAMIN L. CARDIN; AND THE HONORABLE AL FRANKEN

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable John F. Kerry
United States Senate
Washington, D.C. 20510

Dear Senator Kerry:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

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Sincerely,

Ronald Weich
Assistant Attorney General

IDENTICAL LETTERS SENT TO THE HONORABLE PATRICK J. LEAHY; THE HONORABLE RUSSELL D. FEINGOLD; THE HONORABLE BENJAMIN L. CARDIN; AND THE HONORABLE AL FRANKEN

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510

Dear Senator Feingold:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

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Sincerely,

Ronald Weich
Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Benjamin L. Cardin
United States Senate
Washington, D.C. 20510

Dear Senator Cardin:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Al Franken
United States Senate
Washington, D.C. 20510

Dear Senator Franken:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

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