



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 21, 2011

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

Dear Mr. Chairman:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "m w", likely representing Ronald Weich.

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

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

Responses from the Department of Justice

Question from Senator Amy Klobuchar:

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

Answer:

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

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

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

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

Questions from Senator Charles E. Grassley:

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

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

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

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

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

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

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

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

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

Questions from Senator Patrick Leahy:

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

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

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

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

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

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

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

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

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

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

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

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

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