Written Statement

Regarding S. 1194, the Consular Notification Compliance Act of 2011

Hearing on

"Fulfilling Our Treaty Obligations and Protecting Americans Abroad"

Before the

Committee on the Judiciary,

United States Senate

David B. Rivkin, Jr., Partner
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

July 27, 2011

Introduction

My name is David B. Rivkin, Jr.. I am an attorney specializing in matters of constitutional and international law at the firm of Baker Hostetler LLP and co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy. I was also for a number of years an expert member of the United Nations Subcommission on the Promotion and Protection of Human Rights. While at the Subcommission, I dealt extensively with international humanitarian and human rights law.

I have a particularly keen interest in the structural separation of powers and the interplay between the imperatives of public international law and U.S. constitutional law. I also have been involved professionally in a number of cases, both in and out of government, that have implicated these important issues. As the most recent example of my engagement with federalism matters, my colleagues at Baker Hostetler and I serve as outside counsel to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010.

I am testifying today on my own behalf and do not speak either on behalf of my law firm or any of our clients. While I want to commend the Senate Judiciary Committee, and Chairman Leahy and Ranking Member Grassley for holding this hearing, unfortunately, I am unable to support S. 1194, the Consular Notification Compliance Act of 2011. Indeed, this legislation, despite its laudatory goal of seeking to implement the 1963 Vienna Convention on Consular Affairs, raises significant constitutional concerns by improperly intruding in the sovereign domain of the States (entities that are the federal government's constitutional equals) and is, as a matter of policy, unnecessary and unwise. Accordingly, I believe that an entirely different legislative approach that is compliant with our Constitution is needed.

Background

The past two years have witnessed a profound resurgence in public interest in constitutional federalism. While a number of States have been involved in this undertaking, the State of Texas,

through the bold efforts of Governor Rick Perry, Attorney General Greg Abbot, and former Solicitor Generals Ted Cruz and Jim Ho, has been at the forefront of this movement. Texas has led the Nation in enacting environmental policies that clean the air and water without imposing undue burdens on businesses and citizens. It has had a light touch in business regulation, and now leads the Nation in employment growth. And it has fought hard against crime and achieved an admirable record of public safety—a remarkable achievement for a State whose political borders separate it from a region of lawlessness and violence.

It is that effort—specifically, the pursuit of justice for the victims of two depraved foreign nationals—which is the evident impetus of S. 1194 and this hearing today. In 1993, José Ernesto Medellín, a Mexican national and gang member, raped and killed 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena. The rapes were part of his gang initiation, and the murders were intended to prevent the girls from identifying Medellín and his accomplices. Medellín was arrested, was given Miranda warnings, signed a written waiver, and gave a detailed written confession. But he was never informed of his Vienna Convention right to notify the Mexican consulate of his detention. On that basis, the George W. Bush Administration attempted to block his execution. In 2008, the Supreme Court properly rebuffed that attempt, holding that the Convention was not self-executing, that it had never been implemented by legislation, and that the President could not, acting unilaterally, give it legal effect. Medellín was executed.

In 1994, Humberto Leal Garcia ("Leal") raped and murdered 16-year-old Adrea Sauceda. After she was sexually assaulted by no fewer than eight men, Leal carried her to his truck, where he raped her. Police found her dead body on the side of a dirt road. Leal had bashed in her head with a 30- to 40-pound chunk of asphalt and left her to die. I will not describe the full extent of the brutalities done to Ms. Sauceda, but they are a matter of public record. Leal admitted a role in the killing before he was taken into custody—that is, before any Vienna rights would even attach. He was arrested, convicted, and sentenced to death. The Obama Administration sought to stay his execution so that Congress might consider the legislation proposed by the Chairman, S. 1194. The Supreme Court declined to grant the stay, and Leal was executed on July 7th of this year.

Policy Issues Implicated by S. 1194

Today, more than seven years after the International Court of Justice found the United States in violation of its duties under the Vienna Convention in *Avena*, three years after the execution of Jose Ernesto Medellín, and a scant three weeks after the execution of Humberto Leal Garcia, the Senate Judiciary Committee considers legislation that would require state and federal officers to notify foreign nationals arrested for death-eligible offenses, upon their arrest or detention, that they may request that the consulate of their nation of citizenship be notified that they have been detained. This legislation would give foreign nationals arrested for murder (effectively the only death-eligible offense) an immediate and freestanding right to seek consular notification by filing a lawsuit in federal court.

It would also give foreign nationals who have been sentenced to death the right to raise, in a habeas corpus proceeding in federal court, the failure to inform them that they may request consular notification, whether or not that issue was raised in a state post-conviction proceeding. It would reopen the habeas proceedings of foreign nationals who have already been denied relief by state and federal courts and allow them to bring consular notification claims. This process will result in additional years of litigation, even where the foreign national has suffered no discernible prejudice as a result of any failure to notify consular officials, and will come at the tail-end of sometimes decades-long legal proceedings, in federal and state courts, intended to ensure that justice was done.

Let me also emphasize what S. 1194 does and does not do. It codifies, but does not change, the already existing policy and practice of consular notification following a request by a foreign national arrested or otherwise detained. It codifies, but does not change, the already existing policy and practice of allowing communications between consular officials and a foreign national. What it does do is place an additional burden on arresting officers: they must consistently inform certain foreign nationals[1], "without delay," of their right to request consular notification.

[1] Significantly, S 1194 does not address the important question of how arresting officers are supposed to discern who is and who is not a foreign national. This is a difficult problem in our uniquely diverse society, especially since, in a variety of other contexts, questions about national origin or immigration status are disfavored or may even result in discrimination claims. Nor does it resolve the important question, mentioned only in passing in

This burden, albeit minor in most instances, is accompanied by an elaborate framework of legal procedures to enforce what this bill would make a right. As we have seen in the *Miranda* context, this framework will result in extended litigation, obstructionism, and unjustifiable delays in the administration of justice. And, if it works as intended, it would even stymie justice in some cases, an unacceptable result in a country that already guarantees and provides an unsurpassed level of due process to criminal defendants, regardless of their nationality or immigration status. This is an undue cost that most Americans would be unwilling to bear.[2]

What makes this cost particularly undue is that no one who is familiar with our criminal justice system seriously contends that, had notice of consular rights been given to Messrs. Medellín or Leal, it would have changed the outcome of either case. In this regard, both defendants were provided experienced, publicly-financed attorneys—as are all those accused of serious crimes. Both men enjoyed the full rights and protections of trial by jury, and had a full measure of appellate rights and post-conviction proceedings in the Texas courts, followed by habeas corpus proceedings in federal courts. Both were the subject of attention by the U.S. Supreme Court.

In neither case is guilt in doubt. And in neither case was a different sentence likely; anyone uncertain on this point need merely review the facts. In our justice system, such certainty—after trial, appeal, and post-conviction proceedings—is the norm. If determining guilt and innocence is the measure of a justice system, S. 1194 will make no difference in the United States—in these cases or in any others.

But what about the argument, advanced by the Obama Administration and adduced by a number of witnesses appearing before you today, that the failure to enact S. 1194 or substantially similar legislation risks that Americans traveling overseas may be denied their consular access rights? I agree, of course, with the statement of Attorney General Eric Holder and Secretary of State

---

Avena, of whether the consular notification provisions of Article 36 of the Vienna Convention apply to dual nationals.

[2] Another legislative peculiarity of S. 1194 is that it would not actually encompass the vast majority of cases involving foreign nationals charged with criminal offenses in the United States. This is because S. 1194 applies only to those arrested or charged with death-eligible offenses—that is, murder or, far less likely, espionage. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008). It is unusual, to say the least, that Congress would consider legislation providing additional procedural rights to murderers alone, and only foreign ones at that.

Hillary Clinton, expressed in a June 28 letter to the Chairman, that "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." And, as an American who has lived abroad, I agree that such assistance can be "essential . . . to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to sent messages to [] family, or to obtain needed food or medicine." These services are, as the Attorney General and Secretary state, "vital." And that is precisely why Americans who are detained abroad consistently *request* consular assistance on their own accord.

What I disagree with is the notion that a failure to enact S. 1194 would somehow lead other nations to impair the rights of Americans, by causing their requests for consular access to go unheeded. Foreign nations—despite the fact that their legal processes and protection of substantive and procedural rights rarely live up to our own—by and large honor those requests. While there have been some failures in this area, they have not been frequent and have been primarily perpetrated by repressive governments that habitually violate all manner of obligations under international law. These violations have been particularly likely to occur when the foreign government involved has embarked on a path of confrontation with the United States. In that extreme situation, it would be naïve and unrealistic to expect that the passage of any legislation in the United States, including S. 1194, would enhance foreign compliance with the Vienna Convention or any other requirement of international law.

I will also add that, as a factual matter, the Department of State has not identified a single American citizen abroad whose rights have been in any manner affected by the ICJ's decision in *Avena* or by *Medellín* or *Leal*. This risk is not just hypothetical; it is non-existent. There is also no indication, public or private, that any country intends to reverse its Vienna Convention compliance policy as a result of U.S. law currently in force, which provides no judicial remedy for failure to inform a foreign national of his or her consular rights. Nor should they; to do so would be an extreme response to what is, at most, a minor violation of our treaty obligations. The principle of proportionality rules out such a course, as do prudence and comity.

If the Administration has information that Americans' rights abroad will be abrogated as a result of U.S. policies, it has a duty to explain precisely how, so that Congress may legislate accordingly. But the Administration speaks only in generalities and possibilities. That is no basis upon which to make law. I am concerned, though, that by acting as if the status quo is an intolerable affront to other nations, and by claiming that a failure to enact S. 1194 is a major breach by the U.S. of its international law obligations, we may increase the prospect that foreign nations hostile to the U.S. may use this issue as an excuse to stop complying with their Vienna Convention obligations as they apply to American citizens. This would be, to put it mildly, a most unfortunate outcome.

Constitutional Concerns Presented by S. 1194

Although I am not prepared to say that S. 1194 is unconstitutional in its entirety, it raises serious constitutional concerns that weigh heavily against its enactment.[3] In our federalist system, the federal government is limited to certain enumerated powers, while the States retain plenary police powers. Federal law is supreme in its proper constitutional domain, and state law in all others. This dual sovereignty system is the key feature of our constitutional architecture and the key element in protecting individual liberty. It has been recognized as such in centuries of case law.

The treaty power should not, and cannot be, an exception to the fundamental constitutional principles of dual sovereignty and separation of powers. It is true that the Supreme Court implied otherwise, although to an uncertain extent, in *Missouri v. Holland*, 252 U.S. 416 (1920), which concerned a treaty on migratory birds. There is, however, a growing scholarly consensus that the case was wrongly decided[4] and that the treaty power no more authorizes the abrogation of state sovereignty than do Article I's enumerated powers. In both instances, there must be a meaningful, judicially enforceable principle that demarcates state and federal sovereign spheres.

[3] My constitutional concerns are limited to S. 1194's application to states and state officials. Its application to federal officials does not raise any particular constitutional concern.

[4] *Holland* lies "in deep tension with the fundamental constitutional principle of enumerated legislative powers" and federalism that the Court has subsequently embraced. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005).

To the extent that *Holland* authorizes enactments like S. 1194—which is not at all clear—it is inconsistent with the constitutional structure and should be overruled.[5]

Significantly, combating crime and meting out punishment lie at the very core of the States' police power and the absolute periphery of the federal government's proper domain. Moreover, given the fact that modern international treaties cover a multitude of subjects far removed from the core issues of war and peace that dominated public international law at the time of the Founding, if a statute like S. 1194 can be constitutionally enacted and upheld, there would be no remaining domain—be it education, family law, inheritance or licensing issues—in which the States would retain their autonomy. I certainly can identify no limiting principle. In a very real, and not just rhetorical, sense, States would cease to exist as sovereign entities. This would change our great country in a most regrettable way.

With these concerns in mind, I am hopeful that one day the Supreme Court will revisit the matters left unresolved by *Missouri v. Holland* and will clarify the limits on the exercise of the treaty power. Indeed, this may well happen in the near future. *See Bond v. United States*, Slip op. at 14 (S.Ct. 2011). But until that day comes, or even if it never does, Congress, as a matter of constitutional comity, must take it upon itself to honor constitutional federalism.

S. 1194 is plagued by constitutional infirmities. It would impose yet another federal directive on States and state officials. A State that violates S. 1194's directive—for whatever reason, good or bad—can be hauled into federal court and commanded to take remedial action.

It would also apply *Avena* retroactively to upset the settled judgments of state courts: foreign nationals convicted of murder and sentenced to death may seek to have their executions called off. In every instance, they would be entitled—not just eligible, but *entitled*—to a stay of a scheduled execution. This provision, unlike the usual federal habeas process, would give foreign nationals—and foreign nationals alone—a right to bring successive challenges to their

[5] *See id*. at 1938; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich. L. Rev. 98, 100 (2000).

convictions and sentences, a right which U.S. convicts lack.[6] The result would be gaming of the system, as foreign nationals sentenced to death wait until the last minute to raise consular notice claims for the first time. This problem is of a constitutional dimension: state courts would be denied the opportunity to consider and rule on federal constitutional issues before they are heard in a federal habeas proceeding; the properly deferential standard of review of the Antiterrorism and Effective Death Penalty Act would be bypassed[7]; and even meritless claims would delay States from carrying out their criminal judgments, perhaps for years.

More than that, the bill purports to press into service state officials and, through them, carry out federal imperatives. When a State arrests a foreign national for a death-eligible offense, a state officer would be required to inform the foreign national of his consular rights. A state officer would be required to notify the consulate if the foreign national chooses to exercise his rights. A state officer would be required to ensure that consular staff may visit and communicate with the foreign national. All of these are good and worthwhile things, but they are beyond the power of the federal government to accomplish by commandeering state officials. These limitations are plain and well-described in the case law of the Supreme Court:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935 (1997).

It is plain that S. 1194 runs afoul of these limitations, in at least two provisions.[8] Section 3 contains the requirements described above, and section 4(b) provides for a freestanding cause of action for those arrested for a death-eligible crime, but not yet sentenced, to compel a state

[6] Another jarring consequence of S. 1194's approach is that it would give illegal immigrants a statutory right of access for relatively trivial consular notification claims that American citizens lack for breaches of even the most sacrosanct of our constitutional rights, such as the protections of the Fifth and Sixth Amendments.
[7] *See* 28 U.S.C. § 2254(d)(1).
[8] It may be, however, that section 4(a), which provides for habeas relief, does not run afoul of the prohibition on commandeering of state officials, if it is severable from the rest of the bill. This is not to say, however, that it is in any manner consistent with the principles of constitutional federalism. It is not.

official to provide consular notification. These provisions are intended, the bill expressly states, to carry out a federal objective, advancing compliance with the Vienna Convention on Consular Relations. The federal government may request that the States aid it in carrying out its objectives. It may pay them to do so or otherwise encourage them. But it has no authority to command and commandeer its co-equal sovereigns.

Supporters of S. 1194 may point to *Miranda* as an analogous requirement, but it is inapposite. *Miranda*, as propounded by the Supreme Court, is a constitutional requirement that applies directly to the States and their officers, not a mandate imposed by Congress under one or another of its enumerated powers. So *Miranda* is not subject to the limitations of the 10th Amendment and the Constitution's other protections of structural federalism. Any law passed by Congress, however, is—a point made clear in both *Printz* and *New York v. United States*, 505 U.S. 144 (1992). Put simply, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156.

Bending these rules of federalism is not just a bad policy decision, but would compromise the liberty of all Americans. Dual sovereignty itself is a guarantor of freedom, and its breach endangers our liberties, a point made with particular vigor and eloquence by the Supreme Court, speaking unanimously, in its just-concluded term:

> The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one. The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived . . . .
>
> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

Bond v. United States, Slip op. at 8-9 (S.Ct. 2011) (internal quotation marks and citations omitted). A federal government that may command the States, and commandeer their officials,

to carry out its own prerogatives is one that is unchecked by dual sovereignty. Bestowing these additional rights on foreign nationals, when done in a manner inconsistent with federalism, reflects and reinforces the gradual erosion of the liberties of all Americans.

This disregard of constitutional structure and limitations is unfortunately part and parcel with how the Executive Branch under both Republican and Democratic administrations has handled the issue of consular notification. After the *Avena* decision, the Bush Administration issued a "Presidential Memorandum" purporting to convert the terms of a non-self-executing treaty into one directly binding on the States, despite the lack of any implementing legislation. The Supreme Court, in *Medellín*, denied that this memorandum had any particular legal effect; legislation, it explained, must be passed by Congress.

Just last month, in *Leal*, the present Administration argued that the Supreme Court should stay an execution due to the *introduction* of S. 1194. I agree with the Court's conclusion that "[t]his argument is meritless." But I am also shocked by its audacity. The Executive Branch argued, in effect, that the courts should defer to bills that have not become law. This is also another affront to the States: under this view, their laws can be overridden by mere legislative proposals, so long as they are made in the federal Congress. And it is an affront to the power of the judicial branch, which has no more an obligation to defer to bills than to aspirational self-help books.

But most of all, the Administration's position is an affront to this body, the United States Congress. It is this body that holds the legislative power, and whether to legislate is its prerogative. By promising the Supreme Court that the Congress would act, and ascribing to that promise legal significance, the Executive Branch reached beyond its proper domain and into that of the Legislative Branch, effectively claiming the power to legislate a stay of execution. This is offensive because Congress already had acted. After seven years of activism, and two high-profile cases, this body made the considered judgment to leave the law as it was. The Executive Branch should have honored that decision. And as a matter of law, it had no other choice.

The decision that Congress has made so far—to eschew legislation like S. 1194—is the right one. S. 1194 is bad policy, is unnecessary to protect Americans abroad, upsets the basic

principles of federalism, and raises serious constitutional concerns. On the merits, it should be rejected.

Thank you. I would be pleased to address any questions the Committee may have.