Department of Justice

**STATEMENT OF**

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**BEFORE THE**

**JUDICIARY COMMITTEE**
**UNITED STATES SENATE**

**ENTITLED**

# "MEETING THE UNITED STATES' INTERNATIONAL LAW OBLIGATIONS THROUGH THE CONSULAR NOTIFICATION COMPLIANCE ACT OF 2011"

**PRESENTED**

**JULY 27, 2011**

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**Judiciary Committee**
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Good morning, Mr. Chairman, Senator Grassley and Members of the Committee. As the Deputy Assistant Attorney General responsible for international affairs, I am grateful for this opportunity to express the Department of Justice's strong support for the Consular Notification Compliance Act of 2011 ("CNCA"). Passage of this bill is critical to the law enforcement interests of the United States, and thus to the safety of American citizens, both abroad and at home.

As a preliminary matter, it is important to recall the events that have led to this bill. First and foremost, since the United States ratified the Vienna Convention on Consular Relations in 1969, it has had an obligation to provide consular notification and access to foreign nationals arrested or detained in the United States. That treaty is binding domestic law and it applies to every Federal, State and local law enforcement authority in this country.

There is no question that the United States has this obligation. It is not a position specific to this Administration or to the Executive Branch. More than three years ago, in *Medellín v. Texas*, 552 U.S. 491, 522 (2008), the United States Supreme Court held that the United States

had an "international law obligation" to comply with the judgment of the International Court of Justice ("ICJ") in the *Avena* case. *Case Concerning Avena & Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). In *Avena*, the ICJ found the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations ("VCCR") by not informing certain Mexican nationals, who had been convicted and sentenced to death, that they could have received the assistance of their consul after arrest. The ICJ determined that the appropriate remedy for those violations was for the United States to provide, "by means of its own choosing," judicial review and reconsideration of the defendants' convictions and sentences, notwithstanding U.S. procedural default rules.

In *Medellín*, the United States Supreme Court, in a majority opinion written by Chief Justice Roberts, found not only that "the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States," 552 U.S. at 522, but that the United States had "plainly compelling" interests in complying with that judgment, to wit, "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. The Supreme Court held, however, that the ICJ's judgment was neither automatically enforceable in the courts of the United States, nor enforceable through the action of the President, as President George W. Bush had sought to do by issuing a February 28, 2005 Memorandum that stated that the "'the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity ….'" *Id.* at 503.

Thus, as made clear by *Medellín*, and by the Supreme Court's subsequent decision in *Leal v. Texas*, No. 11-5001 (July 7, 2011), it is through passage of implementing legislation by Congress that the United States could, and *should*, meet its "international law obligation" to abide by the ICJ's judgment in *Avena* and fulfill our responsibilities under the Vienna Convention. In *Medellín*, the Supreme Court "agree[d]" that under Article 94 of the U.N. Charter, there is "'a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.'" *Id.* at 508 (quoting Brief for the United States; emphasis in original). The *Medellín* Court further noted that this provision of the U.N. Charter "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Id.* at 508-09 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). Thus, through the action of Congress the United States can meet its "international law obligation," and in doing so satisfy both its "interest" and its "honor."

This is precisely what is accomplished by the Consular Notification Compliance Act ("CNCA") that is before the Committee today. The CNCA addresses three areas of concern:

***First***, Section 3 of the bill simply restates and clarifies the existing obligations of the United States (as they pertain to Federal, State and local officials) under the VCCR and a number of bilateral agreements to provide consular notification and access to non-U.S. nationals arrested or detained in the United States. Despite the fact that these obligations already exist, instances in which notification is not provided continue to occur. By reiterating the existing consular notification and access obligations, the section makes clear that these obligations apply to Federal, State and local governments as a matter of domestic law. It provides that Federal, State, and local authorities shall inform an arrested or detained foreign national, without delay, that he

or she may have his or her consulate notified of the arrest or detention. Where the foreign national requests such notification, or where otherwise required by treaty, these authorities must inform the foreign national's consulate without delay, and the consulate must be provided access.

This section 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 (normally within 48 hours of arrest). This is intended to be a backstop or safeguard to ensure notification occurs by that time, if not already provided. This provision is consistent with the Justice Department's proposed amendments to Rule 5 of the Federal Rules of Criminal Procedure, which would require Federal courts to inform a defendant held in custody at the initial appearance that if the defendant is not a United States national, he or she may have his or her consulate notified of the arrest. Section 3 makes clear that this subsection does not create any judicially or administratively enforceable rights or causes of action. Importantly, however, 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.

***Second***, Section 4(a) directly addresses the judgment of the ICJ in *Avena*, and would bring the United States into compliance with *Avena* through a very limited and narrowly tailored retrospective remedy. This remedy affords an opportunity for judicial review and reconsideration on Federal habeas of the capital conviction and sentence of foreign nationals who have been sentenced to death at the time of enactment of the bill and who did not receive timely consular notification. While procedural default rules will not bar this opportunity, time limitations are set out regarding the filing of a petition under this section, as well as regarding appeal. Consistent with our domestic criminal practice, the petitioner must make a showing of

actual prejudice to the criminal conviction or sentence – a very high burden of proof with which our courts are familiar  If a petitioner can show actual prejudice to his or her conviction or sentence, the court shall order a new trial or sentencing proceeding.  This subsection will bring the United States into compliance with regard to the Mexican *Avena* defendants, and it will also apply to other similarly situated foreign nationals –  including defendants from the United Kingdom and other countries who currently have been sentenced to death but who did not receive consular notification, in violation of the Vienna Convention or our bilateral agreements.

***Third***, Section 4(b) ensures that if  foreign nationals facing capital charges in the future for some reason do not receive timely consular notification, they may raise this objection during the pretrial or trial proceedings and consular access must be allowed at that time.  The section provides that where a failure to provide consular notice and access is timely raised and substantiated before a court with jurisdiction over the charge, the court shall postpone proceedings to the extent the court determines necessary to allow for consular access and assistance.  This subsection is intended to apply only before and during trial, and does not provide a defendant with any right to appellate, post-conviction, habeas corpus, or Federal collateral review of a claimed consular notification violation.  The sole purpose is to ensure that our consular notification obligations are fully honored in this context, and the only remedy for a failure of consular notification is to allow access and assistance, as already required, and the possibility of a temporary continuance of the proceedings as may be necessary to facilitate that access and assistance.  This is consistent with the Supreme Court's observation in *Sanchez-Llamas v. Oregon*, that, if a defendant "raises an Article 36 violation at trial, a court can make

appropriate accommodations to ensure, to the extent possible, the benefits of consular assistance." 548 U.S. 331, 350 (2006).

Section 4 also makes clear that it shall not be construed to create any additional remedy, other than possible postponement to allow an opportunity for consular notification and assistance. This limitation on possible remedies is consistent with the Supreme Court holding in *Sanchez-Llamas,* that suppression of evidence is not available as a remedy for a consular notification violation, as the Vienna Convention itself does not mandate suppression and as the exclusionary rule is primarily reserved to deter constitutional violations, not applicable in this circumstance. *Id.* at 343-350. Nothing in the CNCA, however, is intended to foreclose a defendant from raising an Article 36 violation as part of a broader constitutional claim, such as a challenge to the voluntariness of a confession or a claim that defense counsel performed deficiently in investigating and preparing the defense. To emphasize, this subsection simply makes clear that no criminal law remedy, other than continuance, may be imposed under this section to address a free-standing failure of consular notification claim.

In sum, then, the bill before you carefully balances our treaty obligations and our domestic concerns regarding the very serious nature of capital cases and the need for finality of convictions. By crafting a narrow legislative response to bring the United States into compliance with the *Avena* decision – limiting its scope only to those convicted and sentenced to death before enactment of this legislation, and setting the high standard of actual prejudice in order to obtain reconsideration of such conviction or sentence – the United States recognizes the seriousness of capital proceedings and the extensive criminal justice process they entail up to and including conviction and sentencing. Similarly, by articulating an extremely narrow remedy for

any future lapses with regard to consular access and notification – namely continuance of the trial to allow for such access and notification – the United States again recognizes its treaty obligations but does not allow for excessive disruption of the trial process.

Thus, it is the judgment of the Department of Justice that this bill is fully consistent with, and will further, the law enforcement interests of the United States. In contrast, failure to pass this legislation will endanger the citizens of the United States in three distinct ways.

***Failure to Pass the CNCA Will Endanger Our Citizens Seeking Consular Access Abroad:*** As Undersecretary Kennedy's testimony establishes at greater length, the continuing non-compliance of the United States with the requirements of the treaty threatens the ability of the United States to provide consular access to our citizens abroad. With more than 170 parties, the Vienna Convention has afforded many thousands of American citizens detained abroad the benefits of consular notice and access. 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 *Medellín*, it is a "plainly compelling" interest "to vindicate United States interests ensuring the reciprocal observance of the Vienna Convention." 552 U.S. at 524.

***Failure to Pass the CNCA Will Endanger Our Citizens by Weakening Our International Law Enforcement Partnerships:*** The partnerships that the Department of Justice

forms with its overseas counterparts are critical to the protection of the citizens of the United States. But those partnerships are put directly at risk by the continuing non-compliance of the United States with the *Avena* judgment.

This is most readily apparent with regard to our law enforcement relationship with Mexico. The past ten years have seen the establishment of unprecedented cooperation with Mexican law enforcement, including joint capacity building under the Mérida Initiative, close operational coordination against narcotics cartels, and record numbers of extraditions of defendants from Mexico to face trial in the United States. At their October 22, 2007 meeting in Mérida, Mexico, President Calderón of Mexico, and President George W. Bush, pledged to take the cartels "head-on," and to do so shoulder-to-shoulder. That is precisely what the Government of Mexico has done under President Calderón, together with the United States.

The Government of Mexico also 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. Indeed, earlier this month, Texas proceeded with the execution of Humberto Leal Garcia, one of the Mexican nationals covered by the *Avena* decision, despite unsuccessful efforts to seek a stay from the U.S. Supreme Court – supported by the Department of Justice – to allow a reasonable time for Congress to consider the Consular Notification Compliance Act.

In a letter urging a stay in *Leal* sent to Secretary Clinton on June 14, 2011, Mexico's Ambassador to the United States stated that the U.S.'s "continued non-compliance with the ICJ's

decision has already placed great strain on our bilateral relationship." Mexico's Ambassador further stated:

> 'While our bilateral agenda is moving forward as a result of a joint commitment to deepen and widen cooperation and dialogue, as I wrote to your Legal Adviser dated July 7, 2010, a second execution in violation of the ICJ's judgment [after the execution of José Ernesto Medellín in August 2008] would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."

Far from being a threat of retaliation, the Ambassador's letter goes on to make clear that this is simply a reflection of reality: "another execution of a Mexican national in direct violation of international law will undoubtedly affect public opinion in Mexico. Under these circumstances, in addition to the likely impact on dialogue and cooperation, my government would face significant pressure from Mexico's Congress to revise our cooperation and to re-examine our commitment to other bilateral programs."

Nor is this an issue limited to our law enforcement relationship with Mexico. A number of nations with which we maintain strong law enforcement working relationships on such issues as 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 in which their nationals had not received consular notification and access. It is vital to the protection of our

citizens that these law enforcement relationships continue unimpeded by the *Avena* issue – as passage of the Consular Notification Compliance Act would permit. Indeed, in this regard as well, the Supreme Court in *Medellín* recognized that there was a "plainly compelling" interest in "protecting relations with foreign governments" by complying with *Avena*. 552 U.S. at 524.

***Failure to Pass the CNCA Will Endanger Our Citizens by Weakening Our Ability to Rely on the Rule of Law:*** Our citizens also will 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 *Medellín* also recognized this as a "plainly compelling" interest in complying with *Avena*: "demonstrating commitment to the role of international law." *Id.* at 524.

It is important to be clear about what is meant in this regard. Abiding by the international rule of law does not mean – as the Supreme Court made clear in *Medellín* – that ICJ judgments are automatically and directly enforceable in U.S. courts. What it does mean, however, is that when the U.S. submits itself to the jurisdiction of the ICJ, it undertakes "a *commitment* … to take *future* action through … [its] political branches to comply with an ICJ decision.' " *Medellín*, 552 U.S. at 508.

Because the United States ratified the VCCR as well as the Optional Protocol, under which it had previously acceded to the ICJ's jurisdiction over disputes arising under the VCCR, the United States is, as *Medellín* recognized, under an "international law obligation" to comply with the *Avena* decision. (On March 7, 2005, the United States withdrew from the Optional Protocol. See Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, http://www.state.gov/documents/organization/87288.pdf.)

Indeed, it is precisely by complying with an adverse judgment that the United States most clearly demonstrates its commitment to the rule of law. It is this lesson – willingness to abide by the rule of law, even when judicial rulings are unfavorable – that is the central foundation of the Department of Justice's law enforcement capacity-building efforts overseas. Those capacity-building efforts in turn are designed to protect U.S. citizens, by ensuring that we are helping to establish law enforcement partners who will not only have the ability to fight international crime, but to do so as partners we can trust to act pursuant to the rule of law. If we are to be credible in arguing for the rule of law overseas, we must be seen as abiding by it here as well. The security of our citizens demands nothing less.

***Conclusion:*** I would like to express again the Department of Justice's gratitude for the Committee's work on this critical piece of legislation. We strongly urge passage of this bill because it protects American citizens abroad while preserving our interests in maintaining critical law enforcement cooperation with foreign allies and seeing justice done in capital cases. It is carefully drafted to minimize delay in finally resolving the cases of the limited number of defendants covered by *Avena* or those similarly situated, and we stand ready to work with the Committee to ensure that result. Importantly, it provides no additional post conviction remedies.

This is truly a bipartisan issue: the Committee is carrying forward work that was begun by President George W. Bush, and that has now stretched over two Administrations. Both the Bush and Obama Administrations have shared a single goal: to, in the words of the Supreme Court's decision in *Medellín*, meet our "international law obligation," and in so doing achieve our "plainly compelling" interests in "vindicat[ing] 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." 552 U.S. at 522, 524.

Thank you. I will be pleased to answer any questions.