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Chapter 2
Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Department of State Consular Notification and Access Manual


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I’m especially pleased today to be able to announce the release of the third edition of the Consular Notification and Access Manual, a publication that anchors…efforts…to expand awareness by U.S. law enforcement about what to do to comply with the Vienna Convention on Consular Relations—the VCCR—and other consular treaties.

For centuries, a core responsibility of consular officers has been to protect the rights and security of their nationals living and traveling abroad, especially those in vulnerable situations, such as those who find themselves in the custody of a foreign government and face the prospect of navigating an unfamiliar legal system. The customary right to freedom of communication between consuls and their detained nationals was codified in Article 36 of the VCCR in three basic rules: authorities must ask the detainee “without delay” if he or she wants to have the consulate notified; notify the consulate if so; and allow consular access if the consulate requests it. These rules have since been widely applied, and in our view they constitute customary international law, binding even on the small number of countries that have not yet joined the VCCR.

The text of the VCCR itself leaves many critical questions unanswered, such as what it means to notify “without delay.” The international legal obligations codified in Article 36 are exceptional in that it is not the national government, but each individual law enforcement officer in every state and county across the country—almost a million people—who are called upon to implement the rules in actual cases day after day, usually without the federal government ever knowing about the case or needing to get involved. And while compliance is no simple task for any country, law enforcement officers in the United States confront a rather unique set of circumstances. First, few other countries host the volume of foreign nationals that we do, spread
across every corner of the country. Second, America is a melting pot and its citizenry is made up of people of all different backgrounds and cultures. Law enforcement cannot rely on things such as appearance, skin color, or even non-fluency in English as an indication that the person they’ve arrested is a foreign national. Even explicitly asking each and every arrested person whether they’re a foreign national doesn’t always solve the problem, because some do not wish to disclose their foreign nationality, and some may not even know they have the citizenship of another country.

Facing these and other challenges, we know that our record of compliance with our obligations has not been perfect. We are all aware of the high-profile cases of recent years in which the United States has been publicly called to account for these shortcomings. We are mindful of our obligations in these cases and are working to remedy those past harms. But the biggest takeaway from these cases is that we must do more moving forward to ensure compliance with our obligations not just in the majority of cases, but in every case. The Department of State is committed to overcoming the challenges and achieving 100 percent compliance with the VCCR and our other consular treaty obligations. We believe these efforts are bearing fruit: compliance has improved steadily over the years thanks in large measure to the outreach efforts of Consular Affairs, but we realize more needs to be done.

The manual represents the centerpiece of our mission to spread the word about consular notification and access and explain how law enforcement should apply the obligation. Much of the advice in the manual is compiled from decades of experience...responding to real-life challenges faced by law enforcement officials in the course of their work. Among many other items, the manual contains instructions on the types of detentions that trigger the obligation to notify; how to determine if someone is a foreign national; how and when to advise the detainee of the option to have the consulate notified; what to do if you cannot communicate with the detainee; when and how the consulate should be contacted; how to accommodate a consulate’s request for access; and the restrictions that can and cannot be placed on access. It also contains advice on consular notification for minors, incompetent adults, those involved in sea or air accidents, and deaths, and what to do when the detainee comes from a country with a bilateral treaty requiring notification regardless of the detainee’s wishes.

Our commitment to consular notification and access is rooted first and foremost in our respect for the international rule of law. But it is also motivated by considerations of reciprocity. We accord these rights to consular officers in the confident expectation that if the situation is reversed, American consular officers overseas will be accorded equivalent rights to protect our nationals.

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2. **Avena Implementation and Related Issues**

   a. **Legislation**

   (1) *Consular Notification Compliance Act ("CNCA")*

   On June 14, 2011, U.S. Senator Patrick Leahy introduced a bill in the U.S. Senate entitled the "Consular Notification Compliance Act," or CNCA, intended to facilitate compliance with the VCCR, as well as the ruling of the International Court of Justice ("ICJ") in the *Case

Section 3 of the CNCA would require notice, in accordance with the VCCR, to foreign nationals detained by law enforcement of the option to have their consulate contacted. S. 1194, 112th Congress, 1st Session. Section 4 of the CNCA would create a right for foreign nationals serving a sentence of death at the time of enactment to federal court review of claims that their conviction or sentence had been prejudiced by the denial of such consular notification. Id.


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We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration’s strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country’s consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country’s legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps
that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the Avena judgment and to comply with the U.S. Supreme Court’s decision in Medellin v. Texas, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the Avena problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.
(2) Senate hearing on CNCA

On July 27, 2011, several Executive Branch officials testified at a hearing before the Judiciary Committee of the U.S. Senate on the CNCA. The testimony of Under Secretary of State Patrick Kennedy is excerpted below (with footnotes omitted) and includes a statement by Secretary Clinton. The full text of Under Secretary Kennedy’s statement is available at www.state.gov/m/rls/remarks/2011/169182.htm. All witness statements from the hearing can be found at www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba62c686d. The testimony of Deputy Assistant Attorney General Bruce Swartz at the hearing is also available at www.judiciary.senate.gov/pdf/11-7-27%20Swartz%20Testimony.pdf and the testimony of former Legal Adviser John Bellinger is available at www.cfr.org/international-law/fulfilling-treaty-obligations-protecting-americans-abroad/p25562.

… I appreciate the opportunity to testify today on the proposed Consular Notification Compliance Act. We need swift enactment of this bill to ensure our ability to protect our own American citizens who are detained in a foreign country, to preserve vital international relationships, and to honor our binding treaty obligations.

Secretary Clinton has asked me to underscore that she vigorously supports this bill. She has submitted a statement, which you have before you, that is appended to my written testimony.

The protection of U.S. citizens abroad ranks among the Secretary’s and the Department’s absolute highest priorities. Senators, all of you have constituents who travel and live overseas. Your constituents are among the 4.5 million Americans who live abroad, the estimated 60 million who traveled abroad last year and the 103 million who hold passports—all of whom depend on consular protections, as much as they depend on passports and visas, to ensure their safe passage through foreign countries. To protect Americans in foreign custody, the Vienna Convention on Consular Relations—a binding U.S. treaty—mandates three simple rules: “ask, notify, and allow access.” Arresting authorities must first ask detained foreign nationals if they want their country’s consulate notified; if requested, must notify the consulate; and, must allow access if the consulate seeks to provide assistance. Thus, our ability to secure safe worldwide travel for the millions of Americans who live, work, study, and vacation abroad depends vitally on all countries granting mutual respect to the protective rules in the Vienna Convention.

Mr. Chairman, some have asked “why pass this bill, and why pass it now?” For three reasons: to preserve reciprocal treatment for U.S. citizens detained overseas, to protect our vital foreign policy interests, and to maintain our reputation as a country that values and respects the rule of law.

First, the Consular Notification Compliance Act is essential to ensuring that we will be able to protect American citizens. …In 2010 alone, consular officers conducted more than 9,500 prison visits, and assisted more than 3,500 Americans who were arrested abroad. But the United States cannot ensure that it will be allowed consular access to our citizens abroad—to provide information on foreign legal systems, to facilitate communication with families, and to provide
needed medical assistance—unless it ensures that foreign governments have the same access to their citizens detained here. We strive to ensure U.S. compliance with consular notification because of our strong interest in ensuring that other countries comply with their obligations with respect to our citizens.

* * * *

In the United States, federal, state and local law enforcement officials have in most cases been upholding these obligations for decades...

Overseas, other countries likewise respect our citizens’ consular rights. …When foreign governments fail to provide us with notification or refuse our requests to visit and assist an imprisoned American, we remind them of their obligations under the Vienna Convention, and in most cases, this is enough to secure access.

We find these protections particularly critical for the men and women serving in our Armed Forces, and their overseas dependents. The Department of Defense considers consular access very important for U.S. service members and their families, and the Department expects its personnel who are detained abroad to be able to benefit from a range of assistance from our consulates. In addition, it is in the Defense Department’s interests for foreign military personnel who may be arrested or otherwise detained in the U.S. to receive prompt access to their own consulates, in order to ensure that reciprocal protections are also afforded to U.S. personnel who may be detained abroad.

Senators, each of you has faced the traumatic experience of having a constituent detained overseas. In such circumstances, Americans often have nowhere to turn but the consular system. When a U.S. citizen finds him or herself in a foreign government’s custody, a consular officer is often the best, and sometimes only, resource that citizen has as he or she navigates a foreign legal system. These consular services are extensive and indispensable. Consular officers provide basic information about a country’s legal system and give valuable information on how to find a lawyer. Consular officers conduct regular visits and report back to Washington any mistreatment or poor conditions of detention. They monitor the mental and physical health of detained Americans, communicating concerns about an individual’s well-being not just to the detaining authority but also at a diplomatic level. Consular officers are also frequently called upon by our citizens to convey messages to the detained American’s family members, legal counsel, or congressional representatives back home. They work to ensure that our citizens have access to food, medicine, or religious items as needed. When an American is put on trial in a foreign country, consular officers often attend the trial and seek to ensure that the proceedings are being conducted in a manner that is fair, transparent, and understandable to the defendant. And through close monitoring by our consular officers of local proceedings involving U.S. citizens arrested overseas, the U.S. government may determine that detention is unjust or illegal, and may call on the detaining government to release the U.S. citizen.

We find these services especially critical in countries that do not respect due process of law and fundamental rights. In many countries a defendant has no protections equivalent to our own from government searches and seizures, no guarantees against cruel and unusual punishment, and no right to a lawyer. But in virtually every country in the world when Americans are imprisoned, the same treaties to which we are a party ensure that they have a right to see their consular officer.
Americans who have recently been detained in such countries as North Korea, Iran, Syria, Pakistan and Libya can tell you from their own experience how indispensable consular notification and access is for the protection of U.S. citizens detained overseas. …

Consular access can be particularly important in countries where we do not have diplomatic relations, as in North Korea where the Swedish Embassy represents the U.S. interests. In November 2010, U.S. citizen Eddie Jun was detained by North Korea. After North Korea finally identified Mr. Jun as a detainee, Swedish diplomats were able to visit Mr. Jun six times and inform the U.S. government that he was being well cared for. At U.S. request, Swedish diplomats continued to ask for regular consular access to Mr. Jun, until his release in May 2011. In short, we strive to ensure domestic compliance with our consular obligations not from altruism, but from keen self-interest. If we fail to honor our consular obligations at home, we can expect your constituents to pay the price overseas.

Second, this legislation is not just vital for the protection of Americans abroad. Ensuring compliance with our legal obligations is essential to our foreign relations and close bilateral relationships. We demand consular notification and access from other countries and in return, we assure them that we will give it ourselves. In most cases, this system works remarkably well. But despite concerted efforts, our record has not been perfect. In certain cases, this system has broken down, and foreign nationals have proceeded through our legal system—at times facing serious charges—without being informed that they can receive the assistance of their consulate, in clear violation of our treaty obligations. The United States has been publicly called to account for these shortcomings in several high-profile cases, including the Avena case, in which the International Court of Justice (“ICJ”) found the United States to have violated its Vienna Convention obligations with respect to 51 Mexican nationals who were convicted and sentenced for capital crimes without being informed that they could receive the assistance of their consulate, and ordered that the U.S. judicially review their cases to determine whether the individuals were prejudiced by the violation.

The Bush Administration went to significant lengths to try to secure compliance with the Avena judgment. Our ongoing failure to comply has placed great strain on the U.S. relationship with Mexico; Secretary Clinton has stated that our relationship with Mexico is undoubtedly one of the most important bilateral relationships we have. …

Mexico has stressed on numerous occasions, however, that U.S. compliance with our consular treaty obligations is a priority issue on the bilateral agenda and a matter of significant concern to the Mexican public, and that our non-compliance could seriously jeopardize the ability of the Government of Mexico to continue working collaboratively in these areas. We need swift enactment of the bill before you to resolve our outstanding obligations under the Avena judgment, to reaffirm our commitment to our consular notification treaty obligations, and to remove this longstanding obstacle in the bilateral relationship.

The foreign relations implications of this legislation, moreover, reach well beyond Mexico. Other essential U.S. partners, including the United Kingdom, the European Union, Brazil, Spain, and Switzerland, follow this issue closely and have repeatedly and forcefully called upon the United States to fulfill these obligations, often at high levels. As time has passed,
calls for U.S. compliance have become more vociferous. As anyone who has worked in diplomacy understands, such objections can impair our ability to advance U.S. national interests in our bilateral and multilateral relationships in many concrete ways across a spectrum of law enforcement, security, economic, and other concerns. The benefits that will flow from enactment of this legislation, and the continuing harm that will result if it is not passed, will not be limited to the consular sphere but will be felt across a range of issues that are critical to our national interest.

*Third*, enactment of this legislation is essential to our reputation as a nation that complies with the rule of law internationally. Our treaties are critical to protecting U.S. sovereign interests. U.S. treaties protect our diplomats and government officials overseas, allow us to secure extraditions for our own law enforcement purposes, prevent other states from proliferating nuclear, chemical and biological weapons and from trafficking in certain weapons, secure international cooperation to combat drug trafficking, and facilitate our businesses’ international economic relationships. We are constantly negotiating new agreements to advance fundamental U.S. interests and insisting that other states comply with treaty commitments to us that they have already made.

In this increasingly interdependent world, the United States simply cannot afford to have our partners at the negotiating table or those nations whom we ask to fulfill their own legal obligations question our own commitment to the rule of law. When we do not comply with our obligations, we lose credibility in our insistence that other countries respect theirs. Enactment of the Consular Notification Compliance Act will send a strong message to valued international partners that the United States takes seriously its obligations under the Vienna Convention.

* * * *

After the *Avena* decision was handed down, recognizing the important consequences of the decision for the safety of Americans overseas, President Bush took the extraordinary step of directing state courts to give the ICJ judgment domestic legal effect. Although the U.S. Supreme Court determined in *Medellín v. Texas*, 552 U.S. 491 (2008), that this effort was constitutionally insufficient, Chief Justice Roberts’ opinion for the Court recognized that judgment as a binding international legal obligation, and agreed that the United States’ interests in observance of the Vienna Convention, in protecting relations with foreign governments, and in demonstrating commitment to the international rule of law through compliance with that judgment were “plainly compelling.” *Medellín*, 552 U.S. at 524. He further explained that this compliance could be secured by means of legislation.

Picking up where the last Administration left off, this Administration has worked diligently to find the legislative solution the Court recommended. The Consular Notification Compliance Act was developed in close cooperation with the State and Justice Departments, in order to secure narrow, carefully crafted legislation that facilitates our compliance with our current and future consular notification and access obligations, but also takes into account important interests in facilitating normal law enforcement operations and criminal proceedings…

We consider compliance with these obligations so vital, and the harm from noncompliance so irreparable, that the United States requested that the Supreme Court delay the execution of Humberto Leal García, a Mexican national who was subject to the *Avena* judgment and whose execution without affording him the hearing provided by this legislation would
violate our legal obligations. In denying the request, the Supreme Court made clear that Congress is the appropriate body to take action to bring us back into compliance with our obligations. By so saying, the Court left no doubt that Congress can solve this lingering problem, once and for all, by passing this legislation now, before another execution of an individual covered by Avena takes place, and causes further damage to our reputation in this area.

* * * *

STATEMENT OF SECRETARY OF STATE HILLARY RODHAM CLINTON

The State Department has no greater responsibility than the protection of U.S. citizens overseas – particularly when Americans find themselves in the custody of a foreign government, facing an unfamiliar, and at times unfair, legal system. Last year alone, our consular officers conducted over 9,500 consular visits with more than 3,500 Americans who were in the custody of foreign governments. Through the international system of consular assistance—a system that has evolved over centuries and today is reflected in binding U.S. treaties—we are able to reach our citizens in these vulnerable situations and help them receive food and medical assistance, communicate with their families, and provide them with information regarding foreign legal systems and how they can access legal counsel overseas. In return, the United States has committed to permit foreign officials to provide the same assistance to their own citizens who are arrested here.

This protective system of consular assistance depends on mutual compliance with these obligations by the United States and our treaty partners. If the United States fails to honor our legal obligations toward foreign nationals in our custody, the fabric of this protective system is torn, and ultimately it is Americans who are harmed. And although we work strenuously to honor these commitments, unfortunately at times our own compliance has broken down.

The bill that is before you—the Consular Notification Compliance Act—is a carefully crafted piece of legislation which seeks to ensure that the United States keeps these treaty promises. The bill provides practical steps for federal, state and local authorities to follow to comply with consular notification rules. It would also give foreign nationals in a small number of very serious cases the chance to prove that they were prejudiced by our own failure to provide them with the opportunity for consular assistance, consistent with our legal obligations.

Enactment of this legislation is also essential to our vital foreign relations interests. Our failure to act, and to act now, threatens our close partnership with Mexico, including in the fight against organized crime and drug trafficking and securing our border. Many other countries, including important U.S. allies, have pressed us to comply with these obligations with increasing urgency. Enacting this legislation will demonstrate to the world that we are a nation that keeps our promises. Failure to enact it invariably will harm our ability to secure U.S. interests across a range of law enforcement, security, and other goals.

To protect our citizens, we need to do our part to protect those of other countries. Because enactment of this bill serves our critical interests in protecting our citizens, preserving our foreign policy relations, and abiding by our promises under vital treaties we have ratified, I join the Department of Justice and the rest of the Administration in urgently calling on Congress to pass this narrow and carefully crafted legislation. Thank you very much.

* * * *
(3) Questions for the record

After the July 27, 2011 hearing, both the Justice Department and the State Department provided responses to questions for the record (“QFRs”) from members of the Senate Judiciary Committee. The excerpt below from the Justice Department responses emphasizes that the CNCA would not impose any new obligations on law enforcement beyond those already required by the Vienna Convention and other treaties. The Justice Department’s responses to QFRs are available in full at www.state.gov/s/l/c8183.htm.

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* * * *

Question …

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 Medellin 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 Medellin v. Texas, 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (noting that in Medellin “[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 Medellin 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).

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The State Department’s responses to QFRs reinforced the point that treaty obligations under the Vienna Convention already apply to the states. The excerpt below is the State Department’s response to the question from Senator Leahy: “What obligations regarding consular notification currently apply to the states and why?” The full text of the State Department’s responses to QFRs from the July 27, 2011 hearing is available at www.state.gov/s/l/c8183.htm.
The Vienna Convention on Consular Relations ("Vienna Convention") is a multilateral international treaty to which the United States has been a party since 1969. President Kennedy signed the treaty in 1963, and in 1969 President Nixon transmitted the Vienna Convention to the Senate for advice and consent under Article II, Section 2 of the Constitution, which the Senate unanimously provided by a vote of 81 to 0. The United States is also party to over 50 bilateral consular conventions containing similar provisions on consular notification and access. The United States became a party to each of these conventions by ratifying them upon the Senate’s advice and consent. All of these conventions have been the law of the land, binding on U.S. federal, state, and local authorities, since their ratification.

Domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention1 to follow three simple rules with respect to any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must ask the individual without delay if he or she wants to have the consulate notified; notify the consulate without delay if so; and allow the consulate access to the individual if the consulate so requests. “Asking” an individual means that if authorities ascertain that the detained individual is a foreign national, they must tell the individual that he or she may have the consulate notified of the detention. This may be accomplished by asking the individual if he or she is a foreign national, or by informing all individuals taken into custody that if they are a foreign national, they may have their consulate notified. “Without delay” means that the authorities should inform the individual promptly. This means that there should be no deliberate delay, and notification must occur as soon as reasonably possible under the circumstances. In criminal proceedings, this ordinarily means that the person should be informed about the option to seek consular assistance at booking, when identity and foreign nationality can be confirmed in a safe and orderly way. Notification of the consulate “without delay,” in turn, means as soon as possible but generally no later than 72 hours after arrest.2

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1 Article 36 of the VCCR provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
   (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2 The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

2 As noted below, the Federal Rules Committee currently is considering a recommendation from the Department of Justice to amend Rule 5 of the Federal Rules of Criminal Procedure to require that federal courts ensure that consular notification has been provided to foreign national defendants at the time of their first appearance.
For nationals of countries that are parties to relevant bilateral conventions, the rules may differ slightly. Most commonly, bilateral conventions, including those with China, Russia, and the United Kingdom, require state authorities to notify the consulate of an arrest or detention, whether or not the individual requests it. The specific requirements of these “mandatory notification” conventions and other information are provided in the Department of State’s Consular Notification and Access Manual, available at www.travel.state.gov/consularnotification.

These treaty obligations are directly binding on state and local governments, as well as the federal government, by virtue of the Supremacy Clause, Article VI of the Constitution.3 See Hauenstein v. Lynham, 100 U.S. 483, 489 (1879) (By virtue of Supremacy Clause, “every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State.”); Kolovrat v. Oregon, 366 U.S. 187, 190-91 (1961) (provisions in bilateral treaty with Yugoslavia prevailed over inconsistent provisions of Oregon law); Clark v. Allen, 331 U.S. 503, 508 (1947) (same for treaty with Germany and California law); Asakura v. City of Seattle, 265 U.S. 332, 340-41 (1924) (under the Supremacy Clause, U.S. treaty with Japan was “binding within the state of Washington” and prevailed over a municipal ordinance); Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (“The Supremacy Clause mandates that rights conferred by a treaty be honored by the states.”).

These obligations are also self-executing, and domestic legislation to implement these treaty obligations is not required. In other words, these consular notification and access obligations are already automatically obligatory on federal, state, and local authorities, and implemented through their existing powers.4 See, e.g., Gandara v. Bennett, 528 F.3d 823, 828 (11th Cir. 2008) (The Vienna Convention “has the force of domestic law without Congress having to implement legislation.”); Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007) (“There is no question that the Vienna Convention is self-executing. As such, it has the force of domestic law without the need for implementing legislation by Congress.”); Jogi v. Voges, 480 F.3d 822, 831 (7th Cir. 2007) (“When the United States Senate gave its advice and consent to the ratification of the Vienna Convention in 1969, . . . the Convention became the ‘supreme Law of the Land,’ binding on the states.”); Breard, 134 F.3d 615 at 622 (“The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states.”).5 Section 3 of the Consular Notification and Compliance Act merely confirms these existing obligations on federal, state, and local governments, and sets forth the simple, practical steps their officials must take to discharge the treaty obligations.

3 The Supremacy Clause provides that “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const., Art. VI.

4 The Consular Notification Compliance Act is needed, however, because it will give domestic legal effect to the Avena judgment and prevent further violations of the Vienna Convention by enshrining existing treaty obligations on consular notification and access in Federal law.

5 It is important to note that the U.S. Supreme Court in Medellin did not hold that the consular notification requirements of the Vienna Convention are not binding on the United States or the several states. Instead, it addressed the nature of the International Court of Justice’s judgment in the Avena case, holding that the judgment was not, on its own, directly enforceable in state courts even though President Bush had issued an executive memorandum directing state courts to give effect to the judgment. Medellin v. Texas, 552 U.S. 491, 522-23, 525-26 (2008).
For decades, federal, state, and local governments have applied the Vienna Convention and bilateral conventions directly on the basis of the relevant treaty language and written guidance such as the State Department’s Consular Notification and Access Manual. Many state and local authorities have also issued internal regulations, directives, orders, or similar instructions for their officials. For example, effective January 1, 2000, California adopted legislation setting forth the obligations under state law, Cal. Penal Code § 834c. Texas, Virginia, Indiana, and Wisconsin have all published manuals setting forth consular notification guidance; and a number or local jurisdictions have issued formal policies and guidance to law enforcement, including Peoria and Chandler, Arizona; Bowling Green, Kentucky; Truro, Massachusetts; Suffolk County, New York; and Chesapeake, Virginia.

At the federal level, providing consular notification is standard operating procedure, and is incorporated into the internal procedural manuals and directives of federal law enforcement agencies. The Department of Justice and the Department of Homeland Security (DHS) have promulgated regulations on the steps their officials must take in order to discharge the obligations. See 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. Within these agencies, U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the U.S. Marshals Service, the Drug Enforcement Agency, and the Federal Bureau of Investigation, as well as the U.S. Postal Inspection Service and the Internal Revenue Service Criminal Investigation Division, have all issued standard operating procedures relating to consular notification and access.

* * * *

Guidance for federal prosecutors is routinely made available to U.S. Attorneys Offices. Foreign nationals charged with federal crimes eventually may benefit from a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure that would require federal courts to inform individuals at the time of their first appearance that if they are foreign nationals, they have the option to meet with a consular official. In addition, the Uniform Law Commission currently is considering whether to form a drafting committee for similar uniform state legislation.

Furthermore, for well over a decade, the Departments of State and Justice have worked closely with federal, state, and local officials to ensure that they are aware of their consular notification and access obligations and properly discharge them. The Department of State has distributed over one million sets of briefing materials on consular notification and regularly conducts training sessions all over the country. The Consular Notification and Access Manual is the centerpiece of these efforts, explaining the very simple and practical steps that should be taken to fulfill the obligations in real-world contexts. Last year, the Department distributed 6,000 manuals to law enforcement officials. The Department also distributes tens of thousands of small pocket cards each year (70,000 last year) and training videos for law enforcement personnel, maintains updated information on consular notification on its website, www.travel.state.gov/consularnotification, and has a Twitter feed, @ConsularNotify, followed by over 1,200 organizations and individuals, where it provides tips on consular notification practice.

* * * *

b. Humberto Leal García
On July 1, 2011, Mr. Koh sent letters to relevant authorities in Texas—the governor, the attorney general, the district attorney, and the board of pardons and paroles—urging a continuation or modification of the execution date of Humberto Leal García (“Leal”). Leal was one of the Mexican nationals in the Avena case, who did not receive consular notification in compliance with the VCCR. As a remedy for the violation, the ICJ ordered the United States to provide review and reconsideration to his (and 50 other Mexican nationals’) sentences and convictions. Mr. Koh’s letter to the governor of Texas, which is substantially identical to his letters to the other Texas officials, is set forth below. The letters asked Texas officials to make all available efforts under Texas law to postpone Leal’s execution date to afford Congress a reasonable time to enact legislation to comply with U.S. international legal obligations. The letters are available as exhibits to the U.S. amicus brief filed in the U.S. Supreme Court in support of Leal’s application for a stay of execution. That brief, with exhibits, is available at www.state.gov/s/l/c8183.htm.

* * * *

I write you urgently regarding the case of Humberto Leal García, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal’s execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In Case Concerning Avena and Other Mexican Nationals (Mex. v. US.), 2004 I.C.J. 12 (Mar. 31) (Avena), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States’ obligations under the Vienna Convention on Consular Relations.

His execution on July 7 would violate the United States’ obligations under the ICJ judgment, which required the United States to provide judicial “review and reconsideration” to determine whether Leal’s conviction or sentence was actually prejudiced by the consular violation.

As you know, President Bush sought to secure U.S. compliance with the Avena judgment by directing the state courts to provide the requisite review and reconsideration. In Medellin v. Texas, 552 U.S. 491 (2008), the U.S. Supreme Court found this effort legally insufficient and recognized Avena as imposing a binding international legal obligation, but indicated that Congress could ensure compliance through legislation.

On June 14, 2011, Senator Patrick Leahy introduced S. 1194, the Consular Notification Compliance Act of 2011 (CNCA) (attached), which, if enacted, will bring the United States into compliance with our Avena obligations by providing for post-conviction review of Vienna Convention violations for Mr. Leal and other foreign nationals currently on death row. This legislation was developed in close consultation with the Administration, and as the attached letter of June 28 from the Secretary of State and the Attorney General indicates, the Administration strongly supports it. However, enactment of this legislation necessarily will take some time. I therefore respectfully request that you secure a continuance or modification of Leal’s execution
date at this time to afford a reasonable opportunity for Congress and the President to achieve compliance with the United States’ international obligations.

This request is not a comment on either the conviction or sentence in this case, or on whether Mr. Leal or any other individual would be able to demonstrate actual prejudice. Rather it is simply a request that Texas authorities help us take the steps that both the Supreme Court and the Texas Court of Criminal Appeals have recognized are necessary to bring the United States into compliance with outstanding international law obligations. As the Supreme Court in Medellin made clear, Texas itself could satisfy the United States’ international legal obligations in this matter, by providing Mr. Leal with a hearing that would give appropriate judicial review and reconsideration of his conviction and sentence under circumstances in which the reviewing court had legal authority to award any appropriate relief. Just this week, three judges of the Texas Court of Criminal Appeals recognized the undisputed, binding obligations the Avena judgment creates for the United States and the State of Texas, and called for Texas officials to take action to secure Mr. Leal a stay during the pendency of federal legislation.

A temporary delay of Mr. Leal’s execution date would not prejudice Texas’s important and legitimate law enforcement interests, and it would protect compelling long-term interests of both the United States and the State of Texas. Ensuring compliance with our international consular obligations here at home is essential to ensuring that American citizens from Texas and other states can benefit from U.S. consular assistance if they are detained abroad. Like all Americans, Texans who travel and are detained overseas rely upon precisely the kind of consular notification that was not given here. Mexico has also made clear that Mr. Leal’s execution in breach of our international obligations would seriously jeopardize the ability of the Mexican Government to continue cooperating with the United States on cross-border law enforcement and security and other issues of critical importance to the State of Texas. In the one prior case in which Texas executed a Mexican national subject to the Avena judgment—that of Jose Ernesto Medellin in 2008—Mexico brought a second suit against the United States in the ICJ, which found that the execution constituted another violation. We are concerned that the execution of Mr. Leal, without his receiving the review and reconsideration to which he is entitled under Avena, would simply trigger another round of international litigation damaging to our foreign policy interests.

For these reasons, the United States has a compelling interest in ensuring that this case does not result in a breach of U.S. international law obligations. Therefore ask you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal’s execution date to afford a reasonable time for Congress to enact pending legislation, so that we can avoid the significant damage to United States interests that would result from an execution in violation of our international obligations. Identical copies of this letter are being sent to the Texas Attorney General, the Texas Board of Pardons and Paroles, and the Bexar County District Attorney.

* * * *

In July 2011, the Obama Administration filed an amicus brief in the Supreme Court of the United States in support of a petition for a stay of execution filed by Mr. Leal. The U.S. brief is excerpted below, with most footnotes and references to the submissions in the case omitted. The full brief is available at www.state.gov/s/l/c8183.htm. The brief argued that Mr. Leal’s execution should be stayed in order to comply with international legal
obligations under the Vienna Convention and the ruling in the *Avena* case. The brief also relied on the recent introduction of the CNCA in the U.S. Senate (see discussion in section A.2.a, above). On July 7, 2011, the Supreme Court issued its decision denying the stay. *Garcia v. Texas*, 131 S.Ct. 2866 (2011). Four justices dissented, and their opinion relied heavily on the arguments in the U.S. brief.

* * * *

This case implicates United States foreign-policy interests of the highest order. Indeed, this Court has recognized those interests to be “plainly compelling.” *Medellin II* [*Medellin v. Texas*, 552 U.S. 491 (2008)], at 524. Petitioner’s execution would cause irreparable harm to those interests by placing the United States in irremediable breach of its international-law obligation, imposed by the ICJ’s judgment in *Avena*, to provide judicial review of petitioner’s Vienna Convention claim. That breach would have serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention.

Efforts on the part of Congress and the Executive Branch to satisfy the United States’ obligation under *Avena* have resulted in the recent introduction in the Senate of the Consular Notification Compliance Act (CNCA). The CNCA would provide petitioner the procedural remedy that the United States is obligated to provide under international law: review and reconsideration of his Vienna Convention claim. The CNCA is currently under active consideration in Congress; the Chairman of the Senate Judiciary Committee has announced his intent to hold a hearing on the bill in July. The Executive Branch participated in the development of the legislation and the Secretary of State and the Attorney General have publicly expressed their strong support for its enactment. That support distinguishes this case from *Medellin III*, in which this Court held that the possibility of enactment of a previous bill was “too remote” to warrant the issuance of a stay, in the absence of any statement from the Executive Branch about the likelihood of Congressional action. [*Medellin v. Texas.*] 554 U.S. [759 (2008) (per curiam)] at 759-760; see *id.* at 760 (“The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention.”). While enactment of the Senate bill cannot be assured, in developing and advancing this legislation, the political branches, acting in coordination, have made greater efforts to achieve compliance with *Avena* than at any previous time.

Given these circumstances—petitioner’s imminent execution date, the breach of United States’ legal obligations that will ensue, the significant and detrimental foreign-policy consequences that will follow from such a breach, and the pendency of legislation that would avert those harms—the Court should stay petitioner’s execution until the adjournment of the current session of Congress (which must occur no later than January 3, 2012) in order to allow the United States additional time to meet its international-law obligations. The exercise of this Court’s discretion to grant such a stay is consistent with the equitable principles that have guided this Court’s decisions with respect to stays of execution.

Ordinarily, for the Court to grant a stay in a capital case, “there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court’s decision; and there must be a likelihood
that irreparable harm will result if that decision is not stayed.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation and internal quotation marks omitted). In this case, those factors must be
tailed to the basis for the requested stay, *i.e.*, the introduction of legislation in Congress would,
if enacted, afford petitioner the review and reconsideration that the United States has an
undisputed international-law obligation to provide. The application of the traditional stay factors
in this context must consider whether petitioner would have a right to federal-court review and a
stay of execution under the legislation that has been introduced; whether petitioner—and vital
national interests—would be irreparably harmed by denial of a stay; whether the grant of the stay
would cause significant harm to the State of Texas; and what impact the grant or denial of a stay
stay factors are addressed to this Court’s discretion. *Id.* at 1760-1761. Here, consideration of
those factors justifies the exercise of the Court’s discretion to grant a stay.

1. Congress’s enactment of the CNCA would provide petitioner with the procedural right
to federal-court review of his Vienna Convention claim. The United States has consistently
acknowledged that it has a treaty-based obligation to provide that procedural right under *Avena.*
United States has an international obligation under Article 94 [of the United Nations Charter] to
comply with the *Avena* decision.”); *Medellin II*, 552 U.S. at 504 (“No 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.”) (emphasis omitted). Under *Avena,*
the United States is required to provide review and reconsideration of the convictions and
sentences of the affected Mexican nationals in the decision, including petitioner, because of the
United States’ failure to provide required information about consular notification and assistance.
*Medellin II*, 552 U.S. at 502-503. *Avena* requires such review without regard to any state
procedural-default rules. *Id.* at 503.

In 2005, President Bush acknowledged the international legal obligation created by
*Avena* and determined that the United States would discharge that obligation by “having State
courts give effect” to *Avena* in the cases, including petitioner’s, that were addressed in that
decision. *Medellin II*, 552 U.S. at 503. That determination reflected the President’s considered
judgment that the United States’ foreign-policy interests in meeting its international obligations
and protecting Americans abroad required the United States to comply with the ICJ’s decision.
In *Medellin II*, the United States reaffirmed the important interests implicated by its compliance
with *Avena*, including “(1) the importance of securing reciprocal protection of Americans
detained abroad; (2) the need to avoid harming relations with foreign governments, including
Mexico; and (3) the interest in reinforcing the United States’ commitment to the rule of law.”
U.S. Amicus Br. at 11, *Medellin II, supra* (No. 06-984). This Court agreed that the government’s
interests in “ensuring the reciprocal observance of the Vienna Convention, protecting relations
with foreign governments, and demonstrating commitment to the role of international law * * * are
plainly compelling.” *Medellin II*, 552 U.S. at 524. Protecting those compelling interests is a
sufficiently important matter to warrant this Court’s intervention. See *Medellin III*, 554 U.S. at
761-762 (Stevens, J., dissenting) (noting that the importance of the interests at stake warranted
granting a stay and calling for the views of the Solicitor General); *id.* at 762 (Souter, J.,
dissenting) (same); *id.* at 762-763 (Ginsburg, J., dissenting) (same); *id.* at 763-766 (Breyer, J.,
dissenting) (same).
2. The pendency of the CNCA in the Senate, with the full support of the Executive Branch, creates a sufficient likelihood of petitioner’s receiving judicial review and reconsideration of his Vienna Convention claim to satisfy the first stay consideration, i.e., likelihood of success on the merits. The merits here consist of a procedural opportunity, not a right to a substantive outcome.

a. In *Medellin II*, this Court observed that “[t]he responsibility” for implementing the United States’ international legal obligation to comply with *Avena* “falls to Congress.” 552 U.S. at 525-526. In the immediate aftermath of Medellin II, a bill to implement the decision was introduced in the House of Representatives, see *Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong. (2008), but that bill was introduced without Executive Branch participation or consultation, and it was not enacted. Following that effort, the various interested Departments of the Executive Branch, working with Congress, painstakingly negotiated and developed legislation that would implement *Avena*, while balancing the interests in preserving the efficiency of criminal proceedings and protecting the integrity of lawful criminal convictions. The resulting bill, the CNCA, was introduced by Senator Leahy on June 14, 2011.

The Executive Branch has strongly endorsed the CNCA in a letter to Senator Leahy signed by the Secretary of State and the Attorney General. The letter explains that enactment of the CNCA is “essential” to the government’s “ability to protect Americans overseas and preserve some of [its] most vital international relationships.” On June 29, 2011, Senator Leahy reiterated the crucial importance of the CNCA “to ensuring the protection of Americans traveling overseas” and to restoring the Nation’s “image as a country that abides by its promises and the rule of law.” Cong. Rec. S4215-S4216 (June 29, 2011). Noting that “productive discussions with Republicans and Democrats from both the House and Senate” have begun, Senator Leahy, “[a]s [C]hairman of the Senate Judiciary Committee, * * * announc[ed] that [he] intend[s] to hold a hearing on this critical issue in July.” *Id.* at S4216.

The introduction of the CNCA, with the support of the Executive Branch, represents an important step by the political branches toward fulfilling the United States’ international-law obligation to implement the *Avena* decision. The CNCA provides for judicial review and reconsideration, without regard to procedural default rules, of the capital convictions and sentences of foreign nationals, such as petitioner, who did not receive timely consular notification. CNCA § 4(a)(1). The CNCA also provides that the district court must enter a stay if necessary to allow that review to take place. CNCA § 4(a)(2). If and when enacted, the CNCA would therefore satisfy the United States’ international-law obligation to comply with the *Avena* judgment for petitioner and other covered individuals. And it would give petitioner an enforceable legal right to judicial review of his Vienna Convention claim.

b. The right that petitioner would vindicate under the CNCA is an opportunity for judicial review and reconsideration. Neither *Avena* nor the CNCA would guarantee petitioner a particular outcome. That is because the international-law obligation is one of process, not result. *Avena* does not require the United States to grant relief for a consular notification violation; it requires only an opportunity for review and reconsideration through an adequate judicial process. Petitioner contends that he is likely to show that the Vienna Convention violation caused him prejudice. A tribunal with jurisdiction to address that claim would evaluate petitioner’s submission in light of the “overwhelming” evidence “at both phases of [petitioner’s] capital murder trial.” *Leal v. Dretke*, 2004 WL 2603736, at *18. Under the CNCA, the court would conduct an evidentiary hearing, if necessary, before determining whether petitioner had shown “actual prejudice.” CNCA § 4(a)(3). At this time, however, petitioner’s likelihood of success at
such a proceeding is not the relevant issue. A stay should instead turn on the likelihood of petitioner’s obtaining the procedural opportunity for review.

In Medellin III, the Court stated that a showing of prejudice (there, “that [the defendant’s] confession was obtained unlawfully”) would have to be “[t]he beginning premise for any stay.” 554 U.S. at 760. The Court then noted that such a showing of unlawfulness “is highly unlikely as a matter of domestic or international law.” Ibid. But a likelihood that petitioner would actually obtain relief by review and reconsideration should not be required in the present context. A stay is warranted to protect the United States’ interest in adhering to the rule of international law in affording petitioner the hearing required by Avena. Execution of petitioner without compliance with Avena would produce a further breach of the United States’ international-law obligations and gravely harm the United States’ foreign-policy interests. Because the breach of those obligations would result from the United States’ failure to provide petitioner review and reconsideration, the stay should turn, not on whether he can show a likelihood of prejudice to his trial or sentence, but on whether a sufficient likelihood exists that additional time would enable petitioner to receive the procedural remedy that Avena requires.

Significantly, petitioner has not yet received the judicial review and reconsideration of his claim that Avena requires. In petitioner’s first state habeas proceeding, the court addressed petitioner’s Vienna Convention claim relating to his non-custodial statements, but it held that the Vienna Convention was not violated and, accordingly, it did not consider the issue of prejudice. Although the district court considering petitioner’s second federal habeas petition opined that “there is no arguable merit to petitioner’s claim that he sustained ‘actual prejudice’” as a result of the Vienna Convention violation in his case, Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *7, it made that statement only after determining that it lacked jurisdiction, id. at *5, and the Fifth Circuit vacated that portion of its opinion, 573 F.3d 214, 224-225 (2009). A determination by a court that lacked jurisdiction does not satisfy Avena. Review and reconsideration under the provisions of the CNCA would satisfy Avena. If petitioner receives that review, the United States will have discharged its obligations under Avena, even if petitioner fails to show actual prejudice. Conversely, if petitioner does not receive judicial review and reconsideration of his Vienna Convention claim, the United States will have violated its obligations, whether or not there was a reasonable possibility that petitioner could have shown prejudice. See Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 311, ¶ 76 (July 16) (noting acknowledgment by the United States that if petitioner were “executed without the necessary review and reconsideration required under the Avena Judgment, that would constitute a violation of United States obligations under international law”).

c. Because the CNCA has not yet been enacted, no currently pending case under the provisions of that bill exists. Nevertheless, the All Writs Act, 28 U.S.C. 1651, authorizes this Court to enter a stay to preserve its potential future jurisdiction. That statute provides in relevant part that “[t]he Supreme Court [and other federal courts] may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. 1651(a). It is well established that the Court’s power under the All Writs Act “extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.” FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (emphasis added); see Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984).
If the CNCA is enacted, petitioner can initiate review of his Vienna Convention claims in a federal district court. CNCA § 4(a)(1). He would then be statutorily entitled to a stay of execution, if necessary, “to allow the court to review [his] petition.” CNCA § 4(a)(2) (“the court shall grant a stay of execution”). Should the decision in that proceeding be unfavorable to him, he will be able to appeal by obtaining a certificate of appealability upon a “substantial showing of actual prejudice to [his] criminal conviction or sentence” as a result of a violation of Article 36(1) of the Vienna Convention.” CNCA § 4(a)(6)(B). And the decision of the court of appeals—whether based on a consideration of the merits of an appeal or based on the denial of a certificate of appealability—will be subject to review in this Court under 28 U.S.C. 1254(1). See Hohn v. United States, 524 U.S. 236 (1998). The All Writs Act permits this Court to grant a stay to protect that potential future jurisdiction.

d. Because the CNCA has not yet been enacted, existing domestic law does not afford petitioner a right to review and reconsideration. But in determining whether a stay applicant has shown a significant possibility of success, the Court may take into account the possibility of a change in the law. See, e.g., San Diegans for Mt. Soledad Nat’l War Mem’l v. Paulson, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting a stay in part because the case could be affected by a city ordinance whose validity was being litigated in state court). Indeed, the Court routinely does so when the possible change would result from a judicial decision in a pending case. See, e.g., California v. Hamilton, 476 U.S. 1301, 1302-1303 (1986) (Rehnquist, J., in chambers) (granting stay because “[o]ur decision in Rose v. Clark may well affect the outcome of the instant case”). So long as an applicant can show a reasonable possibility of a change in the law that will entitle him to relief, the source of the change is not relevant.

Because of the active and unequivocal support of the Executive Branch for the CNCA, this case is significantly different from Medellin III. In that case, Medellin sought to delay his execution so that either Congress or the Texas Legislature might have the opportunity to enact legislation implementing Avena and requiring domestic courts to provide review and reconsideration of his procedurally defaulted Vienna Convention claim. 554 U.S. at 759. This Court held that the possibility of enactment of legislation, which had “not progressed beyond the bare introduction of a bill,” was “too remote” to warrant issuance of a stay, where “neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action.” Id. at 759-760. Here, by contrast, the heads of the Departments of State and Justice have communicated to Congress the Executive Branch’s full support for the legislation, emphasized its critical importance to United States interests, and urged Congress to enact it. The Executive Branch’s active participation in the development of this legislation, and support for its enactment, make the possibility of Congressional action more likely, and therefore less “remote,” than it was in Medellin III.

This case is therefore more akin to those in which the Court has exercised its discretion to stay its mandate in order to provide Congress with a reasonable opportunity to enact legislation in light of a judicial decision. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 & n.40 (1982) (ordering a “limited stay” in order to “afford Congress an opportunity to enact legislation that would “reconstitute the bankruptcy courts” in response to the Court’s decision); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976) (per curiam) (entering a stay to afford Congress an opportunity to reconstitute the Federal Election Commission). Those authorities suggest that, in circumstances affecting vital government interests, this Court may exercise its discretion under the All Writs Act to maintain the status quo for a limited period in order to provide an opportunity for Congress to take necessary action.
3. Petitioner’s execution would cause irreparable harm to important foreign-relations interests that this Court has described as “plainly compelling,” Medellin II, 552 U.S. at 524. The execution would irremediably violate the United States’ international-law obligation to comply with the ICJ’s judgment in Avena. It would also violate the United States’ specific commitments to the international community that it would work to give effect to that judgment. See Medellin III, 554 U.S. at 762-763 (Ginsburg, J., dissenting) (quoting representation by the United States that it continues to seek to give full effect to the Avena decision); Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, 61 (Jan. 19) (noting “the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment” as well as “the undertakings given by the United States of America in these proceedings”). Those violations would cause irreparable harm to the foreign-policy interests of the United States.

Most immediately, petitioner’s execution would result in serious damage to United States relations with Mexico. The United States’ failure to comply with Avena has generated increasing concern by the Mexican government and thus posed an ever-greater obstacle to United States-Mexican relations. Those relations are enjoying an unprecedented level of cooperation but they are also unusually sensitive, so that a breach resulting from petitioner’s execution would be particularly harmful. As explained in a letter to the Secretary of State from the Mexican Ambassador, the United States’ “continued non-compliance with the ICJ’s decision has already placed great strain on [the] relationship” between the United States and Mexico. Letter from Arturo Sarukhan, Ambassador of Mexico, to Hillary Clinton, Secretary of State (Jun. 14, 2011). “[A] second execution in violation of the ICJ’s judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States” on important law-enforcement initiatives, “including extraditions, mutual judicial assistance, and our efforts to strengthen our common border.” …

Petitioner’s execution would also harm relations between the United States and other countries and regional and multilateral institutions that “have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena.” [Letter from Hillary Rodham Clinton, Secretary of State, and Eric H. Holder, Jr., Attorney General, to Senator Patrick J. Leahy (Jun. 28, 2011) (“State/Justice Letter”).] The European Union has sent repeated inquiries to the United States about this issue in general, and petitioner’s execution in particular. Other Nations, including the United Kingdom, have sent multiple communications that have raised the issue of Avena compliance at high levels. The European Union, Chile, El Salvador, Honduras, Switzerland, and Uruguay have similarly written the Governor of Texas to urge him to grant petitioner a reprieve to allow time for passage of legislation to implement Avena. Cf. Crosby v. National Foreign Trade Council, 530 U.S. 363, 386 (2000) (noting that “repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes” with foreign powers can be sufficient to establish for purposes of preemption that a state’s action interferes with the national government’s “diplomatic objectives”).

Perhaps most important, petitioner’s execution could seriously undermine the ability of the United States Government to protect United States citizens who are detained in foreign countries. As the Attorney General and Secretary of State have explained, “[c]onsular assistance is one of the most important services that the United States provides its citizens abroad.” State/Justice Letter. In Fiscal Year 2010, United States consular officials assisted more than

* Editor’s note: The State/Justice letter is reprinted in Section 2.a., supra.
3500 United States citizens who were arrested abroad and conducted more than 9500 prison visits. Consular assistance has proved essential to affording needed assistance in several sensitive recent cases involving Americans detained in Egypt, Libya, Syria, Iran, and Pakistan, among other countries. Respecting international rules for consular notification is a matter of paramount importance for Americans detained overseas, as foreign nationals detained in the United States usually have a constitutional right to counsel, whereas United States citizens detained in many foreign countries do not. “The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States.” Ibid. Compliance with those obligations is therefore essential in “ensuring that U.S. citizens detained overseas can receive critical consular assistance.” Ibid. By contrast, failure to comply with Avena will weaken the force of the United States’ insistence that other countries respect those rules; an internationally high-profile execution while remedial legislation is pending would greatly exacerbate that problem.

Finally, the interests served by affording Congress an opportunity to implement the United States’ international-law obligations and to prevent the significant damage to the United States’ foreign relations flowing from any further breach of those obligations outweigh the State’s interest in the immediate enforcement of its judgment. In balancing the equitable principles that govern the issuance of a stay of execution, the Court has recognized the “State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” Hill v. McDonough, 547 U.S. 573, 584 (2006). But in this instance, the State’s own conduct put the United States in breach of its international obligations, and the State had, and continues to have, the power to remedy that breach and to avoid a further violation in this case. And the Court has recognized that the United States’ interests in demonstrating that it respects the rule of law internationally, protecting its citizens who live or travel abroad, and preserving cooperation with Mexico and other nations are “plainly compelling.” Medellin II, 552 U.S. at 524. Because the damage to those interests in the absence of a stay would be permanent and irreparable, as compared to the temporary disruption of the State’s enforcement of its judgment that a stay would cause, the balance of equities favors a stay until the adjournment of the current session of Congress.

B. CHILDREN

1. Adoption

a. Russia

On July 13, 2011, Secretary Clinton and Russian Foreign Minister Sergey Lavrov signed a bilateral agreement “Regarding Cooperation in Adoption of Children.” The agreement will enter into force after the two sides exchange diplomatic notes confirming that each has completed the internal procedures necessary for entry into force, which for Russia includes approval by its Duma. The State Department’s fact sheet on the agreement explained:
This Agreement will provide additional safeguards to better protect the welfare and interests of children and all parties involved in intercountry adoptions. Under the Agreement, only adoption agencies authorized by the Russian government will be able to operate in Russia and provide services in adoptions covered by the Agreement, except in the case of an adoption of a child by his or her relatives. This will largely eliminate independent adoptions from Russia and create a better defined framework for intercountry adoptions between the United States and Russia. The Agreement also includes provisions designed to improve post-adoption reporting and monitoring and to ensure that prospective adoptive parents receive more complete information about adoptive children’s social and medical histories and anticipated needs.


* * * *

Q: Does this mean that the United States does not want Russia to join The Hague Intercountry Adoption Convention?

In order to promote stronger safeguards for children in the intercountry adoption process between our two countries within our existing legal authorities, the United States and Russia negotiated the Agreement, which incorporates several elements of The Hague Convention.

* * * *

Q: Whom does the Agreement cover?

The Agreement will cover adoptions to and from the United States and Russia. It applies to children up to the age of 18 who are citizens of and habitually resident in one country, and who are adopted in their country of origin by spouses habitually resident in the other country (at least one of whom is a citizen of that country), or by an unmarried individual who habitually resides in and is a citizen of the other country.

Prospective adoptive parents should also be aware that the Agreement only covers adoptions where both spouses, or the individual (if unmarried), have seen and observed the child in person prior to adoption and personally participated in the decision-making procedures by the court issuing the adoption decree.

Q: Will the Agreement change U.S. visa processing for adopted children?

The Agreement will not significantly impact visa processing for children adopted from Russia. The processing of an adopted child’s U.S. visa occurs after the adoption in Russia and the approval of the orphan petition (Form I-600, Petition to Classify Orphan as an Immediate Relative) by USCIS. Information on how to adopt from Russia is available on www.adoption.state.gov.
Q: What will change as a result of this Agreement?

Three aspects of the current intercountry adoption process will change:

No independent adoptions

Russia will no longer permit independent adoptions (i.e., adoptions where the prospective adoptive parents elect to act on their own behalf without facilitation by an adoption agency), unless a child is being adopted by a relative. Once the Agreement enters into force, non-relative adoptions from Russia must take place with the facilitation of an authorized organization. Relatives are defined in accordance with Russian law.

Prospective adoptive parent preparation and training

U.S. prospective adoptive parents may be required to obtain additional special training in light of their particular matched child’s special needs. The new procedures called for by the Agreement will help ensure that prospective adoptive parents receive all available information on the child’s social and medical history, possible special needs, and availability for intercountry adoption before the adoption takes place.

The authorized organizations should also provide prospective adoptive parents with information on how to register their adopted children with the Russian Embassy or local consulate in the United States and other post-placement reporting required by Russian law. Prospective adoptive parents will be expected to register their adopted children as soon as possible after bringing them to the United States and to work with their adoption agencies to comply with the post-placement reporting requirements.

Pre-approval process

Russia may require that cases involving Russian children being adopted by U.S. prospective adoptive parents undergo a “pre-approval” step with USCIS after the match but before the Russian adoption process is completed. To implement this pre-approval process, the prospective adoptive parents will file their Form I-600, Petition to Classify an Orphan as an Immediate Relative, before completing the adoption procedures in Russia. Russian authorities will provide all available medical and psycho-social information about the child at this stage in the process, thereby enabling USCIS to review the family’s suitability and eligibility determination in light of the child’s particular needs. Before issuing pre-approval, USCIS will work with the adoption agencies and the prospective adoptive families in an effort to ensure that the family is fully aware of the child’s situation and has completed appropriate training and preparation.

Q: How will the Agreement affect U.S. adoption agencies’ ability to work in Russia?

This Agreement will add no additional authorization requirements under U.S. domestic law. However, under the Agreement, only adoption agencies that are specifically authorized by Russia will be permitted to provide services in adoptions to or from Russia. The Department has agreed to provide the Russian Ministry of Education with the list of U.S. adoption service providers accredited or approved in the United States to provide services under The Hague Convention. The Ministry may, at its discretion, decide to grant requests for authorization only to U.S. adoption service providers who have obtained such accreditation or approval, and may not necessarily authorize all of the organizations on the list provided.

Russian authorization of adoption organizations

Adoption agencies must apply to the Russian Ministry of Education and meet the criteria established by Russia to be authorized to operate in Russia. The U.S. Department of State will publish the specific authorization criteria on www.adoption.state.gov once they become available. Adoption service providers will have 60 days following the Agreement’s entry into
force to submit the required information in order to continue to provide services in adoptions from Russia. The Ministry must make a decision about an adoption service provider’s continued authorization in Russia within 30 days of receiving the required information.

Adoption service providers seeking authorization to operate in Russia for the first time will be able to submit an application at any point after the Agreement’s entry into force. The Ministry must make a decision about the new provider’s authorization request within 60 days of receiving the application.

*Adoption service providers that do not meet the selection deadline*

The Ministry has confirmed that any adoption agencies currently operating in Russia that do not submit the required documentation for authorization under the Agreement within the required 60-day timeframe after the Agreement’s entry into force will be allowed to apply for re-authorization after one year.

**Q: Does the Agreement impose any new or more stringent responsibilities on adoption agencies?**

Adoption service providers authorized to operate in Russia will need to meet requirements established by the Russian Ministry of Education or by Russian law in order to obtain and retain authorization to provide services in intercountry adoptions from Russia. The Agreement lays out several new or expanded requirements for receiving and maintaining authorization that may be imposed on adoption service providers. Adoption service providers may be required to submit documentation assuring that they will comply with certain requirements including the following:

*Post-adoption requirements*

- To inform prospective adoptive parents of Russia’s adoption procedures and post-adoption reporting requirements. If the authorized organization assists with a subsequent dissolution and/or placement of a child with another family, the authorized organization must also inform the new prospective adoptive parents of the Russian procedures and post-adoption reporting requirements.
- To monitor the living conditions and upbringing of adopted children as instructed by Russia. The monitoring would have to be carried out at the family’s home by the authorized organization’s social worker, or by another social worker or organization licensed to evaluate the home.
- To provide periodic reports following an intercountry adoption to the Russian authorities. The reports would have to contain reliable information about the child’s psychological and physical development and adaptation to his/her new life.
- To confirm an adopted child’s lawful entry into the United States and the child’s acquisition of U.S. citizenship.

*Adoption disruption and dissolution requirements*

- To notify Russian authorities and the U.S. Department of State’s Office of Children’s Issues as soon as reasonably possible if a case in which it provided services (even cases facilitated before the Agreement entered into force) is pending dissolution or has dissolved. The notification may need to include information on any proposed placement or new adoptive family, the expected (or completed) timeframe for the U.S. court’s decision (or any decisions reached by the U.S. court). At the same time, for cases still pending a court decision, the authorized organization may be required to request the consent or non-consent of the Russian authorities to the proposed re-adoption, and if a statement is provided by the Russian authorities before the re-adoption decision is made
by the court, present the Russian consent or non-consent information to the court for its consideration.

**Authorized organization requirements**

- To notify the Russian authorities and transfer any pending cases or post-adoption reporting responsibilities to another authorized organization in the event that an authorized organization chooses to cease operating in Russia.

**Q: What if my case started before entry into force?**

Prospective adoptive parent(s) initiating an adoption prior to the Agreement’s entry into force will be able to complete the process under the current (pre-Agreement) procedures. Cases will be considered initiated if the prospective adoptive parents have registered their documents to adopt in Russia prior to entry into force.

**Q: Is any part of the Agreement effective retroactively?**

The Agreement does not apply retroactively. Under the Agreement, Russia may impose requirements on adoption agencies regarding the disruption or dissolution of an adoption that took place prior to entry into force of the Agreement. For example, an authorized organization may be required to report a disruption or dissolution as soon as reasonably possible after it discovers that a case may, or has, been terminated, regardless of when the intercountry adoption was completed.

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**b. Report on Intercountry Adoption**

On November 18, 2011, the State Department released its Annual Adoption Report to Congress. A November 18 State Department media note announcing the release of the report is excerpted below, and available at [www.state.gov/r/pa/prs/ps/2011/11/177348.htm](http://www.state.gov/r/pa/prs/ps/2011/11/177348.htm).

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The Department of State is pleased to announce the release of the 2011 Annual Adoption Report to Congress, which coincides with National Adoption Month. This year, we welcomed Kazakhstan and Ireland as new parties to the Hague Adoption Convention. The Convention provides the best framework for ethical, transparent intercountry adoptions and ensures that adoptions are conducted in the best interest of children.

In fiscal year 2011, the Department of State issued more than 9,300 immigrant visas to children adopted by U.S. citizen parents. More than 2,700 of these immigrant visas were issued under the Hague Adoption Convention.

The Secretary’s Special Advisor for International Children’s Issues, Ambassador Susan Jacobs, has traveled to more than 15 countries this year, most recently to Guatemala, Kyrgyzstan, Kazakhstan, and Ethiopia, to promote ethical intercountry adoptions and the Hague Adoption Convention. The Department recognizes that intercountry adoption can provide a permanent home to a child who would otherwise be without a family. At the same time, the Department continues to support strong safeguards to prevent the abduction or exploitation of children for the
The Bureau of Consular Affairs Office of Children’s Issues prepared this annual report for Congress in compliance with the Intercountry Adoption Act of 2000. The 2011 report can be viewed online at adoption.state.gov. …


In April 2011, the Department of State submitted to Congress its Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) pursuant to 42 U.S.C. § 11611. The report evaluated compliance by treaty partner countries with the Convention. The Convention provides a legal framework for securing the prompt return of wrongfully removed or retained children to the country of their habitual residence where a competent court can make decisions on issues of custody and the child’s “best interests.” The compliance report identifies the Department’s concerns about those countries in which implementation of the Convention is incomplete or in which a particular country’s executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention. The 2011 report, covering the period October 1, 2009, through December 31, 2010, identified St. Kitts and Nevis as “Not Compliant with the Convention” and named Bermuda, Brazil, Bulgaria, Burkina Faso, Honduras, Mexico, and the Bahamas as states demonstrating “Patterns of Noncompliance.” The report is available at http://travel.state.gov/pdf/2011HagueComplianceReport.pdf.

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Cross References

*Alien Tort Claims Act litigation, Chapter 5.B.*

*Protecting power agreement in Libya, Chapter 9.A.*