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Fulfilling our Treaty Obligations and Protecting Americans Abroad

Prepared statement by

John B. Bellinger, III

Partner, Arnold & Porter LLP

Adjunct Fellow in International and National Security Law, Council on Foreign Relations

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Hearing on Fulfilling our Treaty Obligations and Protecting Americans Abroad

Mr. Chairman, Ranking Member Grassley, thank you for inviting me to appear before you today to address Senate Bill 1194, entitled the "Consular Notification Compliance Act of 2011."

I strongly support enactment of this important legislation. It will help protect Americans who travel around the world and are arrested in foreign countries. It will also enable the U.S. to comply with a treaty obligation that the U.S. Supreme Court unanimously recognized is legally binding.

I have been deeply involved for many years in the issues that are the subject of this legislation. I served as The Legal Adviser for Department of State from 2005-2009 in the second term of the Bush Administration and as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005 in the first term of the Bush Administration. I had previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice, so I also bring a criminal justice perspective to this discussion.

I will begin by reviewing the history of the international dispute that has led to this proposed legislation. I believe the context is important and instructive, and the legislation before the Committee needs to be considered in

light of this history. I will then explain the very practical benefits that enactment of this bill will have for Americans who are detained and imprisoned by other countries.

The Administration of President George W. Bush has never been accused of an irrational exuberance for international law and international courts. Nonetheless, in 2004, after the International Court of Justice (ICJ) ruled against the United States in the *Case Concerning Avena and Other Mexican Nationals*, the Bush Administration took notice and took a series of steps spanning the next four years to ensure that the U.S. Government complied with the decision.

In *Avena*, the ICJ ruled that the U.S. must review the convictions and sentences of 51 Mexican nationals who had been convicted of capital murder in Texas and several other states, but who had not been notified by state law enforcement officials of their right under the Vienna Convention on Consular Relations (VCCR), a treaty to which the United States is a party, to have a Mexican consular official notified of their arrest.[1] The Bush Administration worked hard to comply with the *Avena* decision, not because of any special desire to please our Mexican neighbor or a lofty commitment to international tribunals or vague principles of international law, but because it is a binding legal obligation and complying with it is important to protect Americans who travel in other countries.

The Vienna Convention on Consular Relations is one of the most important international treaties to which the United States is a party. [2] The U.S. Senate unanimously approved the Convention in 1969 upon the strong recommendation of then President Richard Nixon. Among other things, the VCCR provides legal rules for countries to help their citizens and nationals who travel or conduct business in foreign countries. In particular, Article 36(1)(b) of the VCCR requires a party to the treaty that detains or arrests a national of another party to the treaty to promptly inform that national of his or her right to meet with a consular official of his or her own state. [3]

This right of consular notification and access is vitally important for Americans, several thousand of whom are arrested in foreign countries each year, sometimes on trumped -up charges. If requested, State Department officials visit these individuals in prison, help them retain lawyers, and relay information to their families.

The VCCR is important not just for American tourists but also for American multinational businesses, which have a very large number of U.S. national employees who travel and live abroad, including in countries with poor rule

[1] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 64 (March 31) ("[T]he appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals.").

[2] Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, *entered into force* March 19, 1967.

[3] Article 36(1)(b) provides: "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."

of law records and abusive governments. For these businesses, the VCCR provides critical protections for their employees should they be arrested or detained. Every constituent of every member of this Committee benefits from having the international legal right of consular notification.

The United States has long recognized the importance of seeking to ensure U.S. compliance with VCCR in order to strengthen our position when Americans are detained in foreign countries. The Department of State, which helps Americans overseas, tries extremely hard to ensure that all federal, state, and local law enforcement authorities are aware of the U.S. obligation to inform any foreign nationals they arrest of their right to meet with a relevant consular official. Despite these efforts, in our large country with a federal system, it has proved impossible for the federal government to ensure that every state official with custody of a foreign national remembers to ask arrested persons if they are foreign nationals and similarly doesn't always inform them of their right to consulate with a consular officer from their country. This is what happened in the cases of the 51Mexican nationals covered by the *Avena* decision.

When I moved from the White House to the State Department with Secretary of State Condoleezza Rice in late January 2005, one of the first international legal challenges we confronted was how to comply with the *Avena* decision, given that the Mexican nationals covered by the decision were barred by state law from pursuing more appeals. We also recognized then, and I recognize now, that these Mexican nationals had been tried and convicted for horrific murders, and that the families of the victims had waited many years for closure.

The United States disagreed with the decision of the ICJ, which had interpreted the Vienna Convention and interfered in our domestic criminal justice system in ways we had not anticipated in 1969 when the U.S. became party to the treaty. Nevertheless, once the ruling was issued, it was absolutely clear to the Bush Administration that as a matter of treaty law the U.S. was required to comply with the ICJ's ruling. Under Article 94(1) of the U.N. Charter, which was approved by the U.S. Senate in July 1945 by a vote of 89-2, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case in which it is a party."[4] With the consent of the Senate, the United States had given our legally binding commitment to other countries that we would comply with the rulings of the ICJ.

Contrary to some public perceptions that it was not committed to international law and held international courts in disdain, the Bush Administration took the U.S. obligation to comply with the ICJ's decision very seriously. In particular, Secretary Rice, as the Executive branch official responsible for the diplomatic protection of Americans when they travel outside the United States, believed that it was vitally important for the United States to make every effort to vindicate the right of consular notice required by the Vienna Convention in order to ensure that Americans who are detained or arrested in foreign countries are notified of their consular rights.

Bush Administration officials engaged in extensive internal discussions about options to comply. The Administration considered asking Congress to pass legislation to give federal courts jurisdiction to hear claims by the Mexican nationals that they had been prejudiced by the lack of consular notification. But, at the time, the

[4] U.N. Charter art. 94, para 1.

Administration concluded that, even with Administration support, Congress would be unlikely to pass legislation before Texas executed the first Mexican, Jose Medellin.

President Bush decided, therefore, that the most effective way for the United States to comply with the decision of the ICJ would be for him to issue an order directing state courts to do so. This decision was based on the need to comply with our international obligations and our concern for the safety of Americans abroad.

This decision cannot have been an easy one for President Bush, especially since 15 of the Mexican nationals had committed murders in his home state of Texas. President Bush was a former governor of Texas, a staunch believer in states' rights, and a supporter of the death penalty. Most Texans strongly opposed giving any further appeals to Mexicans who had been convicted of grisly murders. Jose Medellin, in particular, had been convicted of raping and murdering two teenage girls and strangling one of them with her own shoelaces.

Nevertheless, on February 28, 2005, President Bush sent a memorandum to the Attorney General providing:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[5]

At the same time, President Bush decided that the United States should withdraw from the Optional Protocol to the VCCR, which gave the United States and other countries the right to bring cases to the ICJ relating to breaches of the Convention. The President made this decision in order to protect the U.S. against future ICJ judgments that might similarly interpret the VCCR in ways that might interfere with the U.S. criminal justice system. Accordingly, on March 7, 2005, Secretary Rice notified U.N. Secretary General Kofi Anan that the U.S. was withdrawing from the Protocol.

Unfortunately, Texas refused to comply with President Bush's order, claiming that he had acted unconstitutionally. In 2006, the Texas Court of Criminal Appeals ruled that the President's memorandum did not constitute "binding federal law."[6] The Supreme Court granted certiorari and invited the U.S. Government to submit its views. The Bush Administration staunchly defended the constitutionality of the President's decision in a brief that I helped to write.

[5] President's determination (Feb. 28, 2005) regarding U.S. response to the Avena decision in the ICJ, *available at* http://www.state.gov/s/l/2005/87181.htm.

[6] *Ex parte Medellin*, 223 S.W. 3d 315, 352 (Tex. Crim App. 2006).

In March 2008, the Supreme Court affirmed the decision of the Texas Court of Criminal Appeals. The Court held that neither the ICJ's *Avena* decision nor President Bush's memorandum constituted directly enforceable federal law that pre-empted state law limitations on successive habeas petitions. [7]

Although the Court held that the *Avena* decision is not directly enforceable under U.S. domestic law, it is important to emphasize that the Supreme Court *unanimously* concluded that the *Avena* decision constitutes a binding international law obligation on the United States. In his opinion for the Court, Chief Justice Roberts specifically stated: "No one disputes that the *Avena* decision…constitutes an *international* law obligation on the part of the United States."[8] Moreover, the Court acknowledged that President Bush had sought "to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" and concluded that "that these interests are plainly compelling.[9]

In short, although the Supreme Court held that President Bush lacked authority under the Constitution to order state courts to comply with the ICJ's *Avena* ruling, the Court recognized that the ICJ's decision was a binding international legal obligation on the United States and that the U.S. has a "plainly compelling" interest in complying with the ICJ's decision in order to ensure "reciprocal observance of the Vienna Convention."

Even after the Supreme Court's decision, the Bush Administration did not cease its high-level efforts to comply with the ICJ's decision. On June 17, 2008, Secretary Rice and Attorney General Mukasey wrote a letter to Texas Governor Rick Perry asking that Texas provide review and reconsideration of the convictions and sentences of the Mexican nationals on death row in Texas covered by the *Avena* decision. Governor Perry responded in a letter dated July 18, 2008 that if any individual covered by *Avena* "has not previously received a judicial determination of his claim of prejudice under the Vienna Convention and seeks such review in a future federal habeas proceeding, the State of Texas will ask the reviewing court to address the claim of prejudice on the merits."[10] State Department officials flew to Texas to urge Texas officials to comply with the *Avena* decision. I personally wrote to the Presiding Officer of the Texas Board of Pardons and Parole to ask that the Board consider whether the lack of consular notification had prejudiced Jose Medellin's legal defense.

On June 5, 2008, Mexico commenced a new legal action against the United States in the International Court of Justice, claiming that the U.S. had misinterpreted the ICJ's original *Avena* decision to impose an "obligation of means" but not " an obligation of result" because the federal government had tried but failed to prevent Texas from moving ahead with the execution of Jose Medellin.[11] The United States told the ICJ that it did not dispute Mexico's argument

[7] *Medellin v. Texas*, 552 U.S. 491, at 498-99 (2008).

[8] *Id.* at 504.

[9] *Id.* at 524.

[10] Letter from Rick Perry, Governor of the state of Texas, to Condoleezza Rice, United States Secretary of State, and Michael Mukasey, United States Attorney General (July 18, 2008), *available at* http://www.state.gov/documents/organization/138804.pdf.

[11] Application Instituting Proceedings, Request for Interpretation

that *Avena* imposed an obligation of "result" on the U.S., and that the federal government was continuing to work tirelessly to achieve this result.[12] I personally argued the case for the United States before the ICJ in the Hague. On July 16, 2008, the Court issued a "provisional measures" order -- the equivalent of an injunction -- directing the United States to ensure that Jose Medellin, Humberto Leal, and three other Mexican nationals were not executed unless their convictions and sentences were subject to the review and reconsideration mandated by the *Avena* decision.[13]

Despite the request of Secretary Rice and Attorney General Mukasey and the ICJ's provisional measures order, Texas executed Jose Medellin on August 5, 2008 without providing additional review and reconsideration of his conviction and sentence.

On January 19, 2009, the day before President Obama's inauguration and my last full day as State Department Legal Adviser, the ICJ issued its final decision in Mexico's new claim against the United States. I was present at the Court for the reading of the judgment.[14] The Court agreed with the United States that there was no disputed interpretation of the *Avena* judgment and therefore rejected Mexico's request for an interpretation of that judgment. However, the Court found that the United States had violated the Court's provisional measures order because Texas had executed Medellin.[15]

In sum, the Bush Administration worked diligently -- and at high-levels, starting with President Bush himself -- for all four years of its second term to comply with the ICJ's *Avena* decision, even though doing so was domestically unpopular. I was surprised that the Obama Administration did not make compliance with this international obligation a higher priority during its first two years, but it is right to support the proposed legislation now.

I strongly support passage of Senate Bill 1194, the "Consular Notification Compliance Act of 2011."[16] This legislation would enable the United States to comply with the *Avena* decision with respect to the remaining Mexican nationals covered by the decision and still on death row in Texas and other states. As a nation founded on and committed to the rule of law, our government should take its international law obligations seriously. Under Article VI of the Constitution, "all Treaties made… under the Authority of the United States, shall be the supreme Law of the Land." This does not mean that the United States should become party to every treaty or adhere to every principle that other countries or scholars claim is "customary international law." As the former Legal Adviser of the State Department, I fully understand that there are many principles that others claim to constitute "international law" that the U.S. does not accept. But the *Avena* decision does not fall into that category. The U.S. has a clear treaty-based

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of the Judgment of 31 March 2004 ,(Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (Jun. 5, 2008).

[12] *See* Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (Aug. 29, 2008)

[13] Order, Request for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. Pleadings 3 (July 16, 2008)

[14] *See* "An International Treaty Congress Should Support," *Washington Post*, March 4, 2011 (copy attached)

[15] Request for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), 2009 I.C.J. 3 (Jan. 19)

[16] I have some technical suggestions that I can communicate separately to the Committee.

legal obligation to comply with the *Avena* decision, even if the decision surprised us and we do not agree with it. The Senate accepted this obligation when it gave its advice and consent to the U.N. Charter.

Complying with the *Avena* decision is especially important because it involves the vital right of consular notification and access required by the Vienna Convention on Consular Relations. This right is not a gracious favor that we give to foreigners because we believe in liberal principles of international law and world government. This right is critical for Americans who travel to foreign countries for business or pleasure and who may be arrested or detained. It is a matter of survival for many who are imprisoned in far-off lands without anyone to help them but a U.S. consular officer.

Mr. Chairman and members of the Committee, if a constituent of any member of Congress is arrested or detained in a foreign country (whether it is in Mexico or Syria or Sudan), I am sure that member would want that constituent to be told of his or her right to have a State Department official notified and visit. And if a foreign country fails to provide notice and access, Congress will expect the State Department to complain vigorously to the foreign government for violating its treaty obligations. I am sure that if a Texan is arrested in Mexico or some other country, Texas officials would want that individual to be told of his right to consular notification. I simply do not see how we can reasonably expect other countries to comply with their treaty obligations to us, if we do not comply with our treaty obligations to them.

I am sometimes asked if there will be any real practical effect if the United States does not comply with the *Avena* decision. I cannot tell you with certainty that Mexico or any other country is likely to stop giving consular notice to Americans starting tomorrow. But I can say with confidence that when the United States does not comply with our treaty obligations to provide consular notice (or to provide a remedy when we have failed to do so), it makes it much harder for the State Department to complain if Mexico or any other country fails to give consular notice and access to our nationals.

Earlier this year, Pakistan arrested CIA official Raymond Davis and refused to release him even though he had diplomatic immunity under the Vienna Convention on Diplomatic Relations, another vital international treaty to which the U.S. is a party.[17] Some members of Congress wanted to cut off foreign assistance to Pakistan unless Pakistan released Mr. Davis. Although a different treaty was involved, the principle of reciprocity is the same: it is difficult to insist that other countries honor their treaty obligations to our nationals, if we do not comply with our obligations to them.

Mr. Chairman, I applaud your efforts and those by other supporters of this legislation. The protection of American citizens abroad is and will always be a major issue for the United States.

In closing, let me re-iterate that the Bush Administration worked extremely hard to comply with the U.S. international law obligation under the *Avena* decision, even though it was politically unpopular to do so. We did so in

[17] Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, Apr. 18, 1961, *entered into force* Apr. 24, 1964.

order to uphold a legal obligation unanimously recognized by our Supreme Court and to ensure reciprocal protections for Americans under the Vienna Convention -- a rationale that the Supreme Court found to be "plainly compelling."

For the same reasons, I urge this Committee to approve, and the Senate and Congress to pass, the Consular Notification Compliance Act.