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Sanchez-Llamas v. Oregon: Recent Developments Concerning the Vienna Convention on Consular Relations

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Summary

The Vienna Convention on Consular Relations (VCCR) is a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements between States. Pursuant to Article 36 of the VCCR, when a foreign national of a signatory State is arrested or otherwise detained, appropriate authorities within the receiving signatory State must inform him "without delay" of his right to have his consulate notified. Nevertheless, foreign nationals detained by U.S. state and local authorities are not always provided with requisite consular information.

Until March 2005, the United States was also party to the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes. Parties to the Optional Protocol agree to accept the jurisdiction of the International Court of Justice (ICJ) to resolve disputes arising between nations with respect to the VCCR. Prior to U.S. withdrawal from the Optional Protocol, the ICJ ruled in the *LaGrand Case (Federal Republic of Germany v. United States*) and the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* that Article 36 confers an individually-enforceable right to consular notification. Further, the ICJ concluded that procedural default rules should not, at least in certain circumstances, bar the raising of Article 36 claims by foreign nationals who were not provided with requisite consular information and were subsequently convicted in criminal proceedings.

In the consolidated cases of *Moises Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*, decided on June 28, 2006, the Supreme Court considered arguments as to what judicial remedy, if any, is available to foreign nationals in U.S. criminal proceedings who are not provided requisite consular information. By a vote of 5-3 the Court held that (1) suppression of evidence in a criminal proceeding is never an appropriate remedy for an Article 36 violation; and (2) federal and state procedural default rules prevent the raising of Article 36 claims that were not made on a timely basis. Although the Court considered the ICJ's interpretation of Article 36 as deserving respectful consideration, it did not deem it to be legally binding or necessarily persuasive.

The Court did not determine whether Article 36 creates an individually-enforceable right. Nor did the Court assess the legal implications of the President's 2005 memorandum instructing state courts to give effect to the ICJ's decision in *Avena* with respect to the 51 Mexican nationals at issue in that case. On November 15, 2006, the Texas Court of Criminal Appeals held in the case of *Ex Parte Medellin* that neither *Avena* nor the President's memorandum preempted state procedural default rules.

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Pursuant to Article 36 of the Vienna Convention on Consular Relations (VCCR),[1] when a foreign national of a signatory State is arrested or otherwise detained, appropriate authorities within the receiving signatory State must inform him "without delay" of his right to have his consulate notified. In the consolidated cases of *Moises Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*,[2] decided on June 28, 2006, the Supreme Court considered arguments as to what judicial remedy, if any, is available to foreign nationals in U.S. criminal proceedings who are not provided requisite consular information.

Background on the VCCR and U.S. Implementation

The VCCR is a multilateral agreement codifying consular practices which have traditionally been governed by custom and bilateral agreements between nations. The VCCR enumerates basic legal rights and duties of signatory States relating to, *inter alia*, the conduct of consular relations and the privileges and immunities accorded to consular officers and offices. The United States ratified the VCCR in 1969, and most countries are parties to the agreement.

When the United States became a party to the VCCR, it also chose to become a party to the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol).[3] Parties to the Optional Protocol agree to accept the jurisdiction of the International Court of Justice (ICJ) to resolve disputes arising between nations with respect to the VCCR. On March 7, 2005, the United States withdrew from the Optional Protocol.[4] As a result, the ICJ's jurisdiction over VCCR claims is no longer recognized by the United States.[5]

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [*hereinafter* "VCCR"].

[2] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (U.S. 2006).

[3] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325.

[4] Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, giving notice that the United States withdraws from the Optional Protocol (Mar. 7, 2005).

[5] *Sanchez-Llamas*, 126 S.Ct. at 2685.

VCCR Article 36

VCCR Article 36 provides that when a foreign national of a signatory State is arrested or otherwise detained, appropriate authorities within the receiving signatory State must inform him "without delay" of his right to have his consulate notified. This requirement is potentially beneficial to a detained national. For example, if the consulate of the detained national is given notice of the arrest, it might take diplomatic steps to ensure that its national is treated fairly in the receiving State. A consulate might also arrange for legal representation, or assist in obtaining evidence or witnesses from the sending State to bolster the national's defense in any subsequent criminal case.

U.S. Implementation of the VCCR Article 36

When the VCCR was ratified by the United States, the agreement was understood to be self-executing; that is, no additional, implementing legislation was required for it to take effect or be judicially enforceable.[6] Under regulations implemented prior to U.S. ratification of the VCCR, a foreign national arrested by federal law enforcement authorities will have his consul advised of his arrest unless the national does not wish such notification to be given.[7] Perhaps due to constitutional concerns related to federalism,[8] there is no federal statutory mechanism to ensure adherence to VCCR Article 36 by state and local law enforcement, though the State Department provides informational materials to state and local entities regarding their consular notification obligations under the VCCR.[9]

Despite these measures, foreign nationals detained by state and local authorities are not always provided with requisite consular information. Additionally, state and federal procedural default rules might prevent foreign nationals from obtaining a remedy for an Article 36 violation when they become aware of the VCCR's consular notification requirements *after* having been convicted of an offense. As is the case on the federal level, state procedural default rules generally prevent the reopening of cases to consider claims that were not raised on a timely basis (e.g., before or during trial). The rule may preclude the raising of claims based on the violation of a treaty or (in many cases) a constitutional right. Although lower federal courts have jurisdiction to review state criminal convictions pursuant to writs of habeas corpus, the scope of such review is limited. A person convicted in state court who petitions

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[6] EXEC. REP. NO. 91-9, App. at 5 (1969).

[7] 28 C.F.R. § 50.5(a). Following ratification of the VCCR, new regulations were adopted requiring immigration officials to notify detained aliens of their right to communicate with their local consulate. 8 C.F.R. § 236.1(e).

[8] For discussion of the potential constitutional concerns that would arise if states and localities were required to provide detained foreign nationals with consular information, see CRS Report RL32390, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, by Michael John Garcia [*hereinafter* "CRS Report RL32390"] at 19-22.

[9] *See id.* at 4-5.

for federal habeas relief on account of a violation of the Constitution or a federal statute or treaty must have first raised the claim in state court if he is to be provided an evidentiary hearing under federal habeas review.[10]

The Consolidated Cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*

On November 2, 2005, the Supreme Court granted certiorari in two cases concerning Article 36 violations, *Moises Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*. The Court consolidated these cases for argument. The cases involved review of state convictions of two foreign nationals who were not promptly informed of their ability under VCCR Article 36 to have their consul notified of their arrest. This was not the first instance where the Court was asked to adjudicate matters relating to the enforcement of VCCR Article 36.[11] Most notably, in the 1998 *per curium* opinion issued in the case of *Breard v. Greene*,[12] the Court concluded that, among other things, Article 36 did not alter or create an exception to traditional U.S. procedural default rules in cases where a foreign national was not provided with requisite consular information.[13]

Nevertheless, more recent legal developments raised questions regarding the continuing precedential value of *Breard*. Acting pursuant to the Optional Protocol, Germany and Mexico brought claims before the ICJ against the United States in 1999 and 2003, respectively, for alleged Article 36 violations. In the *LaGrand Case (Federal Republic of Germany v. United States*), the ICJ concluded, *inter alia*, that (1) Article 36 provides covered individuals with a right to consular notification, and a violation of that right may require review and reconsideration of a foreign national's sentence and conviction in certain instances; and (2) the application of procedural default rules to bar the raising of Article 36 claims, at least in certain instances, prevents "full effect" from being given to the purposes for which the rights accorded under Article 36 were intended.[14] Subsequently in the case of *Avena and Other Mexican Nationals (Mexico v. United States of America)*, the ICJ

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[10] 28 U.S.C. § 2254. A possible exception enabling otherwise procedurally defaulted constitutional claims to be raised in federal habeas courts occurs when the claim relies upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id*. at § 2254(e)(2)(A)(i).

[11] *See* Medellin v. Dretke, 544 U.S. 660 (2005) (*per curium* decision finding writ of cert. in Article 36 claim to be improvidently granted); Torres v. Mullin, 124 S.Ct. 919 (2003) (denying cert. in case involving Article 36 violation); Fed. Republic of Germany v. United States, 526 U.S. 111 (1999) (declining to enforce a Provisional Measures Order by the ICJ that instructed the United States to refrain from executing a foreign national, pending the ICJ's ruling in a case concerning U.S. application of the VCCR); Breard v. Greene, 523 U.S. 371(1998) (*per curium* decision denying foreign national relief from Article 36 violation).

[12] 523 U.S. 371 1998) (*per curium*).

[13] *Id.* at 375-377.

[14] LaGrand Case (Fed. Rep. of Germany v. United States), 2001 I.C.J. 466 (Judgment of June 27), at paras. 91, 125.

reaffirmed *LaGrand*'s interpretation of U.S. obligations under VCCR Article 36.[15] At the time that *Avena* was decided, the United States was still a party to the VCCR's Optional Protocol, and accordingly recognized the ICJ as having jurisdiction to settle disputes between Protocol parties regarding the interpretation and application of the VCCR. Although the United States withdrew from the Optional Protocol several months prior to the U.S. Supreme Court granting certiorari in *Sanchez-Llamas* and *Bustillo*, there was some question as to whether the ICJ's decisions in *LaGrand* and *Avena* would compel or persuade the Court to overrule its earlier decision in *Breard*.

Case Background

Petitioner Sanchez-Llamas, a Mexican national, was arrested for attempted murder and other offenses on account of a shootout with Oregon police. When initially arrested, he was informed of his *Miranda* rights but was not told that he could have the Mexican consulate notified of his detention. During subsequent interrogation, Sanchez-Llamas made incriminating statements. Prior to his trial, Sanchez-Llamas moved to have these statements suppressed because authorities had failed to notify him of his right to consular notification under VCCR Article 36. This motion was denied by the trial court and Sanchez-Llamas was convicted. The conviction was affirmed by the Oregon State Court of Appeals and Oregon State Supreme Court, which held that VCCR Article 36 does not create a judicially-enforceable right to consular access. Sanchez-Llamas appealed this ruling to the U.S. Supreme Court.

Petitioner Bustillo, a Honduran national, was arrested and charged with murder by Virginia law enforcement authorities, but only learned of his ability to have his consulate notified *after* having been convicted. Following the affirmation of his conviction on appeal, he filed a habeas petition in Virginia state court arguing for the first time that authorities had violated his rights under Article 36. The Virginia Court of Appeals dismissed this claim as procedurally barred because Bustillo did not raise this argument at trial or on appeal, as required under Virginia law, and the dismissal was upheld by the Virginia Supreme Court. Bustillo appealed to the U.S. Supreme Court.

The Supreme Court granted review to both cases and, in an opinion by Chief Justice Roberts (joined by Justices Alito, Kennedy, Scalia, and Thomas), denied petitioners' claims for relief.

Existence of a Judicially-Enforceable Right under VCCR Article 36

Before considering what remedy, if any, was available to the petitioners for a violation of Article 36, the Court first considered whether Article 36 creates a judicially-enforceable right to consular notification. In the previous case of *Breard*, the Court had only gone so far as to say that Article 36 "arguably confers" an

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[15] Case Concerning Avena and other Mexican Nationals (Mexico v. United States), 2004 I.C.J. No. 128 (Judgment of Mar. 31), at paras. 40, 113. For more detailed background on *LaGrand* and *Avena*, see CRS Report RL32390, *supra* note 8, at 12-16.

individual right to consular assistance following arrest,[16] and lower federal and state courts had reached differing conclusions on the matter.[17]

A five-justice majority of the Court decided not to definitively resolve this issue, concluding that regardless of whether such a right existed, petitioners were not in any event entitled to the remedies they sought.[18] In dissent, Justice Breyer joined by Justices Stevens, Souter, and Ginsburg would have definitively held that Article 36 grants rights that may be invoked by a foreign national in a judicial proceeding.[19]

Exclusion of Evidence as a Remedy to an Article 36 Violation

The exclusionary rule is used to deter constitutional violations by requiring certain evidence gathered in violation of a defendant's constitutional rights to be suppressed at trial. With respect to the question of whether suppression of evidence is an appropriate remedy for an Article 36 violation, a five-justice majority held that suppression is *never* a suitable response. As an initial matter, the Court rejected any suggestion that the VCCR requires the suppression of a defendant's statements to police as a remedy, emphasizing that the text of Article 36 acknowledges that the rights accorded therein are to be "exercised in conformity with the laws and regulations of the receiving State."[20] Asserting that the "exclusionary rule as we know it is an entirely American legal creation" and that the automatic exclusionary rule is still almost "universally rejected" by other countries 40 years after the drafting of the VCCR, the Court concluded it would be "startling" to read the VCCR as requiring suppression of evidence.[21]

Petitioner Sanchez-Llamas argued that suppression of evidence is nevertheless the appropriate remedy under the U.S. system of law to give "full effect" to the rights accorded by Article 36. He further argued that such a remedy should be required by the Court under its authority to develop remedies for the enforcement of federal law in state-court criminal proceedings. The Court rejected this argument, noting that well-established precedent left it "beyond dispute" that the Court did not have a

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[16] *Breard*, 523 U.S. at 376.

[17] *Compare* Cardenas v. Dretke, 405 F.3d 244 (5th Cir. 2005) (defendant cannot bring VCCR claim in judicial proceeding); United States v. Duarte-Acero, 296 F.3d 1277, 1281 (11th Cir. 2002) (VCCR was not intended to create individual rights); United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001) (finding that the VCCR does not create a judicially enforceable right); Shackleford v. Commonwealth, 262 Va. 196, 547 S.E.2d 899 (2001) (same), *with* Jogi v. Voges 425 F.3d 367 (7th Cir. 2005) (concluding that Article 36 confers an individual, judicially enforceable right, and a foreign national may pursue a private right of action on account of a violation); People v. Salgado, 2006 WL 845484 (Ill. App. 1 Dist., Mar. 31, 2006) (finding that the VCCR confers an individual right to detained foreign nationals).

[18] *Sanchez-Llamas*, 126 S.Ct. at 2677-78.

[19] *Id.* at 2694 (Breyer, J., dissenting).

[20] *Id.* (*quoting* VCCR Art. 36(2)).

[21] *Id.* at 2679.

supervisory power over state courts, but only federal.[22] Accordingly, any authority possessed by the Court to craft a judicial remedy applicable to state courts for an Article 36 violation must be derived from the VCCR itself. "Where a treaty does not provide a particular remedy, either expressly or implicitly," the Court reasoned, "it is not for the federal courts to impose one on the States through lawmaking of their own."[23]

Even assuming *arguendo* that a judicial remedy was required to give "full effect" to the rights accorded under Article 36 (an assumption the Court viewed with skepticism),[24] the Court concluded that applying the exclusionary rule would not be the appropriate remedy. Under U.S. law, the exclusionary rule has traditionally been used to deter constitutional violations under the Fourth Amendment and Fifth Amendments (e.g., unreasonable searches and seizures, confessions obtained by police in violation of the right against self-incrimination, and due process violations). The Court found that the rights accorded to a foreign national under Article 36 are different than those for which the exclusionary rule traditionally applies. Article 36 only provides a foreign national with the right to have his consulate *informed* of his arrest, not a substantive guarantee of consular *intervention* or a prohibition on police interrogation pending consular notice or intervention. Suppression would accordingly be "a vastly disproportionate remedy for an Article 36 violation."[25] The Court further noted that any cognizable interests the petitioner claimed were advanced under Article 36 were already protected by other constitutional and statutory protections, including those concerning the right to an attorney and protection against self-incrimination. In conclusion, the Court suggested the availability of other remedies for an Article 36 violation. These included diplomatic options and the possibility of raising Article 36 claims in judicial proceedings as part of a broader challenge as to the voluntariness of a police interrogation.[26]

In a concurring opinion, Justice Ginsburg agreed with the judgment of the Court finding that suppression was inappropriate in the cases before it, but would have left open the question of whether suppression could be an appropriate remedy in different circumstances.[27] Writing in dissent, Justice Breyer (joined by Justices Stevens and Souter) agreed with the majority that the VCCR does not "create a *Miranda*-style automatic exclusionary rule" concerning incriminating statements made by a foreign national who is not provided with requisite consular information, but disagreed with the majority's conclusion that suppression is *never* the proper remedy. The dissenting justices believed that suppression may be an appropriate remedy when it is the only available remedy to cure prejudice related to an Article 36 violation. They

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[22] *Id.* (*quoting* Dickerson v. United States, 530 U.S. 428, 438 (2000)).

[23] *Id.* at 2680.

[24] *See Sanchez-Llamas*, 126 S.Ct. at 2680 ("there is little indication that other parties...have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions").

[25] *Id.* at 2681.

[26] *Id.* at 2682.

[27] *Id.* at 2688 (Ginsburg, J., concurring).

would have remanded both cases to the state courts to consider whether suppression was appropriate given the factual circumstances of each case.[28]

Application of State Procedural Bars to VCCR Claims

The third and final issue considered by the Court was whether state procedural default rules may prevent the raising of Article 36 claims that are not made on a timely basis. Here, the Court reaffirmed its decision in *Breard*, which held that state procedural default rules apply to Article 36 claims.

In reaffirming *Breard*, the Court considered the ICJ's decisions in *LaGrand* and *Avena*, and declined to follow the ICJ's ruling that procedural default should not prevent the consideration of Article 36 claims. Both petitioners and several *amici* argued that the United States was obligated to comply with the VCCR as it had been interpreted by the ICJ. The Court stated that it found nothing in the structure or purpose of the ICJ suggesting that its interpretations were intended to be conclusive for U.S. courts. While the Court noted that the ICJ's interpretation "deserves respectful consideration," it did not deem it to be binding.[29] The Court elaborated that under the U.S. constitutional system, "[i]f treaties are to be given effect as federal law...determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."[30] The Court also stated that the U.S. withdrawal from the Optional Protocol further made it "doubtful that our courts should give decisive weight" to the ICJ's interpretation of VCCR Article 36.[31]

Even according "respectful consideration" to the ICJ's interpretation of Article 36, a majority of the Court found its reading to be unpersuasive. Here, the Court focused on the language of Article 36 providing that the rights contained therein are to be "exercised in conformity with the laws...of the receiving State." Specifically, the Court disagreed with the ICJ's conclusion in *LaGrand* that procedural default rules could prevent "full effect" from being given to the purposes of Article 36. The Court viewed the ICJ's interpretation as overlooking the importance of procedural default rules in an adversary system such as that used in the United States, which relies chiefly on *parties* to raise significant issues to a court in a timely and appropriate manner for adjudication (in contrast to the inquisitorial, magistrate-directed systems employed by many VCCR parties, where inquisitors engage in factual and legal investigations themselves). Under the ICJ's reading of Article 36, the Court suggested, Article 36 claims could potentially trump not only procedural default rules, but also other requirements on parties to present legal claims at the

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[28] *Id.* at 2691 (Breyer, J., dissenting).

[29] *Id.* at 2683.

[30] *Sanchez-Llamas*, 126 S.Ct. at 2684 (*quoting* Marbury v. Madison, 1 Cranch 137, 177(1803) (Marshall, C.J.)).

[31] *Id.* at 2685. Although the United States was not a party to the Optional Protocol at the time certiorari was granted by the Court, it was a party at the time when the Article 36 violations at issue occurred.

proper time for adjudication (e.g., statutes of limitations, prohibitions against filing successive habeas petitions).[32]

The Court disposed of Bustillo's claim for suspension of procedural default rules by analogizing Article 36 to *Miranda* claims.[33] Although a failure to inform a foreign national of his Article 36 rights may prevent him from becoming aware of those rights in time to assert them at trial, the same is also true with respect to *Miranda* claims. If, for example, a defendant is not informed of his *Miranda* rights and subsequently fails to raise a *Miranda* claim during trial, procedural default rules can and do prevent him from raising the claim in a post-conviction proceeding. The Court declined to provide an exception to procedural default rules for Article 36 claims when a similar exception "is accorded to almost no other right, including many of our most fundamental constitutional protections."[34]

Finally, the Court stressed that its holding "in no way disparages the importance of the Vienna Convention." The relief petitioners requested was extraordinary, and there was "no slight to the Convention to deny petitioners' claims under the same principles as we would apply to an Act of Congress, or to the Constitution itself."[35]

In a concurring opinion, Justice Ginsburg agreed with the judgment of the Court concerning the application of procedural default rules to the cases before it, but would have left open the question of whether an exception to default rules for Article 36 claims might be required in different circumstances.[36] Justice Breyer, writing in dissent for himself and Justices Souter and Stevens, argued that the majority had overstated the breadth of the ICJ's rulings in *LaGrand* and *Avena*, and that the ICJ understood the VCCR only to require an effective remedy for Article 36 violations. In *some* (but not all) cases, this could require an exception to traditional procedural default rules to permit the raising of an Article 36 claim. While assuming that the ICJ opinions were not controlling, Justice Breyer argued that "respectful consideration" of ICJ decisions compelled deference to its expertise on VCCR issues and adherence to its interpretation of VCCR Article 36 in the present case. Accordingly, the dissent would have allowed procedural default rules to give way to Article 36 claims when states do not provide any effective remedy for Article 36 violations. Possible remedies could include an ineffective-assistance-of-counsel claim when a defendant's attorney acts incompetently with respect to VCCR rights of which the attorney was aware.[37]

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[32] *Id.* at 2685-2686.

[33] *Id.* at 2687.

[34] *Id*. at 2688.

[35] *Id.*

[36] *Sanchez-Llamas*, 126 S.Ct. at 2688 (Ginsburg, J., concurring).

[37] *Sanchez-Llamas*, 126 S.Ct. at 2699-2700 (Breyer, J., dissenting).

Unresolved Issues

Despite the Court's holdings in the consolidated cases of *Sanchez-Llamas* and *Bustillo*, some issues related to interpretation and application of VCCR Article 36 remain unresolved. As mentioned previously, the issue of whether the VCCR confers an individually enforceable right has not been decided by the Court. The question of whether such a right is conferred by Article 36, and what judicial remedy, if any, is available for a violation of that right, will likely be the subject of continued litigation.

Perhaps the most notable unresolved issue concerns U.S. implementation of the ICJ's ruling in *Avena* with respect to the 51 Mexican nationals at issue in that case. As previously mentioned, in *Avena* the ICJ ruled that the United States failed to comply with its obligations owed to Mexico and its foreign nationals under the VCCR. It further instructed the United States to review and reconsider the convictions and sentences of named Mexican foreign nationals awaiting execution who were denied requisite consular information owed under VCCR Article 36. In 2004, the Supreme Court granted certiorari in the case of *Medellin v. Dretke*,[38] in which it would have likely ruled on the enforceablity of *Avena* by U.S. courts. Petitioner Medillin, one of the Mexican nationals named in the *Avena* case, argued, among other things, that his conviction by a Texas court should be reconsidered in light of the ICJ's ruling, despite such reconsideration being barred by Texas's procedural default rules. Prior to the Supreme Court reaching a decision on this issue, President Bush issued a memorandum instructing state courts to give effect to the *Avena* decision in accordance with general principles of comity, in cases filed by the Mexican nationals addressed in that decision.[39] The memorandum did not instruct state courts to reconsider Article 36 claims by persons who were not named in *Avena*. Days later, the United States withdrew from the Optional Protocol. The Supreme Court subsequently dismissed its writ of certioriari in *Medellin* as improvidently granted, as it was no longer clear that Medellin had exhausted his remedies at the Texas state level in light of the President's memorandum.

The Court in *Sanchez-Llamas* cites the Presidential memorandum only once, to indicate that the United States "has agreed to 'discharge its international obligations' in having state courts give effect to the decision in *Avena*, [but] it has not taken the view that the ICJ's interpretation of Article 36 is binding on our courts."[40] Accordingly, the issue of whether the President may order state courts to provide a remedy for VCCR violations remains unresolved.

Whether the President may instruct state courts to implement an ICJ order raises novel constitutional questions concerning federalism and the scope of the Executive's foreign affairs power. The Supreme Court has found that executive agreements —

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[38] Medellin v. Dretke, 544 U.S. 660 (2005) (*per curium*).

[39] President Bush Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in Avena, February 28, 2005, *available at* [http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html].

[40] *Sanchez-Llamas*, 126 S.Ct. at 2685.

those entered into by the Executive branch that are not submitted to the Senate for its advice and consent — may, at least in certain areas, preempt inconsistent state laws.[41] Most recently in the case of *American Insurance Association v. Garamendi*, the Supreme Court held in a 5-4 opinion that a California law requiring companies to disclose Holocaust-era insurance policies sold in Europe was preempted, as it conflicted with the President's foreign policy objectives, reflected in various executive agreements, concerning the settlement of claims involving insurance policies confiscated by Nazi Germany.[42] However, the President's memorandum ordering state courts to implement the ICJ's order is not an executive agreement, and a reviewing court might therefore treat it differently.[43]

Further, even if state procedural default rules may be preempted to the extent that they conflict with a President's foreign policy objectives relating to the VCCR, it is unclear whether the President has the constitutional authority to *direct* state courts to adopt measures to facilitate those foreign policy objectives. Although the Supreme Court has found in several cases that state law is preempted to the extent that it conflicts with international agreements or U.S. foreign policy objectives,[44] these cases have not involved situations in which the federal government instructed state and local institutions to take affirmative steps to advance U.S. foreign policy interests, as is arguably the case with the President's memorandum instructing state courts to give effect to the *Avena* decision (*i.e.*, requiring state courts to reconsider the convictions and sentences of persons who were not provided requisite consular notification information). Accordingly, the extent to which the Tenth Amendment restricts the scope of the Federal government's treaty and foreign affairs powers remains unclear.[45]

On November, 15, 2006, the Texas Criminal Court of Appeals held in the case of *Ex Parte Medellin* that neither *Avena* nor the President's memorandum preempted

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[41] *E.g.*, American Insurance Association v. Garamendi, 539 U.S. 396 (2003); United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). *Cf.* Missouri v. Holland, 252 U.S. 416 (1920) (upholding federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, despite a Tenth Amendment challenge by the State of Missouri).

[42] *Garamendi*, 539 U.S. at 396.

[43] It should also be noted that in cases where the Court has found that executive agreements preempt conflicting state laws, the conflict has involved the settlement of private claims against foreign governments. *See Garamendi*, 539 U.S. at 396 (involving the settlement of insurance policies confiscated by Nazi Germany); *Belmont*, 301 U.S. at 324 (1937) (concerning the assets of a company seized and nationalized by the Soviet Union); *Pink*, 315 U.S. 203 (1942) (same). It is not clear to what degree an executive agreement could impugn upon the conduct of state criminal proceedings, and whether such action might impermissibly infringe upon the essential character of the state.

[44] See *supra* note 41.

[45] *See generally*, Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

state procedural default rules, and it rejected Medellin's petition for habeas relief.[46] Citing the Supreme Court's ruling in *Sanchez-Llamas,* the Texas state court held that the ICJ's ruling in *Avena* was not binding federal law, and therefore did not preempt Texas's procedural bar. The lead opinion also found that the President's memorandum could not be sustained under either his express or implied constitutional powers or through any power granted by Congress and held that the memorandum violated the separation of powers doctrine by intruding into the domain of the judiciary. The court suggested that Texas's procedural bar might have been preempted by an executive agreement between Mexico and the United States permitting reconsideration of the sentences of Mexican nationals by U.S. courts, even though state law could not be preempted via unilateral action by the President to achieve a settlement. Though the majority opinion was joined by all nine members of the Texas court, a concurring opinion would have also rejected the legal authority of the President's memorandum on federalism grounds,[47] while another would have held that the memorandum did not constitute federal law and was therefore not binding on state courts.[48] The court's decision is potentially subject to appeal to the U.S. Supreme Court.

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[46] Ex Parte Medellin, 2006 WL 3302639 (Tex.Crim.App. Nov. 15, 2006).

[47] *Id.* at *24 (Keller, J., concurring).

[48] *Id.* at *29 (Cochran, J., concurring).