No. 04-10566

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF RESPONDENT

Ian Bassin
Anisha Dasgupta
Yale Law School
127 Wall Street
New Haven, Connecticut 06511
(203) 555-1212
Counsel for Respondent

QUESTIONS PRESENTED[1]

1. Does the Vienna Convention endow a foreign detainee with individual rights of consular notification and access enforceable in the courts of the United States?

2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to the police?

[1] The Petitioner in this action is Moises Sanchez-Llamas. The Respondent is the State of Oregon.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

INTERNATIONAL CASES AND STATUTES

MISCELLANEOUS

No. 04-10566

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Oregon below is reported at 108 P.3d 573 (Or. 2005). The summary affirmation of the Oregon Court of Appeals is reported at 84 P.3d 1133 (Or. Ct. App. 2004). The order of the Jackson County Circuit Court, Raymond B. White, Judge, is unreported.

STATEMENT OF JURISDICTION

The judgment below was entered on March 10, 2005. Petition for certiorari was filed with this Court on June 7, 2005. Certiorari was granted on November 7, 2005. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005) (mem.). This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 36 of the Vienna Convention on Consular Relations provides:

> 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 also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.
>
> (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.

Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

STATEMENT OF FACTS

1. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations grew out of an effort by the international community, in the wake of the Second World War, to codify existing international law and practice on the functions, privileges, and immunities of consular officials. *See* U.N. Charter art. 13(1). The document resulting from the Convention aimed "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states." Vienna Convention on Consular Relations preamble, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The policy choice to focus on consular, rather than individual rights, reflected a common understanding—borne of long experience—that consular officials could better safeguard the rights of nationals abroad than any one tourist or businessman acting on his own behalf. *See* Graham H. Stuart, *American Diplomatic and Consular Practice* 372 (1936) ("[I]t is through its consuls that the state extends its protecting arm over the entire surface of the globe.").

Consular officials have historically undertaken a number of functions, including serving as their state's official voice in diplomatic affairs, protesting treaty violations, advocating the interests of nationals abroad, and transmitting periodic reports about conditions overseas. *See generally*, *Consular Intercourse and Immunities* 72-77, 2 Y.B Int'l L. Comm'n, UN Doc. A/CN.4/108 (report of Jaroslav Zourek, Special Rapporteur) (hereinafter *Zourek Report*); Luke T. Lee, *Consular Law and Practice* 3-17 (2d ed. 1991). From the late eighteenth century, nations began to enter into consular treaties to clarify the powers and limitations of the consular post. *See* Lee, *supra*. Gaps in these treaties came, over time, to be filled by a body of customary international law. *Id.* at 17-23.

Article 36 of the VCCR codified the customary practice of permitting consuls to visit and communicate with nationals who might be detained by the authorities of a foreign state. *Id.* at 134-136. These privileges had historically enabled consuls to monitor the treatment received by their nationals and, when necessary, protest to the government of the receiving state. Though these powers were granted to consuls by the receiving state, it was within the discretion of the consul to exercise them. Many countries do not provide their citizens with an entitlement to consular services. *Id.* at 127.

An optional protocol, appended to the VCCR, provided for disputes arising out of the interpretation or application of the Convention to be brought in the International Court of Justice "unless some other form of settlement has been agreed upon by the parties." *Id.* The U.S. Senate ratified both the Convention and the Optional Protocol in 1969. VCCR, *supra*. Secretary of State Condoleezza Rice announced the United States' withdrawal from the Optional Protocol on March 7, 2005, although there is some question as to whether that withdrawal is effective or valid. *See infra*, at n.7.

2. State Court Proceedings

Petitioner was arrested in December of 1999 following a gun-battle with Oregon police. *See Oregon v. Sanchez-Llamas*, 108 P.3d 573, 574 (Or. 2005). Upon his arrest, the police read him *Miranda* warnings in English and Spanish but neglected to inform him about the prospect of consular access under Article 36 of the Vienna Convention. *Id.*

Petitioner was ultimately charged with attempted murder, attempted murder of a police officer, and several other crimes. *Id.* Before trial, he moved to suppress several post-arrest statements he made to the police on the grounds that, among other things, the police had not informed him of his VCCR rights. *Id.* The trial court denied Petitioner's motion, ruling that

"any violation of the Vienna Convention that may have occurred . . . [did] not require suppression of defendant's statements." *Id.* Petitioner was subsequently convicted of eleven felony counts and sentenced to over twenty years in prison. *Id.*

On appeal, the Oregon Court of Appeals upheld Petitioner's conviction and sentence. *Id.* The Supreme Court of Oregon also affirmed, holding that the VCCR does not give a criminal defendant any rights enforceable in domestic judicial proceedings and that Article 36 of the VCCR was enforceable "by the signatory states and not by individual detainees." *Id.* at 577.

Petitioner now asks this court to determine that the VCCR was intended to provide criminal defendants with new rights and remedies, including the suppression of evidence, to be invoked during proceedings brought against them in local courts.

SUMMARY OF ARGUMENT

I. Individual citizens have no right to enforce Article 36 in domestic judicial proceedings. As a matter of treaty interpretation, courts—including this Court—presume that a treaty bestows rights and obligations on the contracting states, and contemplates enforcement through political and diplomatic processes. For a treaty to provide rights and relief to individuals, it must do so explicitly. Neither the text nor history of the VCCR indicate any clear intent to confer individual rights or authorize a remedy as severe as suppression of evidence.

The Executive Branch, through the State Department, has consistently taken the official position that Article 36 confers no rights on individuals. Because the State Department is charged with the day-to-day management of consular and foreign affairs, its views in this context are entitled to special deference. Furthermore, because the Department of State has repeatedly expressed these views on behalf of the nation in multiple international fora, deferring to those views is critical if the nation is to speak with one voice in foreign affairs.

The other contracting parties to the VCCR have similarly interpreted Article 36 as giving rise to diplomatic rather than criminal-procedure remedies. As the drafting history of Article 36 reveals, the contracting parties understood that full compliance with Article 36 would be practically impossible for large states, federal states, and states containing many foreign nationals. Hence they would never have ratified a treaty that gave individual detainees the right to challenge Article 36 violations in domestic courts, or required domestic courts to remedy Article 36 breaches through a device as disruptive as suppression.

Nor is this Court obligated to follow prior International Court of Justice (ICJ) decisions holding otherwise. By its own statute, the ICJ's decisions are only binding on the parties before it in any given case. And while this Court should give respectful deference to the decisions of international courts, it should give greater deference to the Executive Branch charged with managing the nation's foreign affairs. Furthermore, reading the VCCR or any other treaty to subject this Court to the binding authority of a higher adjudicatory body would raise constitutional questions that should be avoided.

Were this Court to grant individuals the right to enforce the VCCR in domestic proceedings, it would inject the lower courts into complicated areas of foreign affairs that would require this Court's constant attention to harmonize conflicts. In addition, since every other signatory relies on their executive officials to ensure compliance, making the judiciary the primary enforcer of the provisions of the VCCR in the United States would weaken the U.S. executive's hand in negotiating with counterparts from overseas. Depriving the State Department of the leverage of being able to threaten reciprocal noncompliance would thus endanger the interests of Americans abroad.

II. This Court has the power to create an exclusionary remedy for state courts only when enforcing the provisions of the U.S. Constitution. When enforcing federal statutes or treaties, on the other hand, this Court may only impose an exclusionary remedy when it is explicitly called for in the text of the treaty. Because the exclusion of evidence is not contemplated by the text, drafting history, or current practices of the contracting parties, this Court would only have the power to create such a remedy if failure to inform a detainee about the provisions of Article 36 represented a violation of the U.S. Constitution.

Because the petitioner was informed in his own language, in a manner he could understand, of all the rights guaranteed American citizens in the Constitution, any Article 36 violation that occurred in no way prejudiced his rights under the U.S. Constitution. Indeed, to suggest that it did would be to imply that Petitioner deserves greater protection than a U.S. citizen who was similarly situated in terms of language ability and knowledge of the American legal system.

Even if this Court did have the power to create an exclusionary rule for state courts, this Court's own precedents suggest that it should not do so here. First, as this Court has recognized, the exclusionary rule should not be used to suppress evidence that was lawfully obtained. Because Article 36 does not require the receiving state to take any action prior to interrogation, evidence gathered before a detainee was informed of its provisions is not illegally obtained. Second, violations of Article 36 do not amount to violations of due process since the benefits of notification about the prospect of consular access—and indeed consular notification itself—are too indeterminate to be essential to fundamental fairness.

Third, as this Court has explained, the exclusionary rule is only to be used when there is no other adequate means to ensure compliance with the law. The State Department has already

established a comprehensive scheme for improving and ensuring compliance. When such schemes exist, this Court has declined to impose an additional exclusionary remedy. Moreover, because the potential diplomatic and political sanctions associated with noncompliance provide greater punishment than suppression in a few isolated cases, exclusion is not a necessary deterrent.

In this context, the costs of imposing an exclusionary rule on statements that were voluntarily given, lawfully obtained, and of central relevance in investigating the attempted murder of a police officer, are too severe to be justified even by any incremental benefits. Exclusion that was nowhere contemplated in the VCCR, and is employed by no other party to the Convention, should not be imposed for the first time here.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CONFER JUDICIALLY ENFORCEABLE RIGHTS OF CONSULAR NOTIFICATION AND ACCESS ON FOREIGN NATIONALS

Treaties are presumed to create rights and obligations between nations, not individuals. Neither the text nor history of the VCCR overcome that presumption. The proper remedy for breaches of Article 36 is diplomatic and political. That is the view that was held by the drafters, the ratifiers, and the Executive Branch, past and present. It is also the view that the United States has taken publicly as a nation, and should be given special deference to assure that the United States speaks with one voice in foreign affairs.

Affirming the Oregon Supreme Court's decision that Article 36 does not create individual, judicially enforceable rights would align the United States' interpretation of the Convention with that of every other signatory. Reversal would inject the lower courts into a complicated area of foreign policy best left to the Executive Branch.

A. This Court Employs A General Presumption That Treaties Do Not Confer Private Rights On Individuals

"A treaty is primarily a compact between independent nations" that "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." *Edye v. Robertson* (*Head Money Cases*), 112 U.S. 580, 598 (1884); *Charlton v. Kelly*, 229 U.S. 447, 474 (1913). Should a treaty violation occur, it "becomes the subject of international negotiations and reclamation" rather than judicial redress. *Id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided").

Even those treaties "directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a (1987) [hereinafter Restatement of Foreign Relations Law]. When a treaty does provide "certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the state and . . . individual rights are only derivative through states." *United States v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975).[2]

[2] These principles have been repeatedly upheld by the federal courts. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that two conventions "do not create private rights of action for foreign corporations to recover . . . in United States courts" even though they specify, respectively, that certain ship owners "shall be compensated for any loss or damage," and that certain parties "shall indemnify the damage caused by its violation"); *see also Goldstar v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable"); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) (finding no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "under international law it is the contracting foreign government that has the right to complain about a violation"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not create rights that are privately enforceable in courts"); *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir. 1983) (Breyer, J.) (rejecting argument that a violation of the Convention on the High Seas would require exclusion of evidence at the defendant's trial because "any violation of international law invaded not [defendant's] rights [as captain of the ship] but rather the rights of Honduras"); *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980) ("Rights under international common law must belong to sovereign nations, not to individuals, just as treaty rights are the rights of the sovereign"); *Z. &*

These general rules create a presumption that treaties do not confer individual, judicially enforceable rights. Against the backdrop of this presumption, for a treaty to confer individual rights enforceable in domestic courts, it must do so unambiguously. For example, this Court found a privately enforceable right in a treaty between the United States and Japan which expressly authorized companies in the parties' territory "to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other party." Treaty of Commerce and Navigation, U.S.-Japan, art. VII, Feb. 21, 1911, 37 Stat. 1504; *see Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *see also Clark v. Allen*, 331 U.S. 503, 507-08 (1947) (reading treaty as conferring individual rights by expressly providing that "'[t]he nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights'" (quoting Treaty of Friendship, Commerce and Consular Rights, U.S.-F.R.G., art. I, Dec. 8, 1923, 44 Stat. 2132)).[3] The text and history of the VCCR stand in contrast to these clear efforts to create an individual right.

B. The Text Of The Vienna Convention Cannot Overcome The Presumption That Treaties Do Not Create Individual Rights

"In construing a treaty, as in construing a statute, [this Court] first look[s] to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). The text

---

F. Assets Realization Corp. v. Hull, 114 F.2d 464, 472 (D.C. Cir. 1940) (even when a treaty provides for a commission to settle the amounts of claims of citizens of the United States against the government of another nation, "no provision is made or contemplated therein, for submitting any question to the courts"), *aff'd on other grounds*, 311 U.S. 470 (1941).

[3] Commonly, treaties found to confer individual rights protect things like property interests held by members of one contracting state in the jurisdiction of the other. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslavian citizens' right under U.S.-Serbia treaty to inherit personal property located in Oregon); *Hauenstein v. Lyndham*, 100 U.S. 483 (1880) (enforcing treaties assuring alien's right to inherit); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaties granting French citizens right to hold real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (enforcing treaty protecting British property owners against Virginia forfeiture); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia).

of the Vienna Convention says nothing about creating judicially enforceable rights held by individual foreign nationals. In fact, the language of both Article 36 and the preamble suggest just the opposite. Both provisions specifically disclaim the creation of individual rights, concentrating instead on facilitating consular functions.

The preamble to the Convention expressly disclaims any intent to create individual rights, declaring that "the purpose of [the] privileges and immunities [created by the treaty] *is not to benefit individuals*, but to ensure the efficient performance of functions by consular posts." VCCR, *supra*, at preamble (emphasis added).

Article 36 was likewise drafted "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." *Id.* at art. 36. Article 36 never mentions judicial remedies for detained nationals of the sending state. Rather, its purpose, as explicitly stated, is to aid consuls in exercising *their* functions by securing their ability to remain informed of the actions of their citizens in foreign countries. Without this guarantee, consular officers would be unable to properly manage the foreign affairs of their nation, safeguard their nationals, and/or mitigate any diplomatic embarrassments arising from their nationals' misdeeds.

The inclusion of the words "his rights" in subsection (1)(b) of Article 36 in no way alters the thrust of this provision. The Convention's drafting history reveals that this language was inserted to protect the foreign national's privacy interests in *not* having his consulate notified. The original draft of Article 36, described in the accompanying commentary as "defin[ing] the rights granted to consular officials," provided for the automatic notification of consuls upon the arrest of a foreign national. *See* 1 *Official Records of the United Nations Conference on Consular Relations*, Vienna, Mar. 4-Apr. 20, 1963, at 24 [hereinafter *Official Records*]. However, concerns that mandatory consular notification might in some cases be undesirable led

to a compromise in which the Article was changed to provide for optional notification, at the discretion of the individual. *See Id.*, at 82-84. Settling on an optional notification scheme required some way to alert the national to his prerogative to choose whether to notify his consul. *See Id.*, at 84 (statement of Mr. Evans, United Kingdom) (explaining that the United Kingdom's amendment inserting this language was necessary now that mandatory consular notification had been replaced with optional consular notification to be invoked at the discretion of the detained individual). The drafters did not intend to secure the foreign national's right to consular assistance, nor could they. Consuls are under no obligation to respond to a request for access and may even work in aid of the receiving country's prosecution.

Moreover, even if the foreign national was intended to benefit from some ancillary "right," that does not mean that such rights are judicially enforceable in the domestic courts of the receiving state. Treaties are to be interpreted by the courts as the law of the land just as if they were acts of Congress. *See Head Money Cases*, 112 U.S. at 598-99; *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (stating that a treaty binds the rights of parties as much as an act of Congress). And when this Court interprets an act of Congress, the mere mention of the word "rights" in a statute is not sufficient to establish a scheme of judicial enforceability.

For example, in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18-19 (1981), this Court rejected the argument that a statute which "speaks in terms of 'rights'" necessarily creates judicially enforceable rights and obligations. The Court held that the Developmental Disabilities Assistance and *Bill of Rights* Act (emphasis added) did not create individual, judicially enforceable rights, even though the Act stated that one of its purposes was "to protect the legal and human *rights* of all persons with developmental disabilities" and that

"persons with developmental disabilities *have a right* to appropriate treatment" and services. *Id.* at 13, 18-19 (emphasis added). As the Court explained, statutory interpretation "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Id.* at 18-19 (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)). *See also Gonzaga v. Doe*, 536 U.S. 273, 290 (2002) (holding that for Congress to create new, federally enforceable rights, it must specify its intent "in clear and unambiguous terms"); *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (holding that one factor to consider in determining whether a judicially enforceable right has been created is whether the statute was enacted primarily for the benefit of the claimant, and that even the appearance of a right can be rebut by an explicit statement in the text disclaiming any such intent); *California v. Sierra Club*, 451 U.S. 287, 294 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries").[4]

Indeed, in international law it is even more common for rights and obligations to exist without any mechanism for individual enforcement, since the presumption in the international law context is that enforcement will rely instead on diplomacy and the exertion of political pressure.[5]

C. The Drafting And Ratification History Of The Vienna Convention Confirms That The Treaty Does Not Confer Private Rights On Individual Criminal Defendants

"Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers," *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155,

[4] In that sense, "references in the treaties to a 'right' of access, . . . are easily explainable. The contracting states are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul as a means of implementing the treaty obligations as between states. Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward." *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000) (Selya, J., and Boudin, J., concurring).

[5] *See generally*, Letter from David Andrews, Legal Advisor, Dep't of State, to James K. Robinson, Assistant Att'y Gen., Criminal Division, Department of Justice (Oct. 15, 1999), *available at* <http://www.state.gov/documents/organizations/7111.doc> [hereinafter State Dep't Letter].

167 (1999) (quoting *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996)), this Court has "traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties," *Zicherman*, 516 U.S. at 226; *see also United States v. Stuart*, 489 U.S. 353, 366 (1989).[6]

There is no indication in the conference's negotiating history that parties intended individuals to have rights enforceable in domestic proceedings. Indeed, the parties actually endeavored to avoid imposing specific penalties on receiving states out of concern that most states would not have the resources to track and report on every foreign national in their criminal justice system. *See infra*, at 27-28. It is hard to believe that a compromise addressed to these concerns would allow civil damages or lay significant obstacles in the way of domestic law enforcement.

The ratification history in the United States Senate further supports this reading. Repeatedly, throughout the advice and consent process, multiple actors stressed that the Convention did not alter existing laws. The Convention's purpose, after all, was to codify laws and practices already in operation; and prior to the VCCR, no such laws or practices granted individuals a right to consular notification. The State Department's Deputy Legal Advisor testified before the Senate Foreign Relations Committee that the Convention "does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 91-9, at 18 (1969). The Foreign Relations Committee then recommended ratification based on its understanding that "[t]he Convention does not change or

[6] The rule that "when a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred," *Hauenstein*, 100 U.S. at 487, only operates when the fact that *some* right exists has been established. In that event, the treaty should be read in a way that expands rather than restricts the right. For example, in *Hauenstein*, the question was not whether the litigant had the right he was claiming, but rather, what time limits were placed on his exercising it. Where no right exists, ambiguity should not be read to create one.

affect present U.S. laws or practice." *Id.* at 2. Shortly after ratification, the Department of State's Legal Advisor wrote to all fifty governors, explaining that the Department "[did] not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States." State Dep't Letter, *supra*, at A-9 (quoting letter from John R. Stevenson, Legal Advisor, Dep't of State, to governors). The State Department has indicated that such statements would never have been made had the Convention been understood to confer individual rights such that criminal defendants could seek civil damages, the suppression of evidence, or the reversal of convictions. *See id.*

In sum, both the drafters of the Convention and the members of the Senate and Executive Branch who contemplated its ratification saw a treaty that did not interfere with the operation of existing laws, let alone one that included a provision granting criminal defendants a new right so extreme as to allow them to undo critical elements of a criminal proceeding.

D. The Executive Branch's Interpretation That The Vienna Convention Does Not Confer Private Rights On Individuals Is Entitled To Special Deference

1. The State Department's Views Are Entitled To Deference

"Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines, Ltd.*, 525 U.S. at 168. Deference to the State Department's views is particularly important here for two reasons. First, the treaty at issue involves one of the core roles of the State Department: to oversee the operation of our consular services. *See* State Dep't Letter, *supra*, at A-7 ("the interpretation of consular conventions requires more than the usual deference to the executive branch's interpretation" because "[i]t is the executive branch—through the Department of State —that has defined and continues to define the practice of the United States under its consular conventions"); *see also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("Although not conclusive, the

meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Kolovrat*, 366 U.S. at 194 (same); *cf. INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate . . . where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'" (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).). Second, because the State Department has already taken a public position on the treaty's meaning on behalf of the United States, a contrary ruling by this Court would risk the appearance of our government speaking with inconsistent voices. *See* Restatement of Foreign Relations Law, *supra*, § 326 reporter's n.2 (where the executive's interpretation of a treaty has been "previously made in diplomatic negotiation with other countries," the courts are even "more likely to defer" to that interpretation on the "ground that the United States should speak with one voice"); *see also Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) ("[T]he Judicial Branch should avoid 'the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question'" (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).).

2. The State Department Has Consistently Viewed The VCCR As A Treaty Between States, To Be Enforced Diplomatically By Governments And Not By Individuals

The State Department has repeatedly taken the position that "a failure of consular notification is a state-to-state treaty violation that does not, as such, give rise to a right to an individual remedy requiring the reversal of all or part of a criminal proceeding." State Dep't Letter, *supra*, at 2. This position is consistent with the aforementioned letter to all fifty governors which expressed the Department's belief that the VCCR did not alter any existing domestic legal regimes. The Department views the "right of an individual to communicate with

his consular officials [as] derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned." *Id.* The State Department understands that "violations of consular notification obligations are addressed through diplomatic and political channels (or may be referred to the International Court of Justice, if the states concerned are parties to the VCCR's optional protocol)." *Id.*

The State Department has taken this position on behalf of the United States in multiple international fora. Three times before the ICJ the State Department has taken the position that the Vienna Convention governs relations between states and confers no rights on individuals that can be enforced in domestic courts. *See* Verbatim Records, *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, ICJ (Apr. 7, 1998); Counter-Memorial of the United States, *LaGrand Case (F.R.G. v. U.S.)*, 2001 ICJ 466 (June 27); Counter-Memorial of the United States, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ 128 (Mar. 31) [hereinafter Avena Counter-Memorial]. The Department also took this position in oral presentations and written submissions made to the Inter-American Court of Human Rights in a case commonly referred to as "OC16". *See* Written Observations of the United States of America, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion, 1999 Inter-Am Ct. H.R. (ser. A) No. 16 (June 1, 1998) (corrected June 10, 1998) (stating that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation").

The State Department's actions both domestically and abroad in applying the treaty have conformed to its aforementioned views. Domestically, for example, the Department has advised a foreign national being held in American prison that "while the U.S. authorities are required to

comply with the obligations [of Vienna Convention Article 36], failure to do so would have no effect on [his] conviction or incarceration." *See* State Dep't Letter, supra, at A-1 (quoting Letter from Office of the Legal Advisor, Dep't of State, to foreign detainee (Sept. 15, 1989)). As for Americans held abroad, the Department's Foreign Affairs Manual (FAM) for consular officers encourages them "to be as aggressive as possible in ensuring that they receive timely notification and to raise concerns about failures of consular notification with their host-country governments directly." *Id.* at A-5. Nowhere in the FAM does it suggest that failures of consular notification should be addressed through the host country's criminal justice system. In fact, the FAM instructs consular officers to protest violations of Article 36 diplomatically. 7 Dep't of State, Foreign Affairs Manual (FAM) § 426.20 (2004). According to the FAM, "protests may be formal or informal, and either written or oral," suggesting the use of either "a diplomatic note [or] a personal call." *Id.* at § 426.3. It recommends that "[o]ne effective strategy is to protest first at a lower level and, if no satisfactory response is received, to escalate the protest to the state or federal level." *Id*. The sole remedy consuls are instructed to seek is for the Ministry of Foreign Affairs of the offending country to "inform all law enforcement agencies of their obligations under The Vienna Convention." *Id.* at § 420, Exhibit 3 (sample of diplomatic note of protest). Indeed, the State Department told the First Circuit in 1999 that it was unaware of any instance in which the United States had asked a foreign court to undo a criminal proceeding based on a failure of consular notification, *id.*, despite the "many instances where Americans were arrested [and] great delay ensued before our consular offices were notified." H.R. Rep. No. 95-720 (Oct. 19, 1977).

E. The Proper Remedy For An Article 36 Violation Is Diplomatic

As the precedents on treaty interpretation, the text and history of the VCCR, the State Department, and the behavior of the contracting parties all suggest, the proper remedy for violations of consular notification is political and diplomatic. This is how treaties have always been presumed to operate. *See Head Money Cases*, 112 U.S. at 598 (stating that a treaty depends for its enforcement "on the interest and the honor of the governments which are parties to it," and that violations are the subject of "international negotiations and reclamations" with which "the judicial courts have nothing to do and can give no redress").

This is also how both the United States and the other contracting parties have understood the VCCR to operate. *See infra*, at n.11. The Senate that ratified the treaty based its decision, in part, on the testimony of the State Department representative charged with explaining the treaty to the Senate, who testified that "if problems should arise regarding the interpretation or application of the [VCCR], such problems would probably be resolved through diplomatic channels" S. Exec. Rep. No. 91-9, *supra*, at 19.

Indeed, diplomatic protest was the customary practice before the VCCR, and has remained the practice after consular rules were codified in the VCCR. When officials in California had refused to permit a Mexican consul to visit a Mexican citizen in prison in 1934, the Mexican Embassy lodged an official complaint. *See* Lee, *supra*, at 137. The Department of State then wrote to the Governor of California and explained that: "Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if attitude District Attorney is maintained in instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens. It is earnestly requested that you take prompt action

looking to reversal District Attorney's position." *Id.* (sic). The Mexican consul was subsequently permitted to visit his citizen. *See id*. After ratification of the VCCR, when it came to the attention of the United States that large numbers of American citizens had been arrested and tried in Mexico without full compliance with Vienna Convention requirements, the United States launched a diplomatic appeal to push Mexico to improve its consular notification practices. *See* Avena Counter-Memorial, *supra*, at n. 67 (citing Letter from Henry A. Kissinger, Sec'y of State, to Alfonso Garcia Robles, Foreign Minister of Mex., (Feb. 16, 1976)).[7]

When violations of the Vienna Convention are brought to the attention of U.S. authorities, the State Department undertakes an investigation into the charges. If a violation is found, the State Department offers an apology on behalf of the United States to the sending state and seeks to educate the responsible officials about the relevant requirements to ensure future compliance. *See* State Dep't Letter, *supra*, at A-3 (explaining that this is also how foreign governments treat violations made by their law enforcement officials and that this is the approach that has "been followed for decades" with respect to "all of the consular conventions to which [the United States] is a party"). Both the federal and state governments continue to make good faith efforts to improve compliance with the treaty. *See infra*, at 37-39.

F. Neither The Prior Decisions Of The International Court Of Justice On Article 36, Nor The Self-Executing Nature Of The Vienna Convention Changes The Analysis

Prior ICJ decisions do not constitute binding authority on this Court. Under its founding statute, the ICJ only has jurisdiction to hear disputes between nations. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1055. Furthermore, its

[7] Mexico agreed to seek improvements, but acknowledged that administrative realities might mean that even its best efforts could fall short of full compliance. *Id.* (citing Letter from Alfonso Garcia Robles, Foreign Minister of Mex., to Henry A. Kissinger, Sec'y of State (Mar. 25, 1976) (stating that "[w]ith respect to aliens, agents of the Office of the Attorney General have categorical instructions to inform the consul concerned of any arrest as soon as it is made" but that "[w]e cannot, however, expect that irregularities will not occasionally be committed, especially when arrests occur in remote parts of the country")).

decisions "ha[ve] no binding force except between the parties and in respect of that particular case." *Id.* at art. 59. The ICJ interpretation of provisions under the Optional Protocol is entitled to respect, but cannot possibly be entitled to more deference than the Executive Branch, which is charged with negotiating and implementing the treaty. *See Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam) (stating that "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" but then deciding against honoring the international court's request for a stay).[8]

That the Executive Branch initially agreed to the Optional Protocol does not change the analysis. A decision by this Court that, in signing the Optional Protocol, the Executive Branch, with the advice and consent of the Senate, subjected United States courts to the binding authority of an international tribunal, would raise serious constitutional questions.[9] Because this Court should read treaties to avoid serious Constitutional questions when another reading is possible, *cf. United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916),[10] it should construe the Optional Protocol the same way all treaties are viewed: as creating another diplomatic channel through

[8] This argument presumes that the United States remains a party to the Optional Protocol. On March 7, 2005, however, the Secretary of State notified the U.N. Secretary-General of the United States' intent to withdraw from the Optional Protocol. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, Wash. Post, Mar. 10, 2005, at A1 (describing Letter from Condoleezza Rice, Sec'y of State, to Kofi Annan, Sec'y-Gen., United Nations (Mar. 9, 2005)). Whether the President may withdraw from a treaty without the advice and consent of the Senate is a constitutional question of considerable difficulty. *See Goldwater v. Carter*, 444 U.S. at 1003 (declining to decide whether the President may unilaterally abrogate a treaty on political question grounds); Jefferson H. Powell, *President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. W. L. Rev. 527, 563 (1999). Because this Court should avoid such questions when they are not necessary to the instant proceedings, as they are not here, this Court should presume that the United States is still a party to the Optional Protocol. However, were this Court to view the United States' withdrawal as valid, the prior decisions of the ICJ on Article 36 would not be entitled to any deference at all as it would be United States policy not to respect the jurisdiction of the ICJ in resolving disputes arising out of the VCCR.

[9] To name just one, if the other branches may not directly announce a rule of decision for the judiciary, *see United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), it is at least questionable whether the Constitution permits them to delegate that power to an international tribunal.

[10] Though the general rule is that *statutes* should be construed to avoid constitutional doubts, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), the rationale underlying that rule applies with equal force to *treaties*, since treaties and statutes stand "on full parity," *see, e.g. Breard*, 523 U.S. at 376 (per curiam).

which states may negotiate their disputes, to which deference should be given, but which does not bind the courts of the United States.

This reading would be consistent with the dominant paradigm that international agreements and disputes are to be resolved through diplomatic channels. Indeed, the enforcement mechanism contemplated for ICJ decisions is also diplomatic. Article 94 of the U.N. Charter explains that while each member of the United Nations is expected to comply with ICJ decisions, failure to do so is dealt with diplomatically, through resort to the Security Council. U.N. Charter art. 94. Accordingly, when the United States has invoked the ICJ, it has not expected ICJ opinions to be enforceable through anything other than diplomatic means. For example, when the United States brought suit against Iran in the ICJ to seek the release of American hostages, *see Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ 1 (May 24), the United States did not reasonably expect that a decision by the ICJ alone would prompt consular access for the hostages. Instead, a decision from the ICJ was seen as a diplomatic tool—a way to build up world opinion and provide leverage to U.S. negotiators. *See* Kenneth M. Pollack, *The Persian Puzzle* 164 (2004).

The role of self-execution does not change the analysis either. There is no dispute here that the VCCR is self-executing. The Senate ratified the treaty based on testimony from the State Department Legal Advisor that "[t]he Convention is entirely self-executive and does not require any implementing or complementing legislation." Sen. Exec. Rep. 91-9, *supra*, at 5. Though courts sometimes discuss the issue of self-execution in tandem with the question of whether a treaty creates private rights, *see Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988), "[a]t bottom, the questions remain separate." *Li*, 206 F.3d at 68 (Selya, J., and Boudin, J., concurring).

G. This Court Should Not Inject The Judiciary Into This Process Because Doing So Will Frustrate The Ability Of The Executive Branch To Conduct The Nation's Foreign Relations

Two final considerations related to this issue warrant the Court's attention. First, finding an individual, judicially enforceable right in the Vienna Convention will inject hundreds of state and lower federal courts into the business of the nation's foreign affairs. While this Court can attempt to lay out clear and uniform instructions, lower courts are bound to part ways in applying particular facts to that law. When that happens, and a state court in Minnesota grants a new trial to a German, but a North Carolina court refuses to halt the execution of an Israeli, the Executive Branch will be severely hampered in its ability to conduct the nation's foreign policy. Indeed, it will need this Court to continually harmonize lower court applications of the treaty, in essence calling on this Court to act as its partner in managing diplomatic affairs. This is not a model that the Constitution envisions or that this Court should adopt. *See Aguirre-Aguirre*, 526 U.S. at 425 ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of . . . diplomatic repercussions").[11]

Second, a holding that the Vienna Convention creates individually enforceable rights would—by giving foreigners in the United States more rights than American citizens at home and abroad—disrupt the careful balance of reciprocal obligations that lies at the heart of the Executive Branch's ability to conduct foreign diplomacy. "[I]nternational agreements should be consistently interpreted among the signatories," *United States v. Jimenez-Nava*, 243 F.3d 192,

[11] This Court's political question jurisprudence also counsels against injecting the courts into an area of foreign policy that has been committed to a coordinate branch by the Constitution. *See, e.g., Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (Rehnquist, J., concurring) ("concluding that the question . . . is political in nature [is] even more compelling [when] it involves foreign relations—specifically a treaty commitment.").

194 (5th Cir. 2001), and the domestic courts of other contracting parties have not found a judicially enforceable right in Article 36.[12]

The United States is able to protect its citizens traveling abroad because the same branch that has responsibility for negotiating with foreign governments also has the power and responsibility for protecting foreign citizens here in the United States. Thus, when a Secretary of State seeks greater protections for Americans abroad, his overseas counterparts knows that it is the State Department which works to protect their nationals in the United States.[13] Were this Court to remove ultimate authority for compliance from the executive and place it in the hands of the judiciary, it would weaken the ability of our diplomats to negotiate and ultimately endanger the safety of Americans abroad.

For this, and each of the aforementioned reasons, the scheme as designed by the drafters and understood by both our government and that of every other signatory is for the VCCR to create rights held by states and not individuals, with diplomatic and political remedies as the sole means of enforcement.[14]

---

[12] *See, e.g.*, *Canada v. Van Bergen*, 261 A.R. 387, 390 (2000) ("The Vienna Convention creates an obligation between states and is not one owed to the national."); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 7, 2001, 5 StR 116/0, *available at* http://www.bundesgerichtshof.de (holding that the purpose of Article 36(1)(b) was limited to preventing nationals of the sending State from disappearing from the public view without a trace and that its rationale was not to protect a suspect from making uncounseled or incriminating statements).

[13] For example, the State Department protested to Syria in 1975 when two American nationals had been detained there and notification and access had not been provided. The Department declared that "The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established." Lee, *supra*, at 145-46 (quoting Telegram from Dep't. of State, to Embassy, Damascus (Feb. 21 1975)). As to the nationals themselves, the Department made no reference to their having "rights," asserting instead that "[t]he consul's presence may also help assuage the distress of detained nationals." *Id.* The Department threatened that the price of noncompliance with the consul's rights would be reciprocal noncompliance by the United States as to Syrian consular rights in America. *See id.* The Syrian Embassy then reported that consular access had been granted that day. *See id.*

[14] Largely for these reasons, no federal appellate court has found that the Vienna Convention confers individual, judicially enforceable rights, while five have found that it does not. *See United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002); *Jimenez-Nava*, 243 F.3d at 198; *Li*, 206 F.3d at 66; *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 991 (2000); *see also Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998); *Wisconsin v. Navarro*, 659 N.W.2d 487, 489 (Wis.

II. SUPPRESSION OF A DETAINEE'S STATEMENTS TO THE POLICE IS NOT THE PROPER REMEDY FOR VIOLATIONS OF ARTICLE 36

Because this Court "hold[s] no supervisory authority over state judicial proceedings," *Smith v. Phillips*, 455 U.S. 209, 221 (1982), it can require state courts to suppress evidence only when enforcing the Constitution, federal statutes, or treaties made "under the Authority of the United States." U.S. Const. art. VI, § 2 (Supremacy Clause). When enforcing the Constitution itself, the Court has broad discretion to create an exclusionary remedy. *See, e.g.*, *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). However, in the case of statutory violations, "[t]he availability of the suppression remedy . . . turns on the provisions of [the statute]" alone. *See, e.g.*, *United States v. Donovan*, 429 US 413, 432 n.22 (1977); *see also* 18 U.S.C. § 2515 (2006) (federal wiretap statute, specifically prescribing suppression as remedy for certain violations of its provisions).

As this Court has determined, treaties and statutes stand "on full parity," *see, e.g. Breard*, 523 U.S. at 376 (per curiam) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality)). Therefore, the Court cannot require suppression in response to an Article 36 violation *unless* the VCCR specifically prescribes suppression as a remedy, *or* failure to inform a foreign detainee of its provisions amounts to a violation of the U.S. Constitution.

In that sense, three independent and compelling reasons counsel against the use of suppression to remedy breaches of Article 36. First—as the plain text, negotiating history, documents accompanying Senate ratification, and subsequent practices of the contracting parties reveal—the VCCR does not contemplate that Article 36 violations will trigger suppression. Second, failure to inform a detainee of the consular access provisions of Article 36 in no way

---

Ct. App. 2003); *New Mexico v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001), *cert. denied*, 535 U.S. 937 (2002); *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999).

violates the U.S. Constitution. Third, suppression of such statements would not serve the purposes of the exclusionary rule as these have been articulated by this Court.

A. The VCCR Does Not Contemplate Suppression

Remedying Article 36 violations through the suppression of lawfully obtained statements would be plainly contrary to the VCCR's text, negotiating history, and the expectations of its contracting parties.

1. The Text And Negotiating History Of The VCCR Do Not Contemplate Suppression

Nothing in the text or structure of the VCCR indicates that a state's failure to inform a foreign detainee about the terms of Article 36 should result in the suppression of the detainee's statements to the police. "In construing a treaty," this Court "first look[s] to its terms to determine its meaning." *See, e.g., Alvarez-Machain,* 504 U.S. at 663 (citing cases). Article 36 does not specify how states should deal with the problem of non-compliance. Given that other VCCR provisions do specify remedies, *see, e.g.* VCCR, *supra,* art. 23 (allowing withdrawal of official recognition from consular officer of non-complying state), *id.* at art. 31 (requiring payment of compensation to injured state), this silence strongly suggests that VCCR does not contemplate anything other than standard diplomatic remedies for violations of Article 36.

However, even if Article 36 did admit of a judicial remedy, suppressing a detainee's statements to the police would be wholly inconsistent with the expectations of the parties to the Convention. When interpreting treaties, this Court undertakes to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *See, e.g. El Al Israel Airlines,* 525 U.S. at 167 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

First, the contracting parties to the VCCR never intended for Article 36 to be enforced in a rigid manner. On the contrary, the delegates to the Convention strove to minimize the burdens

on the receiving country wherever possible. So as to "lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors," *see 1 Official Records*, *supra*, at 82 (Mr. Kamel, United Arab Republic), they rejected formulations that called for automatic notification of the sending state's consulate.[15] Instead, paragraph one provides that the sending state's consulate be notified only if the foreign detainee "so requests." The delegates also rejected two burdensome draft clauses: one requiring the receiving state to report the reason as well as the fact of detention, *id.* at 38, the other requiring the receiving state to furnish the sending state "periodically with a list of the nationals of that state who were in prison," *2 Official Records*, *supra*, 156. *See*, *e.g.*, S. Exec. E, at 61 (1969) (observing that "[m]any delegations, including that of the United States, viewed the suggestion as impracticable and as entailing for the receiving State an unreasonable administrative burden").

Second, the contracting parties never expected that violations of Article 36 would trigger criminal-procedure remedies. In providing for Article 36 to be implemented "in conformity with the laws and regulations of the receiving State," paragraph two does not seek to "codify criminal law or criminal procedure" or otherwise "modify the criminal laws and regulations of the receiving State." *See 1 Official Records*, *supra*, at 38 (Mr. Anghel, Romania). It simply establishes that consuls must abide by "the provisions of the [receiving country's] code of criminal procedure and prison regulations" when visiting "persons in custody or imprisoned." *2 Official Records*, *supra*, at 24 (Commentary to Draft Articles on Consular Relations). In that sense, paragraph two actually serves as an express assurance that states *need not* "alter their

[15] *See*, *e.g.*, *id.* at 84 (noting that "there were three possibilities before the Conference: to place an unequivocal obligation o[n] the receiving State . . . to provide that the receiving State should notify the consulate only if requested by the person concerned; or to make it incumbent on the receiving State to notify the consular post unless the national concerned expressly opposed it").

criminal laws and regulations" in order to comply with Article 36. *See 1 Official Records*, *supra*, at 40 (Mr. Khlestov, USSR).

Finally, the contracting parties never contemplated that failures to comply with Article 36 would result in a sanction as severe as suppression. Rather, the delegates understandably opposed measures that would "make it difficult for States to exercise their sovereign right to prosecute aliens who broke the law." *Id*; *see also id.* at 84 (Mr. Cristescu, Romania, objecting to "inclusion in the convention of any provision that would affect criminal procedure and put aliens in a better position than nationals"). In selecting the final language of paragraph 1(b), the delegates aimed to "ensure that the authorities of the receiving State would not be blamed if, owing to a pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." *Id.* at 82 (Mr. Kamel, United Arab Republic). Indeed, at least six states openly acknowledged the impossibility of full compliance by developing nations, federal states, and "States where distances were great, [or] where there were many foreign nationals."[16] These countries would presumably have refused to sign and/or ratify the VCCR had they anticipated that failure to comply would result in such severe penalties.

[16] *Id.* at 37 (Mr. Konzhukov, USSR); *id.* at 36 (Mr. Jayanama, Thailand); *see also id.* (Mr. Sharp, New Zealand, declaring "doubt[]whether there were many countries in a position to apply the provisions of article 36 in every case" and noting the difficulty "for larger countries"); *id.* at 38 (Mr. Uchida, Japan, observing, that "in certain countries," compliance with Article 36 would be would be "impossible, not for political but for practical reasons").

New Zealand, Thailand, France, Japan, and India went so far as to make on-record declarations about their own nations' inability to meet the obligations imposed by Article 36. *See id.* at 36 (Mr. Sharp, New Zealand, observing that "the population of New Zealand included thousands of immigrants and it would be impossible to apply those provisions"); *id.* at 336 (Mr. Sreshthaputra, Thailand, proposing deletion of sub-paragraph (b) on the grounds that it "imposed an obligation which [Thailand] would be unable to fulfil [sic]"); *id.* at 337 (Mr. Heuman, France, noting that Article 36 imposed "an impossible task on the authorities" of "countries . . . [with] a large number of permanent foreign residents . . . [and] others, such as his own, [which] had a large seasonal influx of foreign tourists and week-end visitors"); *id.* at 349 (Mr. Das Gupta, India, stating that "[i]t would be asking the impossible to impose the obligations laid down . . . India was so vast, the number of aliens living in India so large and communications so difficult that [India] would find it hard to assume the obligation in question."); *id.* at 343 (Mr. Kanematsu, Japan, noting Japanese authorities "could not comply with the provisions of paragraph 1(b)" given "the large number of persons who attempted to enter Japan illegally and did not possess any papers").

2. The Ratification And Subsequent Operation Of The VCCR Confirm That Article 36 Does Not Contemplate Suppression

The ratification history and subsequent operation of the VCCR further demonstrate that the contracting parties never intended for Article 36 violations to trigger a criminal remedy as severe as suppression. When submitting the VCCR to the Senate Foreign Relations Committee for consideration, the State Department informed the Committee that the VCCR did not "have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 91-9, *supra*, at 18. The Foreign Relations Committee, in turn, "voted to report the Convention favorably to the Senate" on the understanding that "the Convention [did] not change or affect present U.S. laws or practice." *Id.* at 2.

During the thirty-six years since ratification, the State Department has consistently instructed other government bodies that VCCR obligations do not infringe on domestic criminal law. In 1970, the State Department's Legal Adviser informed the governors of the fifty states that State Department "d[id] not believe that the Vienna Convention [would] require significant departures from the existing practice within the several states of the United States. State Dep't Letter, *supra*, at A-9. Similarly, in the 1980s, the Legal Adviser's Office declared its official position that Article 36 violations could not serve as a basis for challenging criminal convictions. *Id.* at A-1. More recently, the Department of State has reiterated this position in multiple submissions made to the ICJ and again in an advisory letter to the First Circuit. *See supra*, at 17. As the State Department itself has noted, these statements "would not have been made if the Department of State had contemplated that the VCCR might require that failures of consular notification be remedied . . . [through] the suppression of evidence or the undoing of other aspects of the criminal process." State Dep't Letter, *supra*, at A-9.

The State Department's official interpretation is based on the understanding of the United States delegation to the Vienna Convention as well as on its own experiences with enforcement of the VCCR. In the event of suspected Article 36 violations involving Americans detained overseas, the State Department expects that the receiving country will "investigate the alleged violation and, if it is confirmed, . . . apologize for it and undertake to prevent future occurrences." *Id.* A-3. Despite setting a "very high standard of assistance for U.S. citizens," the State Department has never instructed United States consular officials to seek a remedy as severe as exclusion of evidence. *Id.* at A-5; *see also* 7 FAM, *supra*, at § 410 (setting out the State Department's "policies, guidance, and procedures" for assisting U.S. citizens and nationals arrested abroad).

Likewise, when informed about possible Article 36 violations in the United States, the State Department investigates the complaint and, if "satisfied that a violation . . . has occurred," will "typically apologize to the government that made the complaint and work with the law enforcement or other domestic officials involved to prevent future similar violations." State Dep't Letter, *supra*, at A-5. Where diplomatic remedies alone seem insufficient to assuage concerns of the complaining state, as in "death penalty cases involving failures of consular notification," the State Department *voluntarily* takes the additional step of "asking the state involved to consider the consular notification violation in the context of its clemency proceedings." *Id.* at A-3. This approach, unlike suppression, provides individual relief in a manner consistent with the Department's longstanding position that "the basic remedies for failures of consular notification are diplomatic and political." *Id.* at A-4.

Suppression was clearly beyond contemplation at the time the VCCR was drafted and remains so from the standpoint of virtually all parties to the VCCR.[17] Most legal systems do not recognize strict exclusionary rules, instead tending to admit relevant evidence "unless admission of it . . . would bring the administration of justice into disrepute." Can. Const. (Constitution Act, 1982) pt. II (Canadian Charter of Rights and Freedoms), § 24(2).[18] In other systems, "only considerations of reliability determine whether evidence is admissible." Bradley, *supra*, at 376 (observing that Israel and China take this approach). None of these jurisdictions would have accepted the punitive sanction of automatic suppression for VCCR violations, especially given the practical impossibility of full compliance with Article 36's obligations of notification.

A 1999 State Department survey of world-wide consular notification practices confirms that the contracting parties do not anticipate full compliance even today. Of seventy-nine countries party to the VCCR or analogous consular treaties with the United States, only forty-five usually provided U.S. detainees with required consular information. Avena Counter-Memorial, *supra*, at n.174 & accompanying text (summarizing the results of the survey). Indeed, as of 2003, the State Department was not aware of "even a single instance in which any national court or any national legislature has concluded that the automatic exclusion of all statements and

[17] The exception is Mexico, which in *Avena* unsuccessfully pressed the ICJ to require exclusion of statements "given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them." *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ 128, para. 126 (Mar. 31). Though, significantly, Mexico itself does not require exclusion of evidence "obtained against a non-Mexican defendant where his or her consulate was not notified pursuant to law." *See*, Avena Counter-Memorial, *supra*, at n. 443 & accompanying text.

Even the other governments litigating Article 36 violations before the ICJ have declined to take such an extreme position. *See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, (Apr. 7, 1998), *available at*: http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (requesting "*restitutio in integrum* in the form of a new trial for its national or the reconveyance of the plea offer"); *LaGrand*, 2001 I.C.J. 104, para. 11 (June 27) (requesting that the United States promise to ensure "the effective exercise of [Article 36] rights" in "any future cases of detention of or criminal proceedings against German nationals" and "in cases involving the death penalty . . . provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36").

[18] Argentina, Canada, England and Wales, France, Germany, Italy, and South Africa all take this approach. *See* Craig Bradley, *Mapp Goes Abroad*, 52 Case W. Res. L. Rev. 375, 376 (2001).

confessions made by an accused to the authorities prior to receipt of consular information is an appropriate remedy for a breach of Article 36." *Id.* at para. 8.31. Thus, reading an exclusionary remedy into Article 36 would plainly contravene the past and present intentions of its contracting parties.

B. Extension Of The Exclusionary Rule To This Context Would Be Inconsistent With The Precedents Of This Court

1. Petitioner's Statements Were Not Obtained Unlawfully

a. Petitioner's Constitutional Rights Were Not Violated

In the absence of a treaty provision calling for suppression this Court can require exclusion only to remedy a constitutional violation. Because the VCCR does not contemplate an exclusionary remedy for Article 36 violations, this Court may instruct state courts to suppress detainee statements only if failure to inform a detainee of the treaty's consular access provisions results in a violation of the U.S. Constitution. "It is beyond dispute" that this Court does not "hold a supervisory power" over state courts. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 438 (2000); *Chandler v. Florida*, 449 U.S. 560, 570 (1981) ("This Court has no supervisory jurisdiction over state courts . . . "). Thus, in accordance with basic principles of federalism, this Court "'may not require the observance of any special procedures' in state courts 'except when necessary to assure compliance with the dictates of the Federal Constitution.'" *Dickerson*, 530 U.S. at 438 (quoting *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) (per curiam)).

The state's failure to notify Petitioner about the provisions of Article 36 in no way prejudiced his rights under the United States Constitution. While in custody, Petitioner received all of the protections that the Constitution provides to American citizens, which are by design sufficient to protect a detainee who does not speak English or understand the details of the legal system. In conformity with *Miranda v. Arizona*, 384 U.S. 436 (1966), the police informed

Petitioner of his right against self-incrimination and right to counsel. *Id.* at 474 (requiring police to "fully apprise a person interrogated of the extent of his rights"). Moreover, they did so in his native language such that he could make a knowing and voluntary waiver of these rights. *Id.* at 445 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."); *Sanchez-Llamas*, 108 P.3d at 574 n.2 (noting that Petitioner waived his *Miranda* rights and "elect[ing] to limit . . . review to the issue that [Petitioner] raises under the VCCR").[19]

Nor does a state's failure to inform a foreign detainee about his eligibility for the additional benefit of consular notification render its otherwise lawful treatment of him fundamentally unfair.[20] Simply put, the real benefits of consular notification are so indeterminate that they cannot possibly be "implicit in the concept of ordered liberty," *Chavez v. Martinez*, 538 U.S. 760, 774 (2003). Article 36 leaves each contracting party to determine what, if any, consular services to provide for their citizens. *See, e.g.* State Dep't Letter, *supra*, at A-1 (observing that "it is up to the consular officer to decide whether, when, and how to respond when notified that a national is in detention). As a result, the nature and extent of consular services available to foreign detainees vary considerably. "[M]any consular officers . . . do little for their nationals, whether for policy reasons or because of resource constraints." *Id.*[21] Indeed,

[19] Given Petitioner's decision to waive his rights to silence and counsel after receiving a *Miranda* warning, it strains credulity to imply that he would have acted differently had he known about the prospect of consular access. The precedents of this Court set a high standard for such a showing. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *Hill v. Lockhart*, 474 U.S. 52, 60 (1985).

[20] Notably, other parties to the VCCR take a similar position. For instance, a Canadian Court of Appeal found that, though Florida police did not notify Canadian defendant about the prospect of consular access, he had not been treated unfairly since he had been "represented by counsel when he pleaded guilty to the Florida charges" and had also benefited from "the extensive questioning of [his] understanding of the process by the Florida judge who accepted the guilty pleas." Likewise, the Italian Supreme Court has held that the consular role in assisting the defense of his fellow nationals was "of complementary and subsidiary nature, and does not replace the right of the accused to make his own arrangements for his own defence [sic]." *See* Lee, *supra*, at 150-51 (quoting decision in *In re Yater*, 1976 Italian Y.B. Int'l L., vol. II, at 336-39).

[21] For example, in 1988, the British government produced a fifteen-second television commercial "warning Britons abroad not to count on government help if they did not 'behave themselves.' The idea, said a Foreign Office

consular officials from Petitioner's own home state of Mexico have "expressed concern" about being "overwhelmed with *notifications*" alone. Avena Counter-Memorial, *supra*, at n. 66 & accompanying text (citing Declaration of Ambassador Maura A. Harty Regarding United States Compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations [hereinafter Compliance Declaration]). Hence it cannot be argued that consular notification, let alone information about the prospect of consular notification, is invariably "essential to the fair and efficient administration" of justice. *Li*, 206 F.3d at 77 (Torruella, J., concurring in part and dissenting in part).[22]

Thus, in the present context, exclusion would not function to safeguard a constitutional right belonging to Petitioner himself and/or society in general. Even within the context of federal court proceedings, where this Court has broad discretion as to remedies, this Court has declined to extend the exclusionary rule to situations where no constitutional violation had taken place. As the Court explained in *United States v. Caceres*, 440 U.S. 741 (1979), the exclusionary rule

> has primarily rested on the judgment that the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community outweighs the importance of securing the conviction of the specific defendant on trial. In view of our conclusion that none of respondent's constitutional rights has been violated here . . . our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case.

---

spokesman, is to make sure they realize that, while those legitimately in need of aid will be helped, British consulates will not concern themselves with 'scroungers, wanglers or sheer bloody time wasters.'" Karen DeYoung, *British Hooligans Invading Europe*, Wash. Post, June 14, 1988, at A1.

[22] As this Court has explained, a right is not essential to ordered liberty where "a civilized system could be imagined that would not accord the particular protection." *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). The absence of any historical analogue to Article 36, lack of full compliance by the contracting parties, and drafting disputes captured in the negotiating history of the VCCR, all belie the proposition that the provisions of Article 36 are "of the very essence of a scheme of ordered liberty." *Id.*

Significantly, the domestic courts of other contracting parties to the VCCR have taken a similar position on information about the prospect of consular access, in no case describing or treating Article 36(1)(b) as fundamental to due process. *See, e.g. Canada v. Van Bergen*, 261 A.R. 387 (2000); *R. v. Abbrederis*, 36 A.L.R. 109 (1981) (Australia); *R. v. Partak*, 2001 C.C.C. Lexis 312 (Ont. Super. Ct. of J.); *In re Yater*, 1976 Italian Y.B. Int'l L., vol. II, at 336-39.

Id. at 754-55; *see also United States v. Janis*, 428 U.S. 433, 446 (1976) (discussing use of exclusionary rule "to safeguard Fourth Amendment rights"); *Miranda*, 384 U.S. at 457 (observing the prevalence of coercive interrogation tactics and applying exclusionary rule to "protect precious Fifth Amendment rights"). Here, the lack of a constitutional interest does more than just distinguish Article 36 violations from the Court's precedents on the exclusionary rule. It also means that this Court cannot require exclusion in state court proceedings.

b. Article 36 Does Not Require That A Detainee Be Notified Of Its Provisions Prior To Interrogation

The exclusionary rule should not be used to suppress lawfully obtained evidence. As this Court has found, if suppression is to deter government wrongdoing, there must be some nexus between the evidence to be suppressed and the violation found to have taken place. *See, e.g. Segura v. United States*, 468 U.S. 796, 804 (1984) ("Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion."); *see also id.* at 805 (noting that "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint'" (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939))).

Nothing in the text or commentary of Article 36 connects the requirement to inform a detainee about Article 36 with commencement of interrogation. Article 36 requires only that authorities of the receiving state inform foreign detainees about the prospect of consular notification "without delay." VCCR, *supra*, at art. 36. It *does not* require that the detainee must be informed of its provisions before interrogation. "If the drafters had intended 'without delay' in the concluding clause of Article 36(1)(b) to mean 'immediately and prior to any interrogation', they plainly would and could have specified this in the text, given the usage of the

term 'immediately' and other variations elsewhere in the VCCR."[23] Notably, Article 36 does not reference interrogation even when specifying a time-frame for *consular notification and access*. This is because it would be unthinkable to require the alternative: that the receiving state delay interrogation "until the relevant consulate was notified and a consular officer had visited the individual, arranged for assistance and could observe the interrogation." *Cf.* Avena Counter-Memorial, *supra*, at para. 6.44; *see also supra*, at 27, 29 (describing the contracting parties' understanding that the VCCR does not modify domestic criminal procedure). In that sense, statements made by a foreign detainee during interrogation but prior to notification have not been obtained in violation of Article 36. Hence there is no nexus at all between the statements that Petitioner seeks to suppress and Oregon's breach of Article 36.

2. Suppression Is Neither Necessary Nor Appropriate To Deter Breaches Of Article 36

The absence of any prejudice to Petitioner's constitutional rights, coupled with the fact that exclusion would have little to no deterrent value renders suppression of Petitioner's statements a wholly inappropriate remedy for Oregon's breaches of Article 36. "In *United States v. Janis*, this Court set forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. Imprecise as the exercise may be, the Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (internal citation omitted). In the instant case, the costs of suppression are stark and substantial: the exclusion of statements that were voluntarily given, lawfully obtained, and of central relevance

[23] Avena Counter-memorial, *supra*, at para. 6.31; *see also id*. at nn.164-68 & accompanying text (undertaking a detailed exegesis of the "without delay" provision as used in the English, French, and Spanish language versions of the VCCR); *id.* at paras. 628-29 (reviewing uses of 'immediately' and its variations elsewhere in the VCCR); *id.* at nn.204-216 & accompanying text (surveying how delegates at the VCCR understood the "without delay" provision and noting that "[n]o delegation proposed a specific time period of less than 48 hours, *nor did any delegation reference the need to notify prior to interrogation by the authorities*") (emphasis added).

in investigating the attempted murder of a police officer. The societal benefits, in comparison, are virtually non-existent.

Recognizing the high social cost of suppression, this Court has never extended the exclusionary rule to a setting where adequate means for ensuring government compliance already existed. In the Fourth Amendment context, the Court was "compelled" to require exclusion "because other remedies . . . completely failed to secure compliance." *See, e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 633 (1965); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) (finding that exclusion was "'the only effectively available way'" to "'compel respect" for the Fourth Amendment'" (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)); *id.* (declaring that exclusion was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").[24]

Accordingly, in *INS v. Lopez-Mendoza*, the Court declined to extend exclusionary rule to civil deportation proceedings on the basis that "the INS ha[d] its own comprehensive scheme for deterring Fourth Amendment violations by its officers." *Lopez-Mendoza*, 468 U.S. at 1044. Similarly, in *United States v. Janis*, the Court rejected suppression on the grounds that "law enforcement officials were already 'punished'" sufficiently by other available remedies. *Lopez-Mendoza*, 468 U.S. at 1041 (quoting *Janis*, 428 U.S. at 448). Both a comprehensive scheme for facilitating compliance and adequate sanctions for violators are present in the instant case.

[24] In the Fifth Amendment context "excluding evidence is not a remedy for an earlier constitutional violation, but a prevention of the violation itself" since "[a] Fifth Amendment wrong occurs only at trial, when testimony is introduced 'in a[] criminal case.'" Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev 757, 791 (1994) (quoting U.S. Const. amend. V)). Exclusion is not directly mandated by the Constitution in the instant case because, aside from the fact that notification about the terms of Article 36 is not a constitutional right, violation of Article 36 lies in the receiving state's breach of its duty to inform the detainee, rather than introduction of a detainee's statements at trial.

Since 1967, the Department of Justice has promulgated regulations to ensure notification of consular officers upon the criminal arrest of foreign nationals. *See* 32 Fed. Reg. 1040 (Jan. 28, 1967) (inserting provision on consular notification into 28 C.F.R. § 50).[25] In 1998, the Department of Justice also amended regulations of the I.N.S. and the Executive Office for Immigration Review (EOIR) to require notification of consular officers upon the detention of inadmissible and deportable aliens. *See* 63 Fed. Reg. 27331-01 (May 19, 1998).[26] Also in 1998, the State Department initiated an intensive and successful program to facilitate state compliance with Article 36. At that time, the Secretary of State began to "broadly disseminate[] to federal and state authorities" a 72-page manual entitled *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*. Avena Counter-Memorial, *supra,* at n.73 & accompanying text. The Manual contains "basic instructions for complying with consular notification requirements," including "a suggested statement to be given to a foreign national from a country governed by the VCCR, which is translated into thirteen languages, including Spanish" and "a suggested fax sheet for providing notification

[25] The current version of this regulation states that the purpose of the regulation is "to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations" and "conform[] to practice under international law and . . . implement[] obligations undertaken by the United States pursuant to treaties." The regulation provides that

> (1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. . . . (2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification. (3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. . . .

28 C.F.R. § 50.5 (a) (2006) (Notification of Consular Officers).

[26] The current version of this regulation, now promulgated by the Department of Homeland Security, provides that "every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." 8 C.F.R. § 236.1 (e) (Apprehension, custody, and detention). The regulation makes consular notification itself contingent on the wish of the foreign detainee except where "[e]xisting treaties . . . require immediate communication . . . whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf." *Id.*

when required." *Id*. In addition, the State Department has produced "a pocket-size reference card . . . regarding consular notification obligations" and "designed to be carried by individual arresting officers." *Id.* By 2003, over 100,000 copies of the manual and about 600,000 pocket cards were in circulation. The Department has also created

> other significant training tools, including a video (produced in cooperation with consular officers from Mexico as well as Australia and Canada) designed to convey to law enforcement audiences the importance of consular notification, and a poster with multiple translations of the Department's suggested statement to foreign nationals about the option of consular notification. The Department also maintains an active internet web page with consular notification information and conducts extensive consular notification training and outreach programs around the United States—some in cooperation with Mexican consular officials.

Id. at n.76 & accompanying text.

These Executive Branch efforts are every bit as rigorous as the "comprehensive" I.N.S. scheme that this Court found sufficient in *Lopez-Mendoza*. *See Lopez-Mendoza*, 468 U.S. at 1045 (finding INS scheme sufficient on the grounds that the INS had developed specific rules and regulations, and also undertaken efforts to ensure that "[n]ew immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law"). Indeed, the success of the State Department program has been such that "[t]hese efforts have been commended as 'setting the standard' for other countries and have improved observance of Article 36 procedures to the extent that Mexican consular officers have even expressed concern that they will be overwhelmed with notifications." Avena Counter-Memorial, *supra*, at n.66 & accompanying text (citing Compliance declaration).

In addition to fostering compliance through education, existing remedies also provide for appropriate punishment of states that breach the requirements set out in Article 36. Namely, receiving states that fail to comply with their Article 36 obligations face diplomatic and political sanctions, which have the virtue of providing far greater deterrent incentives than application of

the exclusionary rule in a few isolated proceedings. *Cf. Lopez-Mendoza*, 468 U.S. at 1043-44 (declining to extend exclusionary rule where the likelihood that evidentiary challenges would be "occasional" at most made it "unlikely" that officers would "shape [their] conduct in anticipation of the exclusion of evidence").

CONCLUSION

Because the VCCR confers no judicially enforceable rights on individuals and, regardless, exclusion is not an available remedy, Petitioner's statements were properly included.

For the foregoing reasons, we respectfully request that this Court affirm the decision of the Oregon Supreme Court.

Respectfully submitted,

Ian Bassin
Anisha Dasgupta
Counsel for Respondent
April 24, 2006