

2009

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Recommended Citation

Victoria M. Lee, *Giving State and Local Law Enforcement the Benefit of the Doubt: How to Ensure VCCR Compliance Without Judicial Remedies*, 17 J. L. & Pol'y (2009).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol17/iss2/6>

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GIVING STATE AND LOCAL LAW ENFORCEMENT THE BENEFIT OF THE DOUBT: HOW TO ENSURE VCCR COMPLIANCE WITHOUT JUDICIAL REMEDIES

*Victoria M. Lee**

INTRODUCTION

Under Article 36 of the Vienna Convention on Consular Relations (“VCCR”), the United States agreed to notify the consulate of a foreign national of any arrest or detention should he so request, and furthermore, to inform all arrested and detained foreign nationals of their “right” to consular notification.¹ Article

* Brooklyn Law School Class of 2010; B.A., Gettysburg College, 2005. Thanks to: the *Journal of Law and Policy* members for their hard work; my family, not only for their continued support, but also for their understanding in dealing with my busy schedule; and my friends for reminding me to take a break now and again.

¹ 1. With a view to facilitating the exercise of consular functions relating to nationals 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.

Vienna Convention on Consular Relations art. 36(1)(b), Dec. 14, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

36 of the VCCR—the communications provision—has recently been the center of both national and international controversy.² The debate has largely centered on three issues: whether this section confers any individually enforceable rights, how it should be implemented, and how it should be enforced.³ United States courts have come to little consensus on any of these questions.⁴ The Supreme Court started the debate on individually enforceable rights with a passing comment in *Breard v. Greene* that the VCCR “arguably confers on an individual the right to consular assistance following arrest.”⁵ The Court, however, has yet to confirm or deny the existence of privately enforceable rights under Article 36.⁶

The United States Courts of Appeals and state courts have largely ignored the question in the criminal context by assuming that even if the VCCR conferred individual rights, whatever remedy sought was an inappropriate measure given the violation.⁷ Having been effectively barred in many instances from challenging a violation of Article 36 with respect to their criminal convictions, an increasing number of convicted foreign nationals are pursuing civil remedies for a violation of their rights under the laws of the United States.⁸ The circuit courts have been more willing to confront the question of individually enforceable rights head-on,

² See generally *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007); *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (March 31).

³ See, e.g., *Cornejo*, 504 F.3d 853; *LaGrand*, 2001 I.C.J. 466; *Avena*, 2004 I.C.J. 12.

⁴ See *Mora v. New York*, 524 F.3d 183, 187 (2d Cir. 2008) (citing the split of the Courts of Appeals).

⁵ *Breard v. Greene*, 523 U.S. 371, 376 (1998).

⁶ See *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.4 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006).

⁷ E.g., *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (“[I]rrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.”); *Conde v. State*, 860 So.2d 930, 953 (Fla. 2003) (same); *State v. Buenaventura*, 660 N.W.2d 38, 45 (Iowa 2003) (same).

⁸ See, e.g., *Mora*, 524 F.3d at 192 (considering an Article 36 violation under the VCCR itself as well as under the Alien Tort Statute and § 1983).

HOW TO ENSURE VCCR COMPLIANCE

611

however, with mixed results.⁹ The majority of courts have found that Article 36 does not confer any judicially enforceable rights on private parties.¹⁰ Techniques of traditional treaty interpretation also support the idea that the VCCR does not confer individual rights.¹¹ Yet, legal scholars protest such a conclusion—primarily on the basis of ensuring international reciprocity and reputation.¹² The courts should not, however, find individual rights—where they do not exist—simply to appease the international community.¹³

Most scholars who argue in favor of individual rights assume that some judicial remedy will then be appropriate to address the violation of Article 36.¹⁴ However, no existing judicial remedy can

⁹ Compare *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008) (finding that Article 36 does not confer “enforceable individual rights”), with *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (finding that Article 36 does confer individual rights on foreign nationals).

¹⁰ E.g., *Gandara*, 528 F.3d at 829; *Mora*, 524 F.3d at 186–87; *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007).

¹¹ Steven G. Stransky, *Sanchez-Llamas v. Oregon: A Missed Opportunity in Treaty Interpretation*, 20 ST. THOMAS L. REV. 25, 67 (2007) (“The VCCR’s text, the Executive Branch’s interpretation, the travaux préparatoires, the VCCR’s ratification process, and other states’ domestic implementation all exemplify the fact that foreign nationals cannot use Article 36 as an avenue for judicial relief in American courts.”).

¹² See, e.g., Michael J. Larson, *Calling All Consuls: U.S. Supreme Court Divergence from the International Court of Justice and the Shortcomings of Sanchez-Llamas v. Oregon*, 22 EMORY INT’L L. REV. 317, 331 (2008) (“[I]n a world with increasing numbers of Americans abroad, it would be beneficial for U.S. citizens arrested in foreign countries for the Supreme Court to set a standard of granting judicially enforceable individual rights under the [VCCR.]”); Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention of Consular Relations*, 91 CAL. L. REV. 1729, 1769 (2003).

¹³ See *Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) (“A treaty is . . . ‘primarily a compact between independent nations’ It ordinarily ‘depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it It is obvious that with all this the judicial courts have nothing to do and can give no redress.’”) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884) (internal citations omitted)).

¹⁴ See, e.g., Larson, *supra* note 12, at 343 (arguing that Article 36 violations are on par with constitutional violations and as such, “similar remedies, such as the suppression of evidence and the granting of a new trial, ought to be

cure a VCCR violation.¹⁵ The United States Supreme Court and most state supreme courts have correctly ruled against suppression of evidence as an appropriate remedy.¹⁶ Civil remedies for a violation of rights under federal law also fail to redress violations of the VCCR.¹⁷ First, courts that have confronted this question have found that neither the VCCR itself, nor the Alien Tort Statute, can justify a remedy.¹⁸ Second, claims under section 1983 (or similarly drawn state statutes) fail by reason of qualified immunity for state actors or as collateral attacks on the foreign nationals' criminal convictions.¹⁹ Therefore, no judicial remedy adequately addresses VCCR violations.

While some scholars argue that a judicial remedy is the only way to ensure domestic compliance with Article 36,²⁰ this is

implemented depending on the degree of the treaty violation"); Marshall J. Ray, *The Right to Consul and the Right to Counsel: A Critical Re-examining of State v. Martinez-Rodriguez*, 37 N.M. L. REV. 701, 728–30 (2008) (arguing in favor of suppression of evidence or jury instructions as appropriate remedies for VCCR violation).

¹⁵ See discussion *infra* Part II.B.

¹⁶ Sanchez-Llamas v. Oregon, 548 U.S. 331, 349 (2006); see also, e.g., People v. Martinez, 867 N.E.2d 24, 31, 32 (Ill. App. Ct. 2007) (refusing to apply the exclusionary rule to VCCR violations); State v. Buenaventura, 660 N.W.2d 38, 45 (Iowa 2003) (“[T]he exclusionary rule simply does not apply to evidence obtained in violation of Article 36.”).

¹⁷ See discussion *infra* Part II.B.2.

¹⁸ E.g., Mora v. New York, 524 F.3d 183, 192 (2d Cir. 2008) (finding no available civil remedy under the VCCR itself because the treaty makes no mention of such a remedy, and no available remedy under the Alien Tort Statute because there is no cognizable tort of VCCR violation).

¹⁹ See discussion *infra* Part II.B.2. The courts that have dealt with section 1983 claims have not yet reached the question of actual remedy because most courts have not found individually enforceable rights; therefore, there has been no decision about the applicability of qualified immunity in VCCR violation cases. However, the Seventh Circuit in *Jogi v. Voges*—which found enforceable rights—noted that “the issue of qualified immunity . . . will [inevitably] arise.” 480 F.3d 822, 836 (7th Cir. 2007).

²⁰ E.g., Joshua E. Carpenter, *Medellin v. Dretke and the United States’ Myopic Failure to Guarantee the “Full Effect” of the Vienna Convention on Consular Relations*, 17 GEO. MASON U. CIV. RTS. L.J. 515, 517 (2007) (“[A] Supreme Court precedent clarifying [individually enforceable rights] is the only way to ensure the United States’ adherence to VCCR Article 36(2).”).

HOW TO ENSURE VCCR COMPLIANCE

613

simply not the case and courts should not impose improper and inadequate remedies based on this assumption. This Note argues that the VCCR confers no individually enforceable right on foreign nationals and that even assuming *arguendo* that some enforceable right does exist, available judicial remedies are either improper or inadequate avenues to addressing VCCR violations.²¹ Instead, enforcement of the VCCR is better served through alternative means. Part I of this Note discusses the background of the VCCR. Part II first addresses the debate on the existence of individual rights in Article 36, ultimately concluding that no such right exists. Part II goes on to argue that in either case, no judicial remedy will satisfactorily address violations of the VCCR. Part III analyzes the current policies in place for VCCR compliance and possible methods of increasing compliance in individual states without judicial remedies. In conclusion, Part III offers a suggestion for how to ensure the United States' compliance with Article 36 without relying on judicial remedies.

I. VIENNA CONVENTION ON CONSULAR RELATIONS

A. *Brief History and Basic Structure*

The VCCR is a multilateral treaty that was designed to unify (and subsequently codify) the practices of consular relations, which prior to the United Nations Conference varied greatly with “bilateral agreements and national laws” governing.²² Representatives from more than eighty-five countries gathered on March 4, 1963, to begin negotiations of an international treaty to regulate all manner of consular relations.²³ The Conference started with a draft developed over eight years by the International Law Commission.²⁴ After several weeks of tedious discussion and negotiation, the Conference ended with a seventy-nine-article treaty and two Optional Protocols—one of which concerned the

²¹ See discussion *infra* Part II.

²² U.N. Conference on Consular Relations Official Record, Vol. I, 1st plen. mtg. at 6, U.N. Doc. A/CONF.25/SR1 (Mar. 4, 1963).

²³ *Id.* at 5.

²⁴ *Id.* at 7.

resolution of disputes under the VCCR.²⁵

With the purpose of “maintain[ing] international peace and security, and [promoting] friendly relations among nations,”²⁶ the United States and its fellow delegations unanimously adopted the VCCR at the conclusion of the United Nations Conference in April 1963.²⁷ Since that time, the total number of member states has increased to over 170 countries.²⁸ Provisions of the VCCR address the spectrum of consular relations including “consular functions; facilities, privileges and immunities of consular personnel; and communications with nationals of the sending state.”²⁹ Several

²⁵ The Optional Protocol—initially signed by the United States and thirty-seven other member states—confers jurisdiction over disputes arising out of the VCCR on the International Court of Justice (“ICJ”). U.N. Conference on Consular Relations Official Record, Vol. II, Optional protocol concerning the compulsory settlement of disputes at 190–92, U.N. Doc. A/CONF.25/15 (Apr. 24, 1963). As of March 7, 2005, the United States is no longer a party to the Optional Protocol, nor bound by decisions of the ICJ. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General at n.1 (2008), available at <http://treaties.un.org/Pages/ParticipationStatus.aspx> (follow “Chapter III” hyperlink; then follow “8. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes” hyperlink) (last visited Feb. 17, 2009). The withdrawal was made in response to an unfavorable decision in the *Avena* case, discussed *infra* notes 82–83 and accompanying text, to “[protect] against future International Court of Justice judgments that might similarly interfere in ways [the U.S.] did not anticipate when [it] joined the optional protocol.” Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16 (quoting Darla Jordan, State Department spokeswoman).

²⁶ VCCR, *supra* note 1, preamble.

²⁷ U.N. Conference on Consular Relations Official Record, Vol. I, 22d plen. mtg. at 41, U.N. Doc. A/CONF.25/SR.1 (Apr. 22, 1963). Some delegations approved the final act with reservations, *id.* at 42–54, with several countries expressing reservations specifically with Article 36. *Id.* at 42, 45, 47–48, 51–52.

²⁸ United Nations Treaty Collection, *supra* note 25 (follow “Chapter III” hyperlink; then follow “6. Vienna Convention on Consular Relations” hyperlink).

²⁹ *Jogi v. Voges*, 480 F.3d 822, 828 (7th Cir. 2007). More specifically, the VCCR is divided into five chapters: 1) Consular Relations in General, 2) Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and other Members of a Consular Post, 3) Regime Relating to Honorary Consular Officers and Consular Posts Headed by Such Officers, 4)

HOW TO ENSURE VCCR COMPLIANCE

615

delegates expressed the sentiment that of all these provisions, “Article 36 was one of the most important in the whole draft.”³⁰

B. The Communications Provision

Article 36—the communications provision—deals in part with notification of local consulates when a foreign national is arrested or detained.³¹ With the presumption that consulates should be given access to arrested or detained nationals, the provision asserts:

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

General Provisions, and 5) Final Provisions. VCCR, *supra* note 1.

³⁰ U.N. Conference on Consular Relations Official Record, Vol. I, 2d Comm., 17th mtg. at 2, U.N. Doc. A/CONF.25/C.2/SR.17 (Mar. 15, 1963) (comments by a French delegate); *see also id.* at 17 (comments by a Tunisian delegate) (stating that “[Article 36] paragraph 1(b) was one of the most important in the draft”); *id.* at 13 (comments by a Greek delegate) (expressing the “very great importance” attached to Article 36 given its potential impact on the future of human rights).

³¹ *See* VCCR, *supra* note 1, art. 36.

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.³²

The International Law Committee, which originally proposed Article 36, designed this provision to cover any situation where a foreign national may be detained—including pre- and post-criminal conviction, “quarantine, [and] detention in a mental institution.”³³ As originally drafted, paragraphs 1 and 2 focused solely on consular officials; there was no mention of the detained foreign national.³⁴ It is clear from discussions at the Conference, however, that the Article was meant to facilitate the ability of consular officials to protect their citizens traveling abroad.³⁵ The final draft reflected a compromise between an attempt to make compliance feasible for receiving states and to maintain the rights of the sending state in protecting its citizens abroad.³⁶

³² *Id.*

³³ U.N. Conference on Consular Relations Official Record, Vol. II, Annexes—Draft articles on consular relations adopted by the International Law Commission at its thirteenth session at art. 36 commentary (4)(c), U.N. Doc. A/CONF.25/6 (1963).

³⁴ *Id.* at 24.

³⁵ *See generally* U.N. Conference on Consular Relations Official Record, Vol. I, 2d Comm., 17th mtg., U.N. Doc. A/CONF.25/C.2/SR.17 (Mar. 15, 1963) (discussion of proposed amendments to paragraph 1(b)).

³⁶ *See* U.N. Conference on Consular Relations Official Record, Vol. I, 11th plen. mtg. at 16, U.N. Doc. A/CONF.25/SR.11 (Apr. 17, 1963) (comments by the Vietnamese delegate) (“[I]t was a matter of reconciling the interests of two

HOW TO ENSURE VCCR COMPLIANCE

617

While Article 36 primarily addresses the receiving states' obligations to consular officials, section (1)(b) directs that the authorities of the receiving state "shall inform the person concerned without delay of his rights"³⁷ The meaning of this phrase is the source of debate, not only in U.S. courts but for other nations and the ICJ as well.³⁸ Ever since the Court's passing comment in *Breard v. Greene* concerning the possibility of individual rights under Article 36,³⁹ a flurry of criminal and civil challenges have been brought by foreign nationals in U.S. courts,⁴⁰ forcing lower courts to grapple with questions about the communications provision that the Supreme Court refuses to answer.⁴¹ Unless the Supreme Court rules definitively that no individual rights exist under the VCCR, the flurry of litigation threatens to continue or possibly become a flood of litigation. In the meantime, legal scholars and lower courts will continue to debate what rights, if any, foreign nationals have, what actions are appropriate to remedy violations of those rights, and how to enforce compliance in the United States with the communications provision.

equal sovereign States — the sending State and the receiving State — with respect for the rights of the detained person.”).

³⁷ VCCR, *supra* note 1, art. 36(1)(b).

³⁸ *See, e.g.*, Brief for Petitioner Moises Sanchez-Llamas at 15, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566), 2005 WL 3598178 (citing art. 36(1)(b) in arguing that the plain text of the VCCR confers an individually enforceable right); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 492–93 (June 27) (citing Germany's argument that the German defendants had individual rights under Article 36 given the reference to "rights" in the last sentence of paragraph 1(b) "of the person concerned").

³⁹ *Breard v. Greene*, 523 U.S. 371, 376 (1998).

⁴⁰ *See, e.g.*, *Jogi v. Voges*, 480 F.3d 822, 831–32 (7th Cir. 2007); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *Rahmani v. State*, 898 So. 2d 132, 134 (Fla. Dist. Ct. App. 2005); *People v. Salgado*, 852 N.E.2d 266, 276–77 (Ill. App. Ct. 2006); *Gomez v. Commonwealth*, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004); *People v. Ortiz*, 795 N.Y.S.2d 182, 183 (N.Y. App. Div. 2005).

⁴¹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006) (assuming, without deciding, that Article 36 conferred an individual right).

II. THE GREAT VCCR DEBATE

A. *Right or No Right?*

Although the Supreme Court has refused to explicitly accept or reject the existence of individual rights under Article 36 of the VCCR, other entities have not been so reluctant to address the issue.⁴² Lower courts, the Executive Branch, the ICJ and legal scholars have all taken definitive positions one way or the other employing a variety of approaches.⁴³

1. *Approach by Domestic Courts*

Although the analysis employed by each court differs in some respect, the majority of domestic courts have ruled against the establishment of privately enforceable rights in Article 36.⁴⁴ In determining whether the VCCR conferred individual rights on foreign nationals, courts have examined both the text of and context around the VCCR.⁴⁵ As noted by the Ninth Circuit majority in *Cornejo v. City of San Diego*, “Article 36 textually uses the word ‘rights’ in reference to a detainee’s being informed that he can . . . have his consular post advised of his detention and have

⁴² *Mora v. New York*, 524 F.3d 183, 187 (2d Cir. 2008) (noting sister circuits that have addressed and answered the question of individual rights under the VCCR).

⁴³ *E.g.*, *Gandara v. Bennett*, 528 F.3d 823, 831 (11th Cir. 2008) (finding no individual right to sue under the VCCR); *see United States v. Li*, 206 F.3d 56, 63–64 (1st Cir. 2000) (“The [VCCR] . . . establish[es] state-to-state rights and obligations . . . [It does] not . . . establish[] the rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state’s right to extend consular protection to its nationals when consular relations exist . . .” (quoting the State Department’s “Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li*”)); *LaGrand*, 2001 I.C.J. at 494 (holding that the VCCR does confer individual rights on foreign nationals); *Stransky*, *supra* note 11, at 67–68 (arguing that no individual rights exist in the VCCR).

⁴⁴ *E.g.*, *Gandara*, 528 F.3d at 831; *Mora*, 524 F.3d at 192; *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007).

⁴⁵ *Mora*, 524 F.3d at 193–94.

HOW TO ENSURE VCCR COMPLIANCE

619

communications forwarded to it.”⁴⁶ On its face, then, the VCCR seems to confer individual rights.⁴⁷ However, when interpreted in the context of the introductory language of Article 36 and the preamble of the VCCR, this textual reference is less clear.⁴⁸ The introductory language of Article 36(1) stipulates that it is related specifically to “facilitating the exercise of consular functions.”⁴⁹ The preamble reinforces this goal, stating that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”⁵⁰ The majority of courts have found these provisions to militate against inferring individual rights under Article 36.⁵¹ However, in *Jogi v. Voges*, the Seventh Circuit found the language of Article 36 so clear that it was unnecessary to use the preamble to interpret its meaning.⁵² Article 36 specifically provides that authorities must “inform the [foreign national] concerned without delay of *his* rights.”⁵³ In light of this language, Seventh Circuit Judge Wood accused the other circuits of “creat[ing] ambiguity . . . where none exist[ed].”⁵⁴

The disagreement over ambiguity, however, stems less from the plain language of Article 36, but primarily from a well-founded principle of treaty interpretation employed by most domestic courts—and ignored by the Seventh Circuit in *Jogi*—that there is a

⁴⁶ *Cornejo*, 504 F.3d at 859.

⁴⁷ See VCCR, *supra* note 1, art. 36(1)(b) (“[A]uthorities shall inform the person concerned without delay of his rights under this sub-paragraph.”).

⁴⁸ *Mora*, 524 F.3d at 195–96.

⁴⁹ VCCR, *supra* note 1, art. 36(1).

⁵⁰ VCCR, *supra* note 1, preamble.

⁵¹ *Mora*, 524 F.3d at 195; see also *Gandara v. Bennett*, 528 F.3d 823, 827 (11th Cir. 2008) (finding that the preamble of the VCCR weighed against Article 36 containing individually enforceable rights); *Cornejo*, 504 F.3d at 859 (same). But see *Jogi v. Voges*, 480 F.3d 822, 833–34 (7th Cir. 2007) (stating that the preamble has no bearing on the enforcement of rights within the VCCR because it was primarily a statement of general purpose for the entire VCCR, and that a preamble is only a useful interpretive tool when ambiguity exists as is not the case in Article 36).

⁵² 480 F.3d at 833.

⁵³ VCCR, *supra* note 1, art. 36(1)(b) (emphasis added).

⁵⁴ *Jogi*, 480 F.3d at 834.

“presumption against inferring [enforceable individual] rights from international treaties.”⁵⁵ Given this presumption, any ambiguity or contradiction within the provisions of the treaty tips the scale against finding an enforceable right.⁵⁶ As enunciated by the Sixth Circuit, “[a]bsent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution.”⁵⁷ State courts have generally followed suit.⁵⁸

Congress’ intent is another aspect of treaty interpretation that courts consider.⁵⁹ The Ninth Circuit in *Cornejo* stated that the appropriate question to ask was “whether, Congress, by ratifying the VCCR, intended to create private rights and remedies enforceable in American courts”⁶⁰ It seems counterintuitive

⁵⁵ *Gandara*, 528 F.3d at 828 (internal quotations omitted); *see also* Restatement (Third) of the Law of Foreign Relations Law of the United States § 907 cmt. a (1987) (“International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”); *accord* *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.3 (2008). *But see* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 378 (2006) (Breyer, J., dissenting) (asserting that the presumption against individually enforceable rights has no basis in any specific Supreme Court case).

⁵⁶ *See* *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001) (using the presumption against implying personal rights in international treaties to find that “Article 36 rights belong to the party states” despite contradictory language in Article 36 and the Preamble).

⁵⁷ *Id.* at 390; *see also* *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (holding that the VCCR does “not create any ‘fundamental rights’ for a foreign national”).

⁵⁸ *See* *Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000) (holding that foreign nationals do not have standing to bring an action under the VCCR because “treaties are between countries, not citizens”); *State v. Banda*, 639 S.E.2d 36, 43 (S.C. 2006) (“[I]nternational treaties do not create rights equivalent to constitutional rights”).

⁵⁹ *E.g.*, *Cornejo v. County of San Diego*, 504 F.3d 853, 861–62 (9th Cir. 2007).

⁶⁰ *Id.* This was one of several civil cases under section 1983 so the court analyzed the issue of enforceable rights within the context of private causes of action. *Id.* at 856. The Supreme Court enunciated the rule for determining whether a statute allowed for private individuals a cause of action under section 1983 or similar statutes in *Gonzaga University v. Doe*. 536 U.S. 273, 283

HOW TO ENSURE VCCR COMPLIANCE

621

that in ratifying the VCCR the Senate intended to confer rights on individuals because consular relations are peculiarly “State-to-State.”⁶¹ Indeed, the courts have placed significant weight on the Senate Report concerning the VCCR which stated that “[t]he [VCCR did] not change or affect present U.S. laws or practice.”⁶² Presumably, then, in the Senate’s view, the VCCR also did not create any additional rights for foreign nationals under U.S. law.⁶³

The dissent in *Cornejo* argued that the majority in that case—and courts using similar analysis—was asking the wrong question.⁶⁴ Judge Nelson contended that the appropriate question is not Congress’ intent in passing the VCCR, but whether the “ratifying Congress of the [VCCR] had an intent to confer individual rights in Article 36(1)(b).”⁶⁵

Even if this is the correct question, it seems unlikely that it would change the decision of the majority of courts. First, the intent of the ratifying Congress is difficult to parse.⁶⁶ Some representatives spoke of “rights” during the discussion of Article 36,⁶⁷ but most of the discussion focused on the ability of receiving

(2002). To make this determination the Court looks for clear, unambiguous intent by the language or structure of the statute. *Id.* at 282–83. Treaties undergo a similar analysis, but must first pass the threshold question of whether or not they are self-executing. *Cornejo*, 504 F. 3d at 856.

⁶¹ *Cornejo*, 504 F.3d at 861.

⁶² *United States v. Li*, 206 F.3d 56, 65 (1st Cir. 2000) (quoting Sen. Doc. Exec. E, 91st Cong., 1st Sess. (1969)).

⁶³ *See id.* at 64–65 (using the emphasis in Senate reports on the Preamble’s assertion that the VCCR does not benefit individuals and the importance of maintaining the status quo expressed in Senate Committee Reports to support finding no individual rights conferred by Article 36).

⁶⁴ *Cornejo*, 504 F.3d at 864 (Nelson, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Compare* U.N. Conference on Consular Relations Official Record, Vol. I, 2d Comm., 17th mtg. at 11, U.N. Doc. A/CONF.25/C.2/SR.17 (Mar. 15, 1963) (comments by the Korean delegate) (noting the “indispensable rights” of the foreign national), *with* U.N. Conference on Consular Relations Official Record, Vol. I, 20th plen. mtg. at 62, U.N. Doc. A/CONF.25/SR.20 (Apr. 20, 1963) (comments by the Egyptian delegate) (focusing on the burden of receiving States).

⁶⁷ *E.g.*, U.N. Conference on Consular Relations Official Record, Vol. I, 2d Comm., 17th mtg. at 11, U.N. Doc. A/CONF.25/C.2/SR.17 (Mar. 15, 1963)

States to implement the requirements of Article 36.⁶⁸ That the delegates considered the interests of individuals does not necessarily lead to the inference that they also meant to confer judicially enforceable rights on individuals.⁶⁹ In light of such ambiguity, domestic courts will rely on the presumption against individual rights.⁷⁰ Second, the VCCR failed to mention any way in which individuals could seek redress.⁷¹ Even the Optional Protocol, which was “designed to implement the terms of the [VCCR],” made no mention of private actions by detained individuals.⁷² Had the signatories contemplated the creation of individually enforceable rights, it would follow that some mention of an individual remedy would be included, at the very least, in the

(comments by the Korean delegate) (“[R]eceiving State’s obligation under paragraph 1 (b) was extremely important, because it related to one of the fundamental and indispensable rights of the individual.”); U.N. Conference on Consular Relations Official Record, Vol. I, 2d Comm., 16th mtg. at 39, U.N. Doc. A/CONF.25/C.2/SR.16 (Mar. 15, 1963) (comments by the United States delegate) (“The object of the amendment was to protect the rights of the national concerned . . . [H]e might not like his consulate to be informed. To avoid such situations the United States proposed the words ‘at the request of a national . . .’”).

⁶⁸ *E.g.*, U.N. Conference on Consular Relations Official Record, Vol. I, 20th plen. mtg. at 62, U.N. Doc. A/CONF.25/SR.20 (Apr. 20, 1963) (comments by the Egyptian delegate) (noting that the revision of the consular notification provision providing that notification occur at the foreign national’s request was meant “to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which receive many tourists and visitors”).

⁶⁹ *See* Brief for the United States as Amicus Curiae Supporting Respondents at 19 n.4, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51, 04-10566), 2006 WL 271823 (“The ‘rights’ to which the American delegate referred were not rights created by treaty, but ‘rights’ that existed wholly independent of the draft convention, i.e., ‘the freedom of action of the detained persons who might not wish their consulate to be informed,’ such as those seeking asylum.”) (citing 1 U.N. Official Records 38 (para.21)).

⁷⁰ *See supra* notes 55–56 and accompanying text.

⁷¹ *Mora v. New York*, 524 F.3d 183, 194 (2d Cir. 2008).

⁷² *Id.* at 197.

HOW TO ENSURE VCCR COMPLIANCE

623

Optional Protocol.⁷³ Again, this weighs against finding an individually enforceable right.

2. Approach by the Executive Branch

Because treaties are negotiated and enforced by the Executive Branch, the Executive Branch's interpretation of what is and is not created under a treaty should be given "respectful consideration," if not a greater level of deference.⁷⁴ In fact, the Supreme Court generally affords "great weight" to "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement."⁷⁵ The State Department has long taken the position that the VCCR does not confer any individual rights.⁷⁶ When raising consular notification violations in other countries, the United States pursues diplomatic channels or addresses the arresting officials directly, but does not raise any arguments for a judicially enforceable right of the American citizen traveling abroad in the offending country's courts.⁷⁷ When

⁷³ See *id.* (noting the absence of private actions by detained individuals as support for the finding that no individual enforceable rights are conferred by Article 36).

⁷⁴ In *Sanchez-Llamas v. Oregon*, the Supreme Court held that "respectful consideration" was owed to any ruling of the ICJ. 548 U.S. 331, 356 (2006). At a minimum, the U.S. Executive Branch deserves at least the amount of deference owed an international judicial body. See *El Al Israel Airlines, Ltd v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

⁷⁵ *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982)); see also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

⁷⁶ See *United States v. Li*, 206 F.3d 56, 63–64 (1st Cir. 2000) ("The [VCCR] . . . establish[es] state-to-state rights and obligations . . . [It does] not . . . establish[] the rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist" (quoting the State Department's "Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li*")).

⁷⁷ See Brief for the U.S. as Amicus Curiae Supporting Respondents at 25,

VCCR violations have come to the Supreme Court, the Executive Branch has repeatedly submitted amicus briefs reiterating its position against the existence of individual rights in the VCCR.⁷⁸ Similarly, when presenting its case to the ICJ, the United States has rejected the idea that the VCCR created any judicially enforceable rights.⁷⁹ The United States' position in the ICJ has always been that the rights in the VCCR are purely state-to-state.⁸⁰

Further evidence of the Executive Branch's construction of the VCCR is found in the recent withdrawal from the Optional Protocol.⁸¹ The withdrawal came shortly after an ICJ ruling against the United States.⁸² Some scholars have criticized the move as "sore-loser behavior,"⁸³ however, it reflects the view of the Executive Branch that when the United States entered the VCCR and Optional Protocol, it was under the belief that U.S. law incurred no major changes.⁸⁴ As the ICJ ruled in ways that undermined this belief, the Executive Branch sought to prevent future rulings that would substantially change U.S. law.⁸⁵ The

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Nos. 05-51, 04-10566), 2006 WL 271823.

⁷⁸ See *id.* ("The Executive Branch has never interpreted the [VCCR] to give a foreign national a judicially enforceable right"); see also Brief for the U.S. as Amicus Curiae Supporting Respondents at 22–23, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

⁷⁹ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 493–94 (June 27).

⁸⁰ *Id.* at 494 ("[R]ights of consular notification and access under the Vienna Convention are rights of States, not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance.").

⁸¹ See *supra* note 25.

⁸² The International Court of Justice found that the United States breached its VCCR obligations by not informing fifty-one Mexican nationals of their right to consular notification upon arrest and found that the "appropriate reparation" was "review and reconsideration of the convictions and sentences" of the aforementioned Mexican nationals. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72 (March 31).

⁸³ Liptak, *supra* note 25 (quoting Peter J. Spiro, law professor at the University of Georgia).

⁸⁴ See *supra* note 76.

⁸⁵ Liptak, *supra* note 25 (stating that the decision to withdraw was made to "protect[] against future International Court of Justice judgments that might similarly interfere in ways [the U.S.] did not anticipate when [it] joined the

HOW TO ENSURE VCCR COMPLIANCE

625

position of the Executive Branch weighs heavily against finding individual rights in the VCCR.

3. Approach the Supreme Court Should Take

The Court will certainly give “respectful consideration” to the ICJ rulings,⁸⁶ which found that the VCCR conferred an individually enforceable right on foreign nationals.⁸⁷ However, U.S. courts interpret treaties under U.S. law.⁸⁸ This is especially true of Article 36, which specifically states that “[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State.”⁸⁹ If under U.S. law Article 36, as constructed and interpreted, confers no individual right, the Court must recognize this despite the ICJ interpretation.⁹⁰ Most who argue in favor of individual rights, however, place great weight on the proviso of Article 36, paragraph 2—that “full effect” be given to the VCCR.⁹¹ This position assumes that full effect cannot be given without a finding of individual rights in Article 36.⁹² However, the U.S. is perfectly capable of giving full effect to the VCCR without ascribing

optional protocol”) (quoting State Department spokeswoman).

⁸⁶ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006).

⁸⁷ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 494 (June 27) (“Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights . . .”).

⁸⁸ *See Mora v. New York*, 524 F.3d 183, 193 (2d Cir. 2008) (“Whether a treaty creates a right in an individual litigant that can be enforced in domestic proceedings by that litigant is for the court to decide as a matter of treaty interpretation.”).

⁸⁹ VCCR, *supra* note 1, art. 36(2).

⁹⁰ *See Sanchez-Llamas*, 548 U.S. at 355 (holding that ICJ interpretations are entitled to “respectful consideration” but are not binding on domestic courts).

⁹¹ *E.g.*, Reply Brief for Petitioner Moises Sanchez-Llamas at 12, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566), 2006 WL 598180; Carpenter, *supra* note 20, at 516–17.

⁹² *See, e.g.*, Carpenter, *supra* note 20, at 517 (arguing that “a Supreme Court precedent . . . is the only way to ensure the United States’ adherence to VCCR Article 36(2)”; Ray, *supra* note 12, at 1769.

judicially enforceable rights to Article 36.⁹³ As such, the Supreme Court can and should find that the VCCR confers no individual rights.⁹⁴

B. No Remedy Regardless

Even if the Supreme Court found that the VCCR conferred individual rights on foreign nationals, its prior opinions and the previous opinions of many state courts and courts of appeals preclude any meaningful remedy from curing the violation.⁹⁵ Oftentimes where the rights of defendants in a criminal case are concerned, the purpose of a remedy is not solely curing the violation, but also deterring abhorrent police behavior.⁹⁶ The VCCR does not include any specific remedial measures; therefore, remedies for such violations must be found in U.S. domestic law.⁹⁷ The remedies available in criminal prosecutions are inappropriate under U.S. law.⁹⁸ Furthermore, to the extent that civil remedies are available, they, too, will prove inadequate in providing specific relief and/or deterrence.⁹⁹

1. Criminal Challenges

In a criminal prosecution, one of two judicial remedies is typically available to cure any prejudice that results from improper

⁹³ See discussion *infra* Part III.B.

⁹⁴ Accord Stransky, *supra* note 11, at 67–68 (using traditional treaty interpretive techniques to arrive at the same conclusion as the majority of circuit courts that no individual rights exist under the VCCR).

⁹⁵ E.g., *Sanchez-Llamas*, 548 U.S. at 350 (foreclosing the suppression of evidence as a remedy used by federal courts).

⁹⁶ See *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006) (suggesting that civil suits may act as a deterrent to police conduct that cannot be addressed through suppression of evidence); *United States v. Leon*, 468 U.S. 897, 916 (1984) (“[T]he the exclusionary rule is designed to deter police misconduct . . .”).

⁹⁷ *Sanchez-Llamas*, 548 U.S. at 343 (pointing out that “the implementation of Article 36 [is left] to domestic law”).

⁹⁸ See *infra* Part II.B.1.

⁹⁹ See *infra* Part II.B.2.

HOW TO ENSURE VCCR COMPLIANCE

627

police conduct: 1) suppression of evidence (“exclusionary rule”) and 2) dismissal of indictment (or, if made post-conviction, overturning conviction).¹⁰⁰ Both remedies carry great societal costs,¹⁰¹ but are sometimes necessary to protect individual rights.¹⁰² Therefore, just as the exclusionary rule is a “last resort,”¹⁰³ so too is dismissal of a charge.¹⁰⁴ The same principles and logic apply to either remedy.¹⁰⁵

The exclusionary rule originated as a “protect[ion of] specific, constitutionally protected rights.”¹⁰⁶ Federal courts have acknowledged the possibility that the rule may extend to certain statutory rights that carry similar weight.¹⁰⁷ Defendants argue that VCCR violations are on the same level as constitutional violations

¹⁰⁰ See *United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (noting that these two remedies are available for violations of the Fourth, Fifth and Sixth Amendments).

¹⁰¹ Most courts speak of the cost-benefit analysis in the context of suppression of evidence, *e.g.*, *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998), but the same reasoning applies to any judicial remedy. The societal costs to consider are high, particularly the increased “risk of releasing dangerous criminals” because incriminating evidence is suppressed. *Hudson*, 547 U.S. at 595.

¹⁰² *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 479–80 (1966) (applying the exclusionary rule to Fifth Amendment violations); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (Fourth Amendment).

¹⁰³ *Hudson*, 547 U.S. at 591.

¹⁰⁴ See *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000) (noting that dismissal is a “more drastic remedy” than suppression); *Li*, 206 F.3d at 61 (asserting that suppression of evidence and the dismissal of an indictment are reserved for the “most fundamental of rights”).

¹⁰⁵ When defendants argue for both suppression or dismissal under the VCCR, the courts typically analyze the remedies contemporaneously. *E.g.*, *Page*, 232 F.3d at 540–41; see also *United States v. De La Pava*, 268 F.3d 157, 165–66 (2d Cir. 2001) (citing other circuit decisions against suppression in support of decision against dismissal).

¹⁰⁶ *Page*, 232 F.3d at 540 (citation and quotations omitted).

¹⁰⁷ *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000) (“[A]n exclusionary remedy may be available for violations of provisions of law other than the Constitution.”).

and thus, the exclusionary rule should apply.¹⁰⁸ Federal courts have rejected this argument since the Supreme Court's suggestion in *Breard* that there may be some individual right in the VCCR.¹⁰⁹ As early as 2000, the Ninth Circuit held that suppression was not a remedy for VCCR violations.¹¹⁰ Other circuit courts soon followed.¹¹¹

In making this determination, many courts have consulted the State Department for guidance.¹¹² The State Department reported that it worked with law enforcement to implement the notification provision, which the Ninth Circuit noted as undermining the traditional justification for the exclusionary rule as the "only available method of controlling police misconduct."¹¹³ Almost as compelling as the State Department's own policy were statements it made regarding treatment of the provision in other countries, since the treaty itself provided no direction as to what remedies should be available.¹¹⁴ The State Department reported that, to its knowledge, no other country utilized suppression as a remedy for VCCR violations.¹¹⁵ In fact, the State Department maintained that

¹⁰⁸ *United States v. Jiminez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (explaining defendant's argument that "consular . . . notification is a 'fundamental right' . . . which merits protection through use of the exclusionary rule").

¹⁰⁹ *Jiminez-Nava*, 243 F.3d at 199 (refusing to afford consular notification the same level of protection as *Miranda* rights). *See also De La Pava*, 268 F.3d at 165 (holding that the "consular notification provision . . . [does] not create any 'fundamental rights' [And a]ccordingly . . . is not the basis for a dismissal") (citation omitted).

¹¹⁰ *Lombera-Camorlinga*, 206 F.3d at 888.

¹¹¹ *E.g.*, *Page*, 232 F.3d at 541; *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000).

¹¹² *E.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *Lombera-Camorlinga*, 206 F.3d at 887; *Li*, 206 F.3d at 66.

¹¹³ *Lombera-Camorlinga*, 206 F.3d at 887-88.

¹¹⁴ *Li*, 206 F.3d at 66 (noting that statements by Department officials and other countries' practices "evidence a belief . . . [that VCCR violations] do not warrant suppression"); *Emuegbunam*, 268 F.3d at 393 (citing *Li* for a similar proposition).

¹¹⁵ *Lombera-Camorlinga*, 206 F.3d at 888 (noting that two countries explicitly rejected suppression); *Li*, 206 F.3d at 65 (citing State Department statement that it knows of no countries who use their criminal justice systems to

HOW TO ENSURE VCCR COMPLIANCE

629

standard practice at the time was an investigation and formal apology with a promise to increase efforts to prevent future violations.¹¹⁶

In its own analysis, the Ninth Circuit also pointed to the lack of connection between consular notification and police interrogation.¹¹⁷ Proponents of the exclusionary rule's application to VCCR violations often analogize the rights of the VCCR to *Miranda* rights.¹¹⁸ As the court noted, however, consular notification, as described in the treaty, does not guarantee anything more than the notification of the foreign national's consulate.¹¹⁹ The consulate is not compelled to assist by providing counsel or resources,¹²⁰ nor are the police compelled to "cease interrogation once the right is invoked."¹²¹ Therefore, the exclusionary rule "does not further the treaty's purposes."¹²² By the end of 2001, relying on the same or very similar reasoning, half of the Federal Courts of Appeals found that the exclusionary rule was an inappropriate remedy for Article 36 violations.¹²³

rectify VCCR violations).

¹¹⁶ *Li*, 206 F.3d at 65.

¹¹⁷ *Lombera-Camorlinga*, 206 F.3d at 886.

¹¹⁸ *Id.* at 887 (reiterating defendant's argument that Article 36 protections are analogous to *Miranda* rights); *United States v. Jiminez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (reiterating a similar argument by defendant); *see also*, Elizabeth Samson, *Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States*, 29 *FORDHAM INT'L L.J.* 1068, 1123–24 (2006) (equating *Miranda* rights with the right to consular notification).

¹¹⁹ *See Lombera-Camorlinga*, 206 F.3d at 886.

¹²⁰ Article 36 deals solely with notification by the receiving state. *See* VCCR, *supra* note 1, art. 36. There is no language that suggests any duties that the consulate then has to its national. *See id.*

¹²¹ *Lombera-Camorlinga*, 206 F.3d at 886.

¹²² *Jiminez-Nava*, 243 F.3d at 199.

¹²³ *E.g.*, *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000); *United States v. Page*, 232 F.3d 536, 540–41 (6th Cir. 2000); *Jiminez-Nava*, 243 F.3d at 199; *Lombera-Camorlinga*, 206 F.3d at 888; *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624–25 (7th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195–96 (11th Cir. 2000); *see also* *United States v. De La Pava*, 268 F.3d 157, 164–65 (2d Cir. 2001) (refusing to dismiss an indictment based on the VCCR).

The Supreme Court finally took up the issue in *Sanchez-Llamas v. Oregon* in 2006.¹²⁴ By assuming, without finding, that the VCCR conferred individual rights, the Court rejected Sanchez-Llamas' claim that his statements to the police should have been suppressed because he was never informed of his right to consular notification.¹²⁵ The Court's approach in rejecting this argument was two-fold: 1) the Court held that it could not require suppression as a rule for violations of the VCCR by state courts applying state criminal law and 2) even if the Court could impose suppression on the states, it did not feel suppression was the proper remedy.¹²⁶

On the premise that the Court generally does "not hold [] supervisory power over the courts of the several States"¹²⁷ and "may intervene only to correct wrongs of constitutional dimension,"¹²⁸ the Court found that it could only intervene in *Sanchez-Llamas* (or any state criminal case) if the VCCR provided a specific judicial remedy.¹²⁹ It is clear from the text of the VCCR, and specifically Article 36, that no such remedy exists in the VCCR itself.¹³⁰ As such, the Court concluded that it could not require suppression because to do so would "enlarg[e] the obligations of the United States under the [VCCR]."¹³¹

The Court, however, continued its examination of the issue of suppression—presumably to establish accord with the findings of the circuit courts.¹³² The Court reiterated that "there is . . . little connection between an Article 36 violation and evidence or statements obtained by police."¹³³ In other words, there is no

¹²⁴ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

¹²⁸ *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

¹²⁹ *Sanchez-Llamas*, 548 U.S. at 346.

¹³⁰ *See generally* VCCR, *supra* note 1.

¹³¹ *Sanchez-Llamas*, 548 U.S. at 346.

¹³² *See id.*; *see also id.* at 350 (noting that foreign nationals are afforded the same Due Process protections as citizens and that these protections "safeguard the same interests . . . [as] Article 36").

¹³³ *Id.* at 349.

HOW TO ENSURE VCCR COMPLIANCE

631

prejudice inflicted on a foreign national whose Article 36 rights are violated that must be cured by suppressing evidence.¹³⁴ Furthermore, deterrence is ill-served by suppressing evidence based on VCCR violations.¹³⁵ As the Court eloquently noted, “the failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions [P]olice win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation.”¹³⁶ Accordingly, the decision of the Supreme Court basically precludes suppression for VCCR violations in the federal system.¹³⁷

Even after *Sanchez-Llamas*, states may choose suppression as a remedy for Article 36 violations,¹³⁸ but this course of action seems unlikely. Prior to *Sanchez-Llamas*—with one exception¹³⁹—state courts confronted with the issue of suppression for VCCR violations concluded that suppression was not a suitable remedy

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *Id.* The Court is referring to the cost-benefit analysis articulated in other cases that employ the exclusionary rule. *See, e.g.,* Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 357–58 (1998). Although the Court does not fully articulate its reasoning, implicit in this statement is consideration of what benefit protecting these interests has on society, and what costs protecting these interests has on society. *See* Hudson v. Michigan, 547 U.S. 586, 596 (2006) (“[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act.”).

¹³⁷ *Sanchez-Llamas*, 548 U.S. at 350 (“[N]either the [VCCR] itself nor our precedents applying the exclusionary rule support suppression of *Sanchez-Llamas*’ statements to police.”).

¹³⁸ The Supreme Court’s decision is binding on state courts only insofar as its interpretation that the VCCR itself does not require suppression because the Court declined to use its supervisory power to render this decision. *See id.* at 346. Individual state courts may incorporate “international law through their independent common lawmaking powers.” Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 476 (2004).

¹³⁹ *State v. Reyes*, 740 A.2d 7, 14 (Del. Super. Ct. 1999), *overruled as recognized* by *State v. Vasquez*, No. CR.A.98-01-0317-R2, 2001 WL 755930, at *1 (Del. Super. Ct. May 23, 2001) (unpublished opinion).

regardless of whether or not there was an individual right.¹⁴⁰ The decision in *Sanchez-Llamas* does nothing to persuade state courts that their initial analyses on this issue were wrong.¹⁴¹ Indeed, post-*Sanchez-Llamas*, state courts continue to deny suppression of evidence for VCCR violations.¹⁴² State court judges may even “feel bound by the application of a federal treaty by the federal courts.”¹⁴³ Many states have their own versions of the exclusionary rule that is applied under state law, but even with these rules, VCCR challenges fail the suppression test.¹⁴⁴ Therefore, even though the Supreme Court’s decision was not binding on state

¹⁴⁰ *E.g.*, *People v. Corona*, 108 Cal. Rptr. 2d 210, 213 (Cal. Ct. App. 2001) (holding that suppression is not an available remedy for Article 36 violations); *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003) (holding that “suppression . . . is not an appropriate remedy . . . for an [A]rticle 36” violation); *State v. Quintero*, No. M2003-02311-CCA-R3-CD, 2005 WL 941004, at *10 (Tenn. Crim. App. Apr. 22, 2005) (declining to apply the exclusionary rule to an Article 36 violation); *Bell v. Commonwealth*, 563 S.E.2d 695, 707 (Va. 2002) (same as *Conde*).

¹⁴¹ The reasons given by the Supreme Court to find that violation of the VCCR does not warrant suppression as a remedy are factors that state courts will also consider. *Compare Sanchez-Llamas*, 548 U.S. at 347–50 (discussion of suppression as a remedy), *with Bell*, 563 S.E.2d at 707 (brief discussion of the same).

¹⁴² *E.g.*, *People v. Martinez*, 867 N.E.2d 24, 31–32 (Ill. App. Ct. 2007) (“If it is improper for the Supreme Court to enlarge the obligations of the United States under the VCCR, it would arguably be worse for this court to do so. In sum, defendant has not offered any persuasive reason for this court to abandon our prior case law and impose the exclusionary rule in cases of alleged Article 36 violations.”); *State v. Morales-Mulato*, 744 N.W.2d 679, 686 (Minn. Ct. App. 2008) (reaffirming its decision prior to *Sanchez-Llamas* that suppression is not an appropriate remedy).

¹⁴³ *People v. Aybar*, No. 7052/95, 2006 WL 2918218, at *1 (N.Y. Sup. Ct. Oct. 12, 2006).

¹⁴⁴ *E.g.*, *State v. Cabrera*, 903 A.2d 427, 430 (N.J. Super. Ct. App. Div. 2006) (“To the extent state courts may apply their own rules of law, the [VCCR], which provides only for notification . . . presents no basis for either requiring the suppression of evidence for noncompliance, development of independent rules of law, or departure from the law as it now stands in New Jersey”); *Sierra v. State*, 218 S.W.3d 85, 87 (Tex. Crim. App. 2007) (noting that Article 36 violations do not warrant suppression under the state exclusionary rule).

HOW TO ENSURE VCCR COMPLIANCE

633

courts, the exclusionary rule will continue to be denied as a remedy for Article 36 violations.¹⁴⁵

2. *Civil Remedies*

In the absence of a satisfactory remedy in criminal prosecutions, foreign nationals can sue the state and municipal actors who allegedly violated their VCCR rights.¹⁴⁶ There may, indeed, be some deterrent value in pursuing civil liability for police misconduct.¹⁴⁷ There are two federal statutes through which foreign nationals can potentially seek redress for Article 36 violations: 1) Alien Tort Statute (“ATS”), 28 U.S.C. § 1350¹⁴⁸ and 2) 42 U.S.C. § 1983.¹⁴⁹

¹⁴⁵ As noted by the Court in *Sanchez-Llamas*, Article 36 violations may be considered as a factor in a broader challenge to voluntariness of statements or effectiveness of counsel. 548 U.S. at 350. Some state courts have encountered such challenges and, thus far, defendants have been unable to leverage Article 36 violations effectively in voluntariness and effective counsel challenges. *See, e.g., Anaya-Plasencia v. State*, 642 S.E.2d 401, 403 (Ga. Ct. App. 2007) (denying claim that Article 36 violation “rendered [defendant’s] statement involuntary”); *see also Lugo v. State*, No. SC06-1532, 2008 WL 4489274, at *17 (Fla. Oct. 8, 2008) (denying ineffective counsel claim based on failure to raise issue of VCCR violation at trial court “since trial counsel is not ineffective for the failure to raise [the] nonmeritorious issue”).

¹⁴⁶ Federal statutes allow civil suits against state actors who violate the Constitution or its treaties. *See Alien Tort Statute*, 28 U.S.C. § 1350 (2004); 42 U.S.C. § 1983 (2000).

¹⁴⁷ *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (suggesting that “civil liability is an effective deterrent . . .”).

¹⁴⁸ 28 U.S.C. § 1350 states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATS confers more than jurisdiction; it allows courts to “recognize private causes of action for certain torts in violation of the law of nations” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

¹⁴⁹ 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

a. Alien Tort Statute

Claims made pursuant to the ATS must be supported by a “customary international law tort” that is “both specific and well-accepted.”¹⁵⁰ It is, however, unlikely that any defendant will be able to establish a customary international law tort based on an Article 36 violation given this high bar.¹⁵¹ First, “[a] violation of Article 36(1)(b)(third) by itself would not meet the specificity requirement for recognition of an ATS cause of action.”¹⁵² The Second Circuit—the only circuit court to reach the issue—considered and rejected a version of an “unlawful detention” tort because it was not “well-accepted” in the international community.¹⁵³ Thus, it seems that ATS is unavailable to foreign nationals seeking to pursue civil liability for VCCR violations.¹⁵⁴

b. 42 U.S.C. § 1983

Claims brought under section 1983 seem more promising.¹⁵⁵

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

¹⁵⁰ *Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (citing *Sosa*, 542 U.S. at 725).

¹⁵¹ *See id.* (“[O]nly a ‘modest number’ of customary international law torts are cognizable under the ATS . . . [in part because of] the ‘collateral consequences of making international rules privately actionable’” (quoting *Sosa*, 542 U.S. at 725)).

¹⁵² *Id.* at 208 n.31 (analyzing the possibility of a cause of action under the ATS within the *Sosa* framework).

¹⁵³ *Id.* at 208–09.

¹⁵⁴ *See id.*

¹⁵⁵ A plaintiff need only establish that an individual right exists to bring a cause of action under section 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). When a treaty is the basis for a section 1983 action, the plaintiff must also establish that the treaty is self-executing. *Cornejo v. San Diego*, 504 F.3d

HOW TO ENSURE VCCR COMPLIANCE

635

Assuming *arguendo* that an individually enforceable right exists under Article 36, that right is automatically enforceable under section 1983.¹⁵⁶ The cause of action, then, simply becomes the violation of Article 36 for which the foreign national would be entitled to civil damages.¹⁵⁷ The issue, however, is that law enforcement officials will almost inevitably raise the well-established affirmative defense of qualified immunity.¹⁵⁸ Typically, qualified immunity shields law enforcement officials from civil liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁵⁹ The rationale behind the availability of such a defense is not merely to protect individual defendants, but society as a whole.¹⁶⁰ When government officials are sued, society bears the costs of litigation, the diversion of government resources, and the deterrence of potential public servants.¹⁶¹ Courts presented with these suits must weigh not only the value of allowing civil liability for the violation to the litigants, but to all of society.¹⁶² As a result, decisions about the validity of a qualified immunity defense must be made early in the litigation.¹⁶³

853, 856 (9th Cir. 2007). Even though the Supreme Court has yet to rule definitively, *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.4 (2008), the lower courts assume that the VCCR is self-executing. *E.g.*, *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008). Thus, it is easier to establish a cause of action under section 1983 than the ATS where the plaintiff must establish a customary international law tort. *See supra* notes 150–53 and accompanying text.

¹⁵⁶ *See Gonzaga*, 536 U.S. at 284 (“Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.”).

¹⁵⁷ *See supra* note 155 (detailed discussion of section 1983 requirements).

¹⁵⁸ The only circuit court to find an individually enforceable right and allow a suit under section 1983 noted the potential use of this defense. *Jogi v. Voges*, 480 F.3d 822, 836 (7th Cir. 2007).

¹⁵⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁶⁰ *Id.* at 814.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See Wilson v. Layne*, 526 U.S. 603, 609 (1999) (noting that qualified immunity is meant to “spare [defendants] not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit”) (quoting *Siebert v. Gilley*, 500 U.S. 226, 232 (1991)).

As such, the threat of suit may well serve as a sufficient deterrent when the alleged violation was of a clearly established right.¹⁶⁴ However, rights under Article 36 can hardly be described as clearly established.¹⁶⁵ Supreme Court precedent is not necessary to clearly establish a right,¹⁶⁶ but “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”¹⁶⁷ Given that judges cannot find common ground on the issue of what Article 36 guarantees an individual, it seems unreasonable to expect law enforcement officers to know what rights exist under Article 36.¹⁶⁸ The likelihood of a successful qualified immunity defense early-on in litigation,¹⁶⁹ therefore, seems likely to nullify any potential deterrent effects and prevent individuals from successfully recovering damages to cure specific violations of the VCCR.

Courts could potentially make an exception to qualified immunity for the implementation of treaty rights with the idea of compliance in mind.¹⁷⁰ As noted by one scholar, “[i]f the United States uses private judicial enforcement to achieve the same result another nation could achieve by executive decree, it has not done any more vis-à-vis its international obligations than the other nation.”¹⁷¹ The use of private remedies, though, imposes greater

¹⁶⁴ See *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

¹⁶⁵ See discussion *supra* Part II.A.

¹⁶⁶ See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.”) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)).

¹⁶⁷ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

¹⁶⁸ See *Wilson*, 526 U.S. at 617–18 (“If judges [] disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”).

¹⁶⁹ See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting the basis for allowing qualified immunity is to allow “insubstantial lawsuits [to] be quickly terminated”).

¹⁷⁰ *E.g.*, *Chaney v. Orlando*, 291 Fed. Appx. 238, 244 (11th Cir. 2008) (noting a narrow exception to qualified immunity whereby an “officer’s conduct [is] so outrageous as to be unconstitutional ‘even without case law on point’”) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)).

¹⁷¹ *Recent Case: Foreign Relations Law -- Treaty Remedies -- Ninth Circuit*

HOW TO ENSURE VCCR COMPLIANCE

637

costs on society than necessary to ensure compliance.¹⁷² Other methods of ensuring compliance not only impose fewer costs on society as a whole, but can be just as effective, if not more so, in enforcing the VCCR domestically.¹⁷³

III. ENFORCING COMPLIANCE WITHOUT JUDICIAL REMEDIES

There is no denying that under some circumstances, judicial remedies are the most effective means of ensuring the protection of citizens and indeed non-citizens throughout a criminal prosecution.¹⁷⁴ The available remedies, however, often come at an extremely high cost to society.¹⁷⁵ As such, courts have always been reluctant to apply those remedies except to protect the most fundamental rights from the most abhorrent police behavior.¹⁷⁶ Any right provided to a foreign national under Article 36 does not rise to that level, nor does a violation of that “right.”¹⁷⁷ As an international treaty obligation, though, it is essential that the United States comply with Article 36.¹⁷⁸

Holds that § 1983 Does Not Provide a Right of Action for Violations of the Vienna Convention on Consular Relations, 121 HARV. L. REV. 1677, 1683 (2008).

¹⁷² See *supra* note 161 and accompanying text.

¹⁷³ See discussion *infra* Part III.B.

¹⁷⁴ See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”).

¹⁷⁵ See *Hudson v. Michigan*, 547 U.S. 586, 596 (2006) (discussing the high cost of the exclusionary rule); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (discussing the high cost of civil liability).

¹⁷⁶ *E.g.*, *Hudson*, 547 U.S. at 598 (refusing to apply the exclusionary rule to the “knock-and-announce” requirement).

¹⁷⁷ See *United States v. Emuegbunam*, 268 F.3d 377, 390 (6th Cir. 2001) (finding that Article 36 does not establish any fundamental rights on the level of constitutional rights).

¹⁷⁸ See *Medellin v. Texas*, 128 S. Ct. 1346, 1367 (2008) (recognizing the United States’ compelling interest in “ensuring the reciprocal observance of the [VCCR], protecting relations with foreign governments, and demonstrating commitment to the role of international law”); see also Asa W. Markel, *International Law and Consular Immunity*, 43 ARIZ ATT’Y 22, 22 (2007)

A. Current Federal and State Policies

The federal government has taken steps toward ensuring compliance among its own law enforcement agencies through executive regulations.¹⁷⁹ For example, the Department of Justice (“DOJ”) requires that arresting officers inform every foreign national that his or her consulate can be notified if he or she so requests.¹⁸⁰ The officer must then report to the nearest United States Attorney’s Office (“USAO”), which must then either notify the appropriate consulate as requested or even where not requested as mandated by treaty.¹⁸¹ The law enforcement agencies and USAOs, as agencies under the DOJ, are directly accountable to the DOJ for any compliance issues.¹⁸² This scheme ensures compliance through the supervisory relationship of the DOJ to its subsidiary agencies—USAOs and law enforcement agencies (i.e. Federal Bureau of Investigation, Drug Enforcement Agency, etc.).¹⁸³ Similarly, the Department of Homeland Security has adopted its own procedures to meet the consular notification requirements.¹⁸⁴ Because federal law enforcement answers directly to the United States government, these measures ensure compliance by such agencies.¹⁸⁵

The federal system accounts for only a small portion of total arrests in the country and thus, it can reasonably be concluded that federal law enforcement’s compliance with the VCCR affects a very small portion of the foreign nationals arrested on U.S. soil.¹⁸⁶

(“[I]nternational law . . . is based on reciprocity between nations.”); Samson, *supra* note 118, at 1112 (“When Nations sign treaties, they do so with the good faith belief that the other signatories will uphold their obligations.”).

¹⁷⁹ See, e.g., 28 C.F.R. § 50.5 (2006); 8 C.F.R. § 236.1(e) (2007).

¹⁸⁰ 28 C.F.R. § 50.5(a)(1).

¹⁸¹ 28 C.F.R. § 50.5.

¹⁸² See 28 C.F.R. § 0.5 (1997) (noting the supervisory power of the Attorney General over all of DOJ including the U.S. Attorneys).

¹⁸³ 28 C.F.R. § 0.1 (2007) (listing the agencies under DOJ).

¹⁸⁴ See 8 C.F.R. § 236.1(e) (Department of Homeland Security).

¹⁸⁵ See 28 C.F.R. § 50.5 (directing compliance by DOJ agencies with the VCCR).

¹⁸⁶ “The federal government estimates it makes about 140,000 arrests each year.” *Feds to Collect DNA in Every Arrest*, USA TODAY, Apr. 16, 2008,

HOW TO ENSURE VCCR COMPLIANCE

639

Given this assumption, the vast majority of foreign nationals, therefore, fall under the jurisdiction of the states.¹⁸⁷ As such, the United States Department of State (“State Department”) has taken an active role in helping states implement the requirements of Article 36 and similar provisions in other treaties that address consular notification.¹⁸⁸ The State Department maintains a comprehensive website to convey its views about consular notification, to describe the consular notification requirements of applicable treaties, and to assist state and local law enforcement in complying with the requirements.¹⁸⁹ The website admonishes the government officials for whom the site is designed that their “cooperation in ensuring that foreign nationals in the United States are treated in accordance with these instructions permits the United States to comply with its consular legal obligations domestically and will ensure that the United States can insist upon rigorous compliance by foreign governments with respect to U.S. citizens abroad.”¹⁹⁰ In addressing failure to notify, the State Department asserts that it will “take appropriate action” by investigating complaints and intervening as necessary to ensure compliance and address the concerns of the sending state.¹⁹¹ The State Department

http://www.usatoday.com/news/washington/2008-04-16-fed-dna_N.htm (last visited Feb. 17, 2009). By contrast, the federal government estimates over fourteen million total arrests in the United States each year. *See* U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States 2007, Table 29, Sept. 2008, http://www.fbi.gov/ucr/cius2007/data/table_29.html.

¹⁸⁷ *See supra* note 186.

¹⁸⁸ In addition to the VCCR, the United States is a signatory of agreements with over fifty countries that mandate consular notification upon detaining a foreign national, notwithstanding any wishes against notification that a foreign national may have. United States Department of State, Consular Notification and Access, Part 5: Legal Material, http://travel.state.gov/law/consular/consular_744.html (last visited Feb. 17, 2009). For a list of countries covered by such bilateral treaties, please see the State Department website. *Id.*

¹⁸⁹ *See generally* United States Department of State, Consular Notification and Access, http://travel.state.gov/law/consular/consular_753.html (last visited Feb. 17, 2009).

¹⁹⁰ *Id.*

¹⁹¹ United States Department of State, Consular Notification and Access, Part 3: FAQs, http://travel.state.gov/law/consular/consular_748.html (last visited

suggests that the proper response is either immediate notification as soon as the agency is aware of the failure so that the consulate can exercise its rights, or an apology to the sending state and efforts to prevent future breaches.¹⁹²

The website also provides law enforcement officials with the relevant background information on consular notification, including a brief explanation of the VCCR, the text of Article 36, and State Department's views on the basis for implementing it.¹⁹³ In reference to implementing the VCCR, the State Department asserts that the Supremacy Clause binds all federal, state and local law enforcement officials to comply with the VCCR and that this is best accomplished through directives, orders, and police manuals issued by individual jurisdictions.¹⁹⁴ Given this policy, the website provides ample resources to law enforcement officials to implement consular notification.¹⁹⁵ The website allows government officials of any federal, state, or local agency to order, free of charge, "Consular Notification and Access" booklets, training videos, consular notification pocket cards, and a CD-ROM with training materials.¹⁹⁶ The booklets and the pocket cards contain suggested wording for notifying foreign nationals of the consular notification provision¹⁹⁷ and the website and CD-ROM

Feb. 17, 2009).

¹⁹² *Id.*

¹⁹³ *See generally* United States Department of State, Consular Notification and Access, Part 5: Legal Material, *supra* note 188.

¹⁹⁴ *Id.*

¹⁹⁵ *See generally* United States Department of State, Consular Notification and Access, *supra* note 189.

¹⁹⁶ United States Department of State, Consular Notification Materials Order Form, http://travel.state.gov/law/consular/consular_726.html (last visited Feb. 17, 2009). The information contained in all of these materials is also available on the website itself. *See generally* United States Department of State, Consular Notification and Access, *supra* note 189.

¹⁹⁷ The State Department promulgates two suggested wordings, one based on the VCCR where notification is optional per the foreign national's discretion and the other based on the bilateral treaties where notification is mandatory. United States Department of State, Consular Notification and Access, Part 1: Basic Instructions, http://travel.state.gov/law/consular/consular_737.html (last visited Feb. 17, 2009).

HOW TO ENSURE VCCR COMPLIANCE

641

make versions of this wording available in other languages.¹⁹⁸ The State Department further eases the burden on law enforcement officials by including the contact information for all consulate offices and a form fax sheet to notify those offices.¹⁹⁹ It also engages in outreach and training around the country to educate law enforcement about the notification requirements and improve compliance.²⁰⁰ As evidenced by the multitude of information, policy statements, and resources on the State Department website, the federal government is committed to ensuring compliance and has made significant steps toward compliance, thus far, without the use of judicial remedies.²⁰¹

Law enforcement agencies have, on their own, shown a commitment to increasing compliance with the consular notification requirements. The Commission on Accreditation for Law Enforcement Agencies, Inc. (“CALEA”)²⁰² adopted a consular notification and access (“CNA”) standard that will now be required for accredited law enforcement agencies.²⁰³ This

¹⁹⁸ United States Department of State, Consular Notification and Access, Part 4: Translations, http://travel.state.gov/law/consular/consular_749.html (last visited Feb. 17, 2009).

¹⁹⁹ United States Department of State, Consular Notification and Access, Part Six: Foreign Embassies and Consulates in the United States, http://travel.state.gov/law/consular/consular_745.html (last visited Feb. 17, 2009).

²⁰⁰ United States Department of State, Training and Outreach, http://travel.state.gov/law/consular/consular_2244.html (last visited Feb. 17, 2009). The Department has conducted approximately 450 training sessions, “distributed over 1,000,000 pieces of training materials,” and published articles in law enforcement publications to raise awareness. *Id.*

²⁰¹ *See generally* United States Department of State, Consular Notification and Access, *supra* note 189.

²⁰² The CALEA is a credentialing authority established in 1979 by four major law enforcement associations “to improve the delivery of public safety services, primarily by: maintaining a body of standards, developed by public safety practitioners, covering a wide range of up-to-date public safety initiatives; establishing and administering an accreditation process; and recognizing professional excellence.” Commission on Accreditation for Law Enforcement Agencies, Inc., About CALEA, <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 12, 2009) [hereinafter CALEA].

²⁰³ *See generally* Mark Warren, *Consular Notification: Statutory and*

standard requires agencies to adopt Standard Operating Procedures that ensure compliance with the VCCR and other consular notification agreements.²⁰⁴ While CALEA membership is voluntary, its members represent more than 80% of law enforcement agencies in the United States; as such, its views represent a significant portion of law enforcement.²⁰⁵ The CNA standard, in particular, demonstrates the growing knowledge of consular notification and general willingness and desire of the law enforcement community to bring agencies into compliance.²⁰⁶

To date, two state legislatures have taken steps to ensure compliance by their own law enforcement officials by codifying procedures for consular notification: California and Oregon.²⁰⁷ Other states, most notably Georgia, have utilized official law enforcement manuals to implement consular notification.²⁰⁸ In some cases, specific local police departments have utilized their own patrol manuals to implement notification.²⁰⁹ It is clear that strides are being made in the area of consular notification

Regulatory Provisions, <http://users.xplornet.com/~mwarren/compliance.htm> (last visited Apr. 5, 2009).

²⁰⁴ See *id.* (citing the CALEA standard in its entirety). The State Department prepared a model CNA Standard Operating Procedure (“SOP”) for use by any government agency; the State Department recommends that every agency use this model or develop similar SOPs regardless of their affiliation with CALEA. United States Department of State, Download a Model CNA Standard Operating Procedure, http://travel.state.gov/law/consular/consular_3002.html (last visited Feb. 17, 2009).

²⁰⁵ United States Department of State, Training and Outreach, *supra* note 200.

²⁰⁶ The Supreme Court recently noted that the increase in the “professionalism of police forces, including internal police discipline” acts as a civil rights violations deterrent. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). CALEA is an example of the increased professionalism and its adoption of the CNA acts similarly as a deterrent for consular notification violations. See CALEA, *supra* note 202.

²⁰⁷ Warren, *supra* note 203. See also CAL. PENAL CODE § 834c (West 2000); OR. REV. STAT. § 181.642 (2008).

²⁰⁸ See Warren, *supra* note 203.

²⁰⁹ See *id.* (listing the manuals of New York Police Department, Los Angeles Police Department, and Lubbock (Texas) Independent School District Police).

HOW TO ENSURE VCCR COMPLIANCE

643

compliance within the United States at the federal, state, and local levels.²¹⁰ This is not to say, however, that there is no room for improvement.

B. Trust the States to Fill the Gap

The federal government is ultimately liable for the failure of state and local agencies to abide by the terms of the VCCR; however, that does not mean that only the federal government can effectively enforce the provisions of the VCCR.²¹¹ Because the majority of all arrests are under state jurisdiction, the arrests of most foreign nationals—and thus, violations of Article 36—also fall under state jurisdiction.²¹² Therefore, Article 36 compliance is best left primarily in the hands of the states because: 1) the ways in which the federal government can compel compliance will be less effective and less efficient than allowing the states to deal with the issue on their own, and 2) under our federalist system, the states often take an active role in treaty implementation and Article 36 particularly warrants such a state role.

The federal government's hands are virtually tied by state sovereignty under the current system.²¹³ Having ruled out judicial remedies as a means of enforcement,²¹⁴ the legislative and

²¹⁰ It should be noted that the methods of compliance employed by federal and state agencies closely mimic the efforts in other countries who are party to the VCCR. *See id.* (listing various foreign codes that address implementation of the VCCR). Some countries, for instance Australia, require notification prior to questioning, but this goes beyond the requirements of the VCCR, which prescribed nothing more than notification without undue delay. *See id.*

²¹¹ *See* Ku, *supra* note 138, at 521 (giving examples of states enforcing international obligations).

²¹² *See supra* note 186–87 and accompanying text.

²¹³ Federal courts cannot use their supervisory power to force states into compliance. *See* *Dickerson v. United States*, 530 U.S. 428, 438 (2000). It is beyond Congress' power to regulate state criminal laws and procedures. *See* U.S. CONST. art. I, § 8.

²¹⁴ A bill introduced in the House of Representatives, H.R. 6481: Avena Case Implementation Act of 2008, proposes “to create a civil action to provide judicial remedies to carry out certain treaty obligations of the [U.S.] under the [VCCR].” Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong.

executive branches have few viable options to enforce the VCCR directly. Congress could authorize and require a federal agency to interview all new inmates in state facilities to determine their citizenship status.²¹⁵ While this solution would certainly guarantee that every foreign national is given the option of consular notification, the practicality of such a scheme seems shaky at best.²¹⁶ To screen every one of the fourteen million arrestees each year would require an enormous amount of manpower and money.²¹⁷ Moreover, there are no statistics indicating what percentage of these arrests are of foreign nationals, so this extreme expenditure of time and money may only be beneficial to a small percentage of all arrestees.²¹⁸ Without concrete proof, or even a suggestion, that the benefits would be much more substantial, this seems an impractical solution. Congress cannot go much further than this to directly enforce the VCCR in state arrests because Congress cannot mandate that state courts apply specific procedural rules, nor can it require state legislatures to amend their criminal laws and procedures.²¹⁹

(2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-6481> (last visited February 12, 2009). The bill was introduced in July 2008 and has been referred to the House Committee on the Judiciary. *Id.* The bill is tailored specifically to remedy Article 36 violations. *Id.*

²¹⁵ Molora Vadnais, Comment, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 336 (1999).

²¹⁶ See U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States 2007, Table 29, *supra* note 186.

²¹⁷ See *id.*

²¹⁸ The federal government and state governments keep statistics of all arrests, but while these statistics include a breakdown of arrests by types of crime, age, and region, these reports do not include a breakdown of arrests by nationality or citizenship status. *E.g.*, Department of Justice, Federal Bureau of Investigation, Crime in the United States 2007, <http://www.fbi.gov/ucr/cius2007/arrests/index.html> (last visited Feb. 17, 2009); California Office of the Attorney General, Arrests Statistics, <http://ag.ca.gov/cjsc/statistics/datatables/dtbsarrests.php> (last visited Feb. 17, 2009); New York Division of Criminal Justice Services, Criminal Justice Statistics, <http://criminaljustice.state.ny.us/crimnet/ojsa/stats.htm> (last visited Feb. 17, 2009).

²¹⁹ This is outside the scope of Congress' constitutional authority. See U.S. CONST. art. I, § 8.

HOW TO ENSURE VCCR COMPLIANCE

645

Likewise, there is little that the Executive Branch can do to directly enforce adherence to Article 36 by state officials.²²⁰ The Attorney General could bring suits against offending states as it has done in the past when state and local governments have violated treaty obligations.²²¹ Indeed, this solution could be an effective deterrent to violations of Article 36, but it will result in costly litigation, which will ultimately cost taxpayer dollars on the local, state, and federal level.²²² It would be more efficient and cost-effective to prevent violations from the outset than retroactively sue every offending locality.²²³

While there is not much that the federal government can do to directly enforce the VCCR, actions taken by the federal government can indirectly impact the enforcement of the VCCR in state criminal systems.²²⁴ By enacting a consular notification funding statute, Congress can provide incentives to states that will encourage compliance.²²⁵ For instance, Congress could implement a consular notification program that would require states to issue reports regarding foreign nationals' arrests and to provide documentation of action taken regarding consular notification; in exchange, Congress would provide funds to support those procedures.²²⁶ The Executive Branch, via the State Department,

²²⁰ See Samson, *supra* note 118, at 1118 (enumerating ways in which the Executive Branch could ensure compliance).

²²¹ *Id.*

²²² The costs of litigation instituted by the Attorney General against state entities will be similar to at least the monetary expense and diversion of resources discussed in context of traditional civil remedies. See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

²²³ See Mark J. Kadish & Charles C. Olson, Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation, 27 MICH. J. INT'L L. 1185, 1228 (2006) (suggesting that preventative efforts are an effective means of enforcing Article 36).

²²⁴ See Vadnais, *supra* note 215, at 336 (enumerating actions Congress can take to directly and indirectly impact compliance).

²²⁵ *Id.*

²²⁶ This is the basic structure of any congressional funding statute designed to bring states into compliance with burdensome regulations. For example, the Individuals with Disabilities Education Improvement Act (IDEA) provides

has already taken steps to indirectly impact the enforcement of the VCCR by raising awareness of the provision, and providing training and materials to state and local officials to ease the burden of compliance.²²⁷

Ultimately, though, the federal government need not and should not go any farther to implement the requirements of the VCCR among state and local jurisdictions. The consular notification provision directly affects the states' individual criminal justice systems, since it requires that every arrested or detained foreign national within the United States border have the option of notifying his or her consulate.²²⁸ Each state sets and adheres to its own criminal law and procedures.²²⁹ Because the criminal law is entirely an issue of each state's jurisdiction, states are the proper authority to address the consular notification provision.²³⁰ State control in implementing foreign policy is by no means a novel idea—historically, states have independently handled issues of “consular powers in estate proceedings [and] the immunity of foreign states from taxation”²³¹ In modern times, aside from consular notification obligations, states are also responsible for implementing the requirements of international human rights treaties.²³² As argued by one scholar, “the reason the states hold that power is because the foreign policy question[s]

funding to states that follow prescribed rules and regulations regarding services provided to children with disabilities. *See* Individual with Disabilities Education Improvement Act, 20 U.S.C. §§ 1407, 1411–13, 1415–19 (2004).

²²⁷ *See supra* notes 195–200 and accompanying text.

²²⁸ *See* VCCR, *supra* note 1, art. 36.

²²⁹ *See* 1 WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.2(b) (3d ed. 2008).

²³⁰ *See* Vadnais, *supra* note 215, at 312 (noting the constitutional quandary in having state officers implement the VCCR pursuant to some congressional or federal court mandate).

²³¹ Ku, *supra* note 138, at 478.

²³² *Id.* at 521 (citing a declaration by Congress that accompanied ratification of the International Covenant on Civil and Political Rights that interpreted the agreement as binding the federal government on matters within its jurisdiction and leaving implementation of matters within state jurisdiction to states with the caveat that the federal government “take measures for the fulfillment” of those obligations).

HOW TO ENSURE VCCR COMPLIANCE

647

directly implicate[] matter[s] of state control.”²³³ This scholar contends that in leaving these issues to the states, the federal government is acknowledging the importance of state sovereignty.²³⁴ Barring some need for absolute uniformity, there is no need for the federal government to directly implement the requirements of Article 36 and ignore state sovereignty over their own criminal justice systems.²³⁵

Absolute uniformity in implementing the consular notification provision is not a necessity since the VCCR itself speaks only very broadly about what receiving states must do with respect to consular notification.²³⁶ This suggests that each receiving state has the power to devise its own procedures for implementation under the treaty—suggesting that uniformity of implementation is not necessary under the VCCR.²³⁷ Thus, there is no reason that every state within the United States must utilize the same procedures.²³⁸ As such, states should be allowed to continue to implement the provision as they see fit.

Arguments in favor of judicial remedies or direct intervention by the federal government in the case of Article 36 inevitably assume that states, left to their own devices, will not comply.²³⁹ According to one legal scholar, state noncompliance stems from: 1) lack of knowledge on the part of law enforcement officials,

²³³ *Id.* at 520.

²³⁴ *Id.*

²³⁵ See Kathleen Patchel, Memorandum to Participants in October 7, 2007 Informational Meeting Regarding Treaty Implementation, at 8 (Sept. 28, 2007), available at http://www.law.upenn.edu/bll/archives/ulc/jeb/patchel_memo.pdf (noting that where lack of uniformity is not problematic, state implementation may be a “reasonable and feasible alternative”).

²³⁶ See VCCR, *supra* note 1.

²³⁷ See *id.*

²³⁸ See Patchel, *supra* note 235, at 8 (noting that where lack of uniformity is not problematic, state implementation may be a “reasonable and feasible alternative”).

²³⁹ E.g., Asa Markel, *The Vienna Convention on Consular Relations: After the Federal Courts’ Abdication, Will State Courts Fill in the Breach?*, 7 CHL-KENT J. INT’L COMP. L. 1, 30 (2007) (implying that the Supreme Court’s holding in *Sanchez-Llamas* in favor of states’ rights will adversely affect U.S. treaty obligations of the VCCR).

2) inability or unwillingness to bear the burden of notifying foreign nationals, 3) difficulty in distinguishing between citizens and foreign nationals due to the diversity of American citizens, and 4) failure from the outset by the federal and, by default, state governments to take the notification requirements seriously.²⁴⁰ However, these issues have either already been extinguished or are easily addressed.

Both the first and last issues—lack of knowledge and failure to take the requirements seriously—no longer exist.²⁴¹ *Sanchez-Llamas v. Oregon* and *Medellin v. Texas*²⁴² have brought both national and international attention to the requirements of Article 36.²⁴³ Should state officials somehow have missed these important cases, the State Department took steps to put state officials on notice of the consular notification provision.²⁴⁴ These steps by the State Department not only ensure that officials are aware of the provision, but also exemplify the federal government's

²⁴⁰ Vadnais, *supra* note 215, at 332–33.

²⁴¹ See, e.g., United States Department of State, Consular Notification and Access, *supra* note 189 (serving as an example that knowledge among individual enforcement agencies is increasing and that the federal government, at least, is taking the provision seriously).

²⁴² This case centered on fifty-one Mexican nationals who were sentenced to the death penalty in Texas without being informed of the consular notification provision in Article 36. *Medellin v. Texas*, 128 S. Ct. 1346, 1352 (2008). Mexico brought a case on behalf of its nationals before the International Court of Justice which ruled against the United States and asked for “review and reconsideration” of the convictions. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72 (March 31). The Supreme Court held that an ICJ ruling was not binding on the state courts. *Medellin*, 128 S. Ct. at 1367.

²⁴³ See, e.g., Jeffrey Davidow, *Protecting Them Protects Us; Why You Should Care About What Happens to 51 Mexican Nationals on Death Row*, L.A. TIMES, Aug. 4, 2008, at A15; Linda Greenhouse, *Justices Hear Arguments Over Whether Foreigners Have Reciprocal Rights in the U.S.*, N.Y. TIMES, Mar. 30, 2006, at A19.

²⁴⁴ The State Department periodically sends notice to state governors and state attorneys general regarding the consular notification provision, as well as pocket-sized reference cards for distribution to law enforcement officers. Vadnais, *supra* note 215, at 333. See also discussion of State Department website and training efforts *supra* Part III.A.

HOW TO ENSURE VCCR COMPLIANCE

649

commitment to enforcing Article 36.²⁴⁵ Procedural safeguards implemented by the DOJ (and similarly situated executive offices)²⁴⁶ further demonstrate the seriousness with which the federal government now takes the provision. While it may have been reasonable to assume that states could or would not comply because of ignorance or a failure to take the provision seriously ten years ago,²⁴⁷ recent cases and executive actions have forestalled such assumptions.²⁴⁸

The second and third issues—difficulty in identifying foreign nationals, and unwillingness or inability to bear the burden of notifying foreign nationals²⁴⁹—can be easily resolved. If Congress enacted a funding statute, the federal government—not individual states—would bear the cost of enforcing the provision, which should alleviate concerns that states will not comply because of the financial burden of enforcement.²⁵⁰ Furthermore, the State Department has offered materials to ease any administrative burdens, both in providing a ready-made program for implementation so no resources need to be expended on developing procedures²⁵¹ and in creating materials that make implementation easy for officers on a day-to-day basis.²⁵² Therefore, the proposed method, in which Congress enacts a funding statute, in combination with the current practices of the federal government, would eliminate the traditional excuses against state implementation of the VCCR.

²⁴⁵ Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 444 (2004) (discussing the ICJ's commendation of the increased State Department efforts as a "good faith effort" to comply with the VCCR).

²⁴⁶ See *supra* notes 179–85 and accompanying text.

²⁴⁷ See generally *Breard v. Greene*, 523 U.S. 371, 376 (1998) (first Supreme Court Article 36 case).

²⁴⁸ See *supra* notes 242–46 and accompanying text.

²⁴⁹ See *Vadnais*, *supra* note 215, at 332–33.

²⁵⁰ See *supra* note 224–25 and accompanying text.

²⁵¹ United States Department of State, Download a Model CNA Standard Operating Procedure, *supra* note 204.

²⁵² See discussion of State Department training material, *supra* Part III.A.

Not only are the states capable of implementing the VCCR, there is merit in allowing states to do so.²⁵³ Aside from the importance of preserving state sovereignty, allowing states to spearhead implementation on their own can lead to greater, more effective execution of such rights by permitting experimentation with different procedures and approaches.²⁵⁴ Some methods may prove more effective or more efficient than others; those methods can in turn be adopted by other jurisdictions.²⁵⁵ Also, some procedures may be well-suited for states with large populations of foreign nationals, but not for those with smaller concentrations of foreign nationals.²⁵⁶ Allowing flexibility in implementation will allow the most effective and efficient means of compliance within each jurisdiction. In fact, this would be consistent with the spirit of the provision, which recognizes that different methods may be more or less effective in different legal systems, and thus purposefully leaves implementation to each nation.²⁵⁷ In sum, the choice of specific procedures to implement the requirements of Article 36 should be left to the states because they can more effectively and efficiently enforce compliance than the federal government. The federal government should merely supplement states' efforts to ease the administrative and financial burdens states face in complying with an international treaty obligation.

²⁵³ See Patchel, *supra* note 235, at 11 (discussing the advantages of conditional spending as the implementation of treaty obligations where states retain primary control).

²⁵⁴ See Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 911 (2008) ("Diversity produces many good ends such as . . . chances to experiment with different solutions to similar problems . . .").

²⁵⁵ See *id.* ("Diversity produces many good ends such as . . . competitive pressures on local governments to adopt the most appealing of these solutions.").

²⁵⁶ The distribution of foreign nationals is uneven with California, New York, Texas and Florida harboring a majority of all foreign nationals in the U.S. See, e.g., Department of Homeland Security, Mapping Immigration: Legal Permanent Residents (LPRs), <http://www.dhs.gov/ximgtn/statistics/data/lprmaps.shtm> (follow "Total LPR Flow by State" "2000-2003" and "1990-1999" hyperlinks) (last visited Feb. 14, 2009) (graphs showing total legal permanent resident flow by state).

²⁵⁷ See generally VCCR, *supra* note 1.

HOW TO ENSURE VCCR COMPLIANCE

651

CONCLUSION

There is no denying the importance of Article 36 of the VCCR. As Jeffrey Davidow, former U.S. statesman,²⁵⁸ put it, “[n]o citizen is in more need of consular support than the one who faces the terrifying ordeal of arrest and imprisonment under a foreign legal system.”²⁵⁹ The consular notification provision gives at least some assurance to travelers that if necessary, they have at least one ally in their country throughout such an ordeal. Enforcing compliance with the provision domestically strengthens U.S. use of the provision when its own citizens are in trouble abroad.²⁶⁰ However, to assume that judicial remedies are the best and only option available to give effect to the provision ignores both the construction of the treaty and the alternative forms of compliance.

First, by way of modern treaty interpretation as employed by U.S. courts, the VCCR does not confer any individually enforceable rights on foreign nationals.²⁶¹ Second, the VCCR provides no specific judicial remedies, and no domestic judicial remedies are well-suited to address the consular notification provision—even if the treaty is read to encompass individual rights.²⁶² Finally, the federal government has already taken effective steps to ensure compliance within federal law enforcement agencies.²⁶³ States have not yet uniformly adopted any such steps;²⁶⁴ however, given a “funding statute” and guidance from the State Department, states are capable of ensuring compliance on their own. This method of compliance that works with, rather than competes with, federalism is both an effective and

²⁵⁸ Jeffrey Davidow served as “U.S. ambassador to Zambia, Venezuela and Mexico in the Reagan, Clinton, and both Bush administrations.” Davidow, *supra* note 243.

²⁵⁹ *Id.*

²⁶⁰ See *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (discussing the increased likelihood that U.S. citizens abroad will be denied access to their consulate if the U.S. fails to comply with the VCCR).

²⁶¹ See *supra* Part II.A.

²⁶² See *supra* Part II.B.

²⁶³ See, e.g., 28 C.F.R. § 50.5; 8 C.F.R. § 236.1(e).

²⁶⁴ See, e.g., CAL. PENAL CODE § 834c; OR. REV. STAT. § 181.642.

652

JOURNAL OF LAW AND POLICY

efficient solution to the problem of consular notification compliance in the United States.