President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights
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Addendum

Background

The Vienna Convention on Consular Relations, a multilateral treaty to which the United States, Mexico and 164 other states (countries) are parties, requires the competent authorities of each party to inform the consulate of the other party if the latter party's national is arrested and requests that the consulate be notified. The convention also requires the authorities to forward any communication the arrested person addresses to the consulate, and to inform the person concerned without delay of his or her right to communicate with the consulate. The consular authorities have the right to visit and correspond with that person and to arrange for his or her legal representation.[1]

Until the last few years, authorities in the United States frequently did not comply with these requirements, which apparently were little known in law enforcement circles or even among court-appointed defense lawyers. In scores of homicide cases, nationals of states parties to the Convention were sentenced to death even though they had not been given timely notification of their right to communicate with their consulates. In the typical case, the court-appointed defense lawyer failed to raise the issue at the trial, and belatedly did so only on appeal or in a habeas corpus petition after conviction and sentencing. The courts denied relief, either on the ground that procedurally it was too late to raise the matter (the "procedural default rule"), or that the Consular Convention establishes rights only for the states parties to it and not for individuals who seek to enforce the convention in U.S. courts.

In separate proceedings brought over the last few years, Paraguay, Germany and Mexico have challenged these U.S. practices in the International Court of Justice (ICJ). In the first case, the ICJ in preliminary proceedings called on the United States government to take all measures at its disposal to ensure that the Paraguayan national, Angel Francisco Breard, would not be executed pending a final decision by the ICJ.[2] The U.S. Secretary of State requested the Governor of Virginia to suspend Breard's impending execution, and Breard sought immediate relief in U.S. courts. The U.S. Supreme Court denied his petitions for habeas corpus and for certioriari, relying on the procedural default rule.[3] The Governor of Virginia rejected the Secretary of State's request. Breard was executed before the ICJ could decide the merits of the proceedings brought by Paraguay.[4]

The ICJ decided the other two cases (the LaGrand case and the Avena case) on the merits, holding in each case that the United States had violated the Consular Convention and was therefore obligated, "by means of its own choosing," to allow the review and reconsideration of the convictions and sentences by taking account of the rights set forth in that convention.[5] According to the ICJ, use of the procedural default rule to preclude review and reconsideration in these cases would violate the Consular Convention.[6]

The U.S. Position

Until very recently, the United States government's response to the violations of the Consular Convention and to the ICJ decisions has been simply to apologize to the governments whose nationals were convicted, and to issue instructions to law enforcement officials in the United States on the requirements of the convention. But on February 28, 2005, President George W. Bush made the following determination:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the

International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[7]

There are several noteworthy aspects of the President's determination. First, he acknowledged that the United States is under an international obligation to comply with the ICJ decision in the Avena case. This would not be remarkable (since the United States and all other United Nations members have agreed in the ICJ Statute that a decision of the Court is final and binding on the parties to the case[8]), were it not for the disinclination of the U.S. government in some previous cases to concede that it is bound to give full effect to the ICJ's orders in judgments adverse to the United States.[9] Although the President's determination expressly applies only to the Avena case, there is no distinction in principle between the effect of that judgment on the U.S. as a matter of *international law* and the effect of any future ICJ judgment that goes against the United States on the merits. Whether any given ICJ judgment has immediate effect in U.S. *domestic law* is another question, discussed below.

Another noteworthy point is the President's reliance on his constitutional and statutory authority to make a determination as to how state courts should treat the ICJ decision. Contrary to what was said in at least one news report on the President's determination,[10] he does not, strictly speaking, have broad constitutional authority to "order" state courts to grant review of cases they have already decided. But his constitutional authority clearly does allow him to make decisions regarding U.S. foreign policy, including decisions in the capacity of head diplomat. The decision to give effect to the ICJ judgment in the Avena case would fall within that category, since it clearly would smooth out U.S. relations with Mexico and would enhance U.S. standing as an international law-abiding nation. Any state action that conflicts with the express foreign policy of the federal government is pre-empted under a consistent line of Supreme Court decisions.[11] Decisions of state courts in the United States amount to state action.[12] Thus the state courts with jurisdiction over the cases involving the 51 Mexican nationals could not, under Supreme Court precedent, decline to give effect to the President's determination.

Implicit in the President's determination is the proposition that the state courts in these cases should not adhere to the procedural default rule. The Solicitor General's amicus brief in a pending Supreme Court case involving one of the 51 Mexican nationals makes the same point explicitly.[13] Consequently, even though the attorneys for the Mexican nationals may not have raised the point during the trials, the failure to comply with the Consular Convention may now be put forward. But neither the President's determination nor the ICJ judgment in the Avena case requires the courts to quash the convictions or the sentences simply because of the failure to comply with the convention. All that is required is reconsideration in light of the rights set forth in the convention.

The President's determination would seem to preclude the state courts from denying relief on ground that the convention simply gives consular rights to governments and not to individuals, although this point is not crystal clear. The Supreme Court in the Breard case said that the convention "arguably" confers on an individual the right to consular assistance following arrest, but it did not finally decide the point and the President had made no determination in that case that the state court should give effect to the ICJ's preliminary order.[14]

More importantly, the Supreme Court in the Breard case said that even if the Consular Convention claim had been properly raised and proved, "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[15] The sentence just quoted, however, refers only to conviction and not to sentencing.

Finally, the President's determination said that state courts should give effect to the ICJ decision "in accordance with general principles of comity." "Comity" denotes a willingness to act in accordance with good will and respect, but it does not denote a legal obligation to do what is contemplated. Exactly what the President meant in the current context is not apparent, since – as mentioned above – he expressly

acknowledged an international obligation under the ICJ decision in the Avena case, which called for review and reconsideration of the convictions and sentences of the 51 Mexican nationals. Perhaps he meant simply that state courts, in revisiting their decisions in these cases, should do more than go through the motions and should instead give real respect to the ICJ judgment. Perhaps he meant that state courts are not legally required to give any ICJ judgment immediate effect in U.S. domestic law in the absence of a determination by the President. If the latter, and if it is intended as a general statement extending beyond the facts of the present case, there would be a separation-of-powers question whether the President's foreign affairs authority under the Constitution extends to determining the direct legal effect of ICJ judgments on domestic judicial proceedings in the United States.

At this writing, it is unclear what effect the President's determination will have on the currently-pending Supreme Court case, mentioned above, involving one of the 51 Mexican nationals.[16] The Court granted certiorari in that case before the President made his determination. The questions the Court said it would address did not foresee any such determination.

Conclusion

In any event, the President's determination is a statement of respect for international law and adjudication. It enhances the stature of the ICJ. Yet it remains to be seen whether this will defuse assertions by foreign governments that the United States has little to complain about if Americans who are arrested abroad are not notified of their right to communicate with the American consulate. Presumably it would have that effect if the state courts give serious reconsideration to these cases, and if similar reconsideration is given to other cases in which officials in the United States have not complied with the Consular Convention.

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1), 21 U.S.Treaties 77, 596 U.N. Treaty Series 261.

[2] Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States), 1998 ICJ Rep. 248, 37 International Legal Materials (ILM) 810 (1998). See ASIL Insight, International Court of Justice Orders United States to Stay Execution of Paraguayan National in Virginia (April 1998).

[3] Breard v. Greene, 523 US 371, 118 S.Ct. 1352 (1998).

[4] See Agora: Breard, 92 AJIL 666 (1998).

[5] LaGrand Case (Germany v. United States), 2001 ICJ Rep. 466, 40 ILM 1069 (2001); Case Concerning Avena and Other Mexican Nationals, 2004 ICJ Rep. 128, 43 ILM 581 (2004). See ASIL Insights, World Court Rules Against the United States in LaGrand Case Arising from a Violation of the Vienna Convention on Consular Relations (July 2001), and Consular Notification and the Death Penalty: The ICJ's Judgment in *Avena* (April 2004).

[6] *LaGrand* case, ¶ 90; *Avena* case, ¶ 113.

[7] Quoted in Brief for the United States as Amicus Curiae Supporting Respondent in Medellin v. Dretke,

U.S. Supreme Court Docket no. 04-5928. The brief is available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.html>.

[8] ICJ Statute arts. 59 & 60. The ICJ Statute is annexed to the U.N. Charter and is a treaty obligation of all U.N. member states.

[9] In the Military and Paramilitary Activities case (Nicaragua v. United States), 1986 ICJ Rep. 14, 25 ILM 1023 (1986), the United States did not participate in the proceedings on the merits after the Court had rejected the U.S. objections to its jurisdiction, and did not concede that it was bound by the Court's final judgment.

[10] "Convicted Mexicans Allowed Case Reviews," International Herald Tribune, Friday, March 4, 2005.

[11] See American Insurance Ass'n v. Garamendi, 539 US 396, 123 S.Ct. 2374 (2003); Crosby v. National Foreign Trade Council, 530 US 363, 120 S.Ct. 2288 (2000); Zschernig v. Miller, 389 US 429, 88 S.Ct. 664 (1968); United States v. Pink, 315 US 203, 62 S.Ct. 552 (1942); United States v. Belmont, 301 US 324, 57 S.Ct. 758 (1937).

[12] See Shelley v. Kraemer, 334 US 1, 68 S.Ct. 836 (1948).

[13] Brief for the United States as Amicus Curiae, supra note 7.

[14] Breard v. Greene, 523 US 371, 376 (1998).

[15] Id. at 377.

[16] Medellin v. Dretke, U.S. Supreme Court Docket no. 04-5928. The federal Court of Appeals in this case held (before the President's determination) that the procedural default rule precluded reconsideration and that the Consular Convention does not give individuals a right to enforce it in U.S. courts. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).
