

CHAPTER NINE

Vienna Convention Issues

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9.1 OVERVIEW

Chapter Nine provides an overview of non-citizen rights under Article 36 of the Vienna Convention on Consular Relations (VCCR), which requires a foreign consulate to be notified when one of its citizens is being detained by foreign governmental authorities and the best practices for ensuring compliance with the VCCR. It also addresses the separate but related bilateral treaties between the U.S. and individual nations. As highlighted here, developments in the past decade, including decisions from the International Court of Justice (ICJ) and the U.S. Supreme Court, have brought attention to issues regarding compliance with VCCR and related treaty obligations.

Additionally, this chapter highlights issues and suggests best practices for facilitating compliance with these obligations without jeopardizing other rights of noncitizens. Notification of VCCR rights should be given by law enforcement officers upon arrest of all defendants. However, since this is not always standard practice, some prosecutors and courts have implemented practices that require or encourage a non-citizen to disclose information about their citizenship, nationality and/or immigration status. Non-citizens are a particularly vulnerable

group within the criminal justice system.¹ While exercising the right to talk to consular officials might be beneficial for some non-citizens, disclosing citizenship information risks exposing a non-citizen to immigration authorities and possible deportation. The rights embodied in the VCCR are important and useful. However those rights must be administered and exercised in such a manner as to not violate or foreclose other equally important rights and protections.

9.2 RECOMMENDED BEST PRACTICES TO ENSURE CONSULAR NOTIFICATION OBLIGATIONS AND RECOGNIZE DEFENDANTS' FIFTH AMENDMENT RIGHTS

Article 36 requires that the consular notification rights be exercised in accordance with U.S. law. It is not difficult to establish a procedure that harmonizes Article 36 and bilateral agreement notification requirements. In short, defendants can be informed of the consular notification requirements pursuant to Article 36 and the bilateral agreements and the parties can make a record of having done so without an improper inquiry into citizenship or immigration status in court.

In 2006, King County prosecutors and defenders came together and established the following process that is the recommended best practice for courts throughout Washington to consider adopting.

- **At arraignment, every defendant is provided with the form titled “Vienna Convention and Bilateral Treaty Notification, Acknowledgement and Waiver or Request”. See Appendix N for a sample form.**

This form has one place to request consular notification (by affixing a signature) and a second signature line that permits the defendant to acknowledge receipt of information regarding the consular notification option but to decline to disclose citizenship information and waive any consular notification right at that time. It also permits the defendant to request consular notification at a later time should she choose to do so.

Even if a defendant desires to have her consulate notified, s/he should not have to go through the judge and the prosecutor to invoke consular contact. As the State Department recommends, the jail authorities detaining her should simply fax the form provided in Appendix N to the consulate in question. Additionally, defense counsel can also facilitate contact with consulates on behalf of detained non-citizens. The Washington Defender Association Immigration Project provides assistance on contacting foreign consulates.

¹ See, e.g., *Matter of Hammermaster*, 139 Wn.2d 211, 244, 985 P.2d 924, 941 (1999).

9.3 WHAT ARE THE VIENNA CONVENTION AND THE BILATERAL TREATIES?

The Vienna Convention on Consular Relations (VCCR) is an international treaty to which the United States adhered in 1969.² The treaty mainly deals with the establishment and duties of consular relations between states. While its preamble states 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,” Article 36 of the VCCR guarantees free communication between nationals of a “sending state” and consular officials.

Article 36(1)(b) applies to noncitizen defendants. In particular, this section requires the “receiving state” (e.g. the United States government) to inform a foreign consulate if one of their nationals is “arrested or committed to prison or to custody pending trial or is detained in any other manner...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.”

In addition to Article 36 of the VCCR, there are a series of bilateral treaties on consular relations between the United States and individual nations. Some of the agreements include a mandatory requirement that the two countries notify each other when their nationals are detained. The State Department’s advisory material emphasizes that the notification in these cases is mandatory, regardless of the desires of the non-citizen.³

Although the notification is an obligation of one State to another, neither the bilateral treaties nor the VCCR create an affirmative individual legal obligation by a non-citizen to reveal information that she does not otherwise need or want to reveal, especially where that would violate legal protections to which he or she has a right. The starting point for the bilateral treaties is that a foreign national’s status has become known, and that once that is known the notification is obligatory. The purpose of the bilateral consular notification treaties is to facilitate consular functions, one of which is protection of foreign nationals; but not to subject them to additional legal penalties or ferret them out against their will.

Like the VCCR’s voluntary consular notification requirement, the bilateral treaties’ mandatory consular notification requirement is best served by informing all defendants of the treaty obligations, without subjecting them to an unnecessary judicial inquiry into citizenship status, prohibited by RCW §10.40.200(1),⁴ and the Fifth Amendment.⁵

² Vienna Convention on Consular Relations, Dec. 24, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261 (hereinafter “VCCR”).

³ *Consular Notification and Access Manual*, DEPARTMENT OF STATE (2010), available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

⁴ RCW §10.40.200(1) (1983).

⁵ U.S. Const. amend IV.

9.4 WHO IS RESPONSIBLE FOR ENSURING COMPLIANCE WITH THE VCCR AND BILATERAL TREATIES?

The primary obligation for treaty compliance rests with the Department of State (DOS). Neither the VCCR nor the bilateral treaties make state courts responsible for compliance. When the U.S. signed the VCCR it also signed an “Optional Protocol” making the ICJ the forum for resolving disputes about the VCCR.⁶ In *Avena*, a 2004 case brought by Mexico against the U.S. before the ICJ concerning over 50 Mexicans on death row, the ICJ found the U.S. to be in violation of VCCR Article 36’s consular notification requirement and required the U.S. to “provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.”⁷ The ICJ finding is specifically put in the context of those individuals sentenced to “severe penalties.”⁸

Subsequent to the *Avena* decision, the President then issued a memorandum stating that the U.S. would discharge its international obligations under the ICJ’s *Avena* judgment by “having State courts give effect to the ICJ decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”⁹ The U.S. then immediately withdrew from the Optional Protocol.

The State Department has historically worked directly with law enforcement authorities to facilitate compliance with the VCCR, efforts that were stepped up following the *Avena* decision.¹⁰ According to the State Department, “[t]he law enforcement officers who actually make the arrest or who assume responsibility for the alien’s detention ordinarily should make the notification. . . . Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification.”¹¹ However, to promote compliance, the State Department encourages judges and prosecutors to ask whether consular notification has been complied with. As noted below, however, this suggestion by the State Department can run afoul of a non-citizen’s right to not disclose her status and does not take into consideration the immigration consequences that can flow from exposing herself to apprehension by immigration authorities.

In a 2000 en banc decision, the Ninth Circuit overturned its prior precedent holding that Article 36 notification was an individual right that could be remedied via a motion to suppress and noted,

[t]he addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. . . . Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this

⁶ *Optional Protocol*, 21 U.S.T. 325 (entered into force by the U.S., Dec. 24, 1969; U.S. withdraws, Mar. 7, 2005).

⁷ *Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12, ¶ 151 (March 31).

⁸ *Id.*

⁹ George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005).

¹⁰ *Consular Notification and Access Manual*, *supra* n.3.

¹¹ *Id.* at *15.

instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct.¹²

9.5 WHAT ARE THE CONSEQUENCES AND REMEDIES FOR VIOLATIONS OF THE VCCR?

In recent years, the U.S. Supreme Court addressed issues regarding rights under Article 36 of the VCCR in two decisions: *Sanchez-Llamas v. Oregon*¹³ and *Medellin v. Texas*.¹⁴ The essence of these decisions is as follows:

- **Individual Enforceable Right Undecided:** The Court stopped short of directly deciding if Article 36 creates individual rights enforceable in domestic courts. "...[W]e thus assume, without deciding, that Article 36 grants foreign nationals 'an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'"¹⁵
- **No Fourth Amendment Suppression Claim:** Suppression of evidence via the exclusionary rule is not an appropriate remedy for an Article 36 violation for failure to notify.¹⁶ A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.¹⁷
- **No Stand-Alone Sixth Amendment Ineffective Assistance of Counsel Claim:** An ineffective assistance claim cannot be based on the VCCR alone: "...[A]n attorney's lack of knowledge does not excuse the defendant's default, unless the attorney's overall representation falls below what is required by the Sixth Amendment."¹⁸

Neither the Ninth Circuit, nor any Washington Court, has issued rulings on Article 36 claims subsequent to the *Sanchez-Llamas* and *Medellin* decisions.

9.6 DO NONCITIZENS HAVE THE RIGHT TO NOT DISCLOSE CITIZENSHIP STATUS?

Below is a brief summary of the rights of noncitizens to not disclose citizenship or immigration status information in the context of their criminal proceedings. The information in Chapter Three outlines in more detail the right of noncitizens to not disclose their citizenship or immigration status and the importance of having the court recognize these rights in the course of conducting these proceedings. As a practical matter, in light of expanded immigration

¹² *U.S. v Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000).

¹³ *Sanchez-Llamas v. Or.*, 548 U.S. 331 (2006).

¹⁴ *Medellin v. Texas*, 552 U.S. 491 (2008) (also referred to as *Medellin II*).

¹⁵ *Id.* at 506 n.4.

¹⁶ *Sanchez-Llamas*, 548 U.S. at 350.

¹⁷ *Id.*

¹⁸ *Sanchez-Llamas* at 357 n.6.

enforcement efforts, inquiries by the court or prosecutor in open court risk chilling the desire to actually seek consular consultation.

- **Washington State Law Prohibits Requiring a Person to Identify His Immigration Status**

Washington State's statute on potential immigration consequences requires that defendants be told that a guilty plea may have potential immigration consequences, but also unambiguously prohibits requiring that *any* defendant "...at the time of the plea... be required to disclose his or her legal status to the court."¹⁹

- **Noncitizen Defendants Have a Fifth Amendment Right to Not Disclose Their Legal Status²⁰**

The Fifth Amendment applies to non-citizens, even if they are undocumented.²¹ The privilege against self-incrimination applies at all times, not just after arrest.²² It applies in any proceeding: civil or criminal, administrative or judicial, investigatory or adjudicatory.²³ Its protections continue even through sentencing.²⁴ The privilege extends to disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt can be established.²⁵ Moreover, that link may be provided not simply by use of the response itself as evidence,²⁶ but also by its use as an investigatory lead to other evidence that could lend support to a prosecution.²⁷

Numerous federal crimes contain either nationality or current immigration status as elements of the offense. Given these possibilities of criminal exposure, the threat that this privilege protects against is "real and appreciable." As such, a non-citizen has the right to invoke the Fifth Amendment and may refuse to answer any questions about his/her alienage, nationality or citizenship posed by prosecutors or judges in open court.

¹⁹ RCW §10.40.200(1) (1983).

²⁰ Wash. Const. art. I, § 9; *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630, 634 (1971) (The "Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution.").

²¹ "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

²² The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976).

²³ *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

²⁴ *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

²⁵ *Kastigar*, 406 U.S. at 469.

²⁶ *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

²⁷ See *Albertson v. Subversive Activities Ctrl. Bd.*, 382 U.S. 70, 78 (1965) (investigatory leads are sufficient); *Kastigar*, 406 U.S. at 444.