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Note

Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities

Gregory Dean Gisvold

The possibility of arrest and imprisonment in a foreign jail is perhaps the worst nightmare of the international traveller.\(^1\) Joseph Stanley Faulder, a Canadian citizen working in Texas, faced this frightening situation during the late 1970s when Texas authorities arrested Faulder and charged him with the murder of a prominent local citizen.\(^2\) Faulder’s unique physical and mental characteristics further complicated the daunting task of protecting himself within a foreign legal system: Faulder suffered from organic brain damage.\(^3\) A Texas court convicted

\(^1\) "Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar, especially since they may be unable to converse in the language of the detaining state." LUIK T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991) [hereinafter LEE, CONSULAR LAW]; see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 32-34 (1990) (citing RICHARD D. ATKINS & ROBERT L. PISANI, THE HASSLE OF YOUR LIFE: A HANDBOOK FOR THE FRIENDS AND FAMILIES OF AMERICANS IMPRISONED ABROAD 4-5, 10-12 (1982)); see also Mark A. Tarasiewicz, Lawyer Helps Troubled Americans Abroad, LEGAL INTELLIGENCER, May 18, 1993, at 1 (offering examples of legal help available to United States citizens imprisoned abroad). See generally U.S. Citizens Detained in Foreign Jails on Drug Related Charges: Hearing before the Sub-comm. on Foreign Assistance of the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 39 (1977) (describing some foreign penal and judicial systems as systems “Americans would not tolerate at home”).


\(^3\) Joseph Stanley Faulder grew up in Alberta, Canada, the youngest of three children in a middle class family. Applicant’s Amended Application for Writ of Habeas Corpus at 5, Ex Parte Faulder, (No. 10,740) (Tex. Crim. App. 1992). Faulder suffered from both significant organic brain damage, stemming from a childhood accident, and alcoholism. \(\text{id.} \) at 5-7. Despite these setbacks, Faulder married and had two daughters. \(\text{id.} \) at 7. During his seven-year marriage, he lived and worked in British Columbia. \(\text{id.} \) In 1970, Faulder’s mar-
Faulder and sentenced him to death.4

Faulder would likely have presented a stronger defense at his trial5 had he enjoyed the counsel of Canadian consular representatives stationed in the United States.6 The inaction of marriage dissolved and he moved away from the town where the couple had lived. Id. He left Canada in 1973 and traveled to the United States. Id. at 8.

Although the local authorities knew of Faulder's foreign citizenship at the time of his arrest and trial, they made no effort to notify his consulate of his detention. See Letters from the Texas Attorney General's Office to Canadian law enforcement agencies (1976-93) (on file with the University of Minnesota Law Review) [hereinafter Texas Attorney General's letters]. Additionally, they did not inform Faulder of his right to seek consular protection from Canadian representatives. Id. The Texas officials did contact the criminal justice organs of the Canadian government, however, to learn whether Faulder had any criminal or penal record in Canada. Id.

4. Faulder, 611 S.W.2d at 630.

5. Faulder's attorney could have obtained substantial evidence located only in Canada, including background information and favorable testimony from Faulder's family. Applicant's Amended Application for Writ of Habeas Corpus, supra note 3, at 14-15, 18. This evidence could only have surfaced if either Faulder's attorney recognized the importance of Faulder's citizenship or the Canadian consulate knew of Faulder's detention and cooperated with the defense attorney.

Mitigating evidence is of paramount importance to a successful defense in a capital trial. In Texas, organic brain damage, alcoholism, and the supportive testimony of relatives may all serve as mitigating factors for jury consideration in a capital trial. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 318-19 (1989) (stating that organic brain damage deserves special jury instruction); Lackey v. State, 819 S.W.2d 111, 129 (Tex. Crim. App. 1991) (opinion on rehearing) (finding alcoholism to be a mitigating factor); Ex Parte Baldree, 810 S.W.2d 213, 216-217 (Tex. Crim. App. 1991) (en banc) (stating that evidence of a positive family background reflects "his character and bears upon his propensity, or lack thereof, for committing future violent acts"). For almost twenty years, Faulder's family believed that he had died. Upon learning of his incarceration, one of Faulder's daughters traveled to Texas to testify at an evidentiary hearing. Rick Mofina, Family Awaits Father's Fate, CALGARY HERALD, July 12, 1992, at A3.

6. The Vienna Convention on Consular Relations defines consul as "any person . . . entrusted . . . with the exercise of consular functions." Vienna Convention on Consular Relations, Apr. 24, 1963, art. 1(d), 21 U.S.T. 77, 80, 596 U.N.T.S. 261, 264 [hereinafter Vienna Consular Convention]. One cannot easily compile a comprehensive listing of consular duties because they vary by situation. Lee, CONSULAR LAW, supra note 1, at 115. Among other functions, consular representatives help facilitate legal relationships between the sending and receiving States. Id. at 231-94. (For clarity, this Note will, except in quotations, use "States" to denote nation-states and "states" to denote members of the United States of America.)

Historically, consular representatives attempted to facilitate international trade, a duty that remains central to a consul's mission. Id. at 189-99, 503-43; see also infra notes 26, 37 and accompanying text (discussing consular duties). Consular representatives function as the first step in travel and immigration procedures, id. at 200-30, and provide essential aid in refugee matters. Id. at
Texas officials, however, foreclosed options otherwise available to aliens\(^7\) convicted of crimes in the United States.\(^8\) Nonethe-

352-65. The assistance denied Faulder, however, represents one of the foremost consular activities: the protection of fellow nationals. *Id.* at 124-88; *see also infra* notes 12-16 and accompanying text (describing and providing examples of the consular protective functions).

The Canadian government considers “providing assistance to Canadians abroad ... one of the important tasks carried out by consular officials.” Brief for the Canadian Government as *Amicus Curiae* in Support of Petitioner’s Request for Issuance of Writ of *Habeas Corpus* at 6, *Faulder v. Collins*, (Civ. 6:92CV755) (E.D. Tex. 1993) [hereinafter Canadian Amicus Brief]. To help a Canadian citizen detained or imprisoned abroad, a Canadian consul

WILL notify [the family] of the arrest or detention of a relative if requested by the person detained;

WILL visit or maintain contact with the prisoner;

WILL attempt to obtain case-related information to the extent that this cannot be obtained directly by the prisoner (or the prisoner’s representative) and provided the prisoner so requests; WILL provide available information on such matters as the local judicial and prison systems, approximate time requirements for court action, typical sentences in relation to the alleged offense, bail provisions, transfer of offender procedures (if applicable) and methods of transferring funds

*Id.* at 7 (citing 11 CONSULAR MANUAL OF THE DEPARTMENT OF EXTERNAL AFFAIRS AND INTERNATIONAL TRADE OF CANADA annex C, ch. 3).

7. International law defines “alien” as someone in a country not his or her own. *See James R. Fox, Dictionary of International and Comparative Law 17* (1992); *David Weissbrodt, Immigration Law and Procedure in a Nutshell 17* (3d ed. 1992) [hereinafter Weissbrodt, Nutshell]. The United States Congress defines an alien as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (1988). For legal purposes, four classes of aliens exist: those seeking entry to the United States, those admitted as immigrants or as permanent resident aliens, those admitted as non-immigrants or temporary visitors, and those living in the United States as undocumented or illegal aliens. Weissbrodt, Nutshell, *supra*, at 351. Most legal protections for aliens extend to resident aliens, who most closely resemble citizens. *Id.* at 352. Resident aliens live permanently in the United States, pay taxes, are subject to military service, and are part of their communities. *Id.*

A “citizen” belongs to the political community in which he or she usually resides. The citizen owes this community a duty of continuous allegiance. *See United States v. Cruikshank*, 92 U.S. 542 (1875). Citizens in the United States have the right to vote and hold office, and cannot be expelled from or denied the right to enter the country. *U.S. Const.* amends. XIV, § 2, XV, XVI, XXIV and XXVI (voting); *id.* art. I, § 3, art. II, § 1 (holding office). Moreover, the constitution specifically provides certain exclusive rights to citizens as benefitting from certain rights. *U.S. Const.*, art. IV, § 2; *id.* amend. XIV, § 1. Although both citizens and aliens may serve in the military, only citizens may serve on a jury. 28 U.S.C. § 1865 (b)(1) (1988) (prohibiting aliens from serving on juries); *In Re Griffiths*, 413 U.S. 717, 727 n.18 (1973) (noting that aliens may serve in military and must take an oath).

In contrast, an alien owes a duty of continuous allegiance to a nation different from the one in which he is located. Furthermore, an alien may not enjoy the same rights and privileges as a citizen.

8. One common long-term solution for persons imprisoned in foreign jails
less, the Texas Court of Criminal Appeals recently held that the failure of Texas authorities to accord Faulder his right to consular protection did not require a new trial. Faulder's situation implicates not only a serious issue of United States compliance with international law, but also an important question of federalism; namely, the need for state and municipal governments to alter their arrest practices regarding foreign nationals to help the federal government comply with a treaty.

The inherent unfamiliarity of a foreign legal system provides little sense of security to visiting aliens. Nonetheless, tourists continue to travel, confident in the knowledge that their governments station fellow citizens as consuls in countries around the world. Protecting their nationals from the perils of foreign legal systems represents one of the foremost duties of consular representatives. The consul's protective function is the use of prisoner transfer treaties. These treaties enable arresting States to return alien prisoners to their home States to serve out their sentence after trial. See M. Cherif Bassiouni, Perspectives on the Transfer of Prisoners Between the United States and Other Countries, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 271 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987). See generally Pleifer v. United States Bureau of Prisons, 468 F. Supp. 920 (S.D. Cal. 1979), aff'd 615 F.2d 873 (1980), cert. denied 447 U.S. 908 (1980) (holding that the prisoner may serve sentence in U.S. prison for crimes committed in Mexico). The United States and Canada have enjoyed a viable prisoner transfer treaty relationship since 1978. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, U.S.-Can., 30 U.S.T. 6263, (entered into force July 19, 1978). As Faulder never had the opportunity to request that the appropriate Canadian authorities be notified of his arrest, no one in Canada, government official or family member, could suggest an alternative to the death penalty.


10. See supra note 6 and accompanying text (describing the functions and duties of consuls).

11. Consular authorities may differ from diplomatic authorities. Lee, Consular Law, supra note 1, at 72. Diplomatic missions cost a great deal of money and do not exist everywhere. Where a State has not established a formal diplomatic mission, it will often choose to conduct diplomatic relations through consular posts. Id. Consular posts also do not exist everywhere, and sometimes States may share consular responsibility. See, e.g., id. at 70-71 (stating that Canada, France, Federal Republic of Germany, Italy, Spain, and United States share staffing of a consular post in Oaxaca, Mexico). See generally id. at 593-604 (describing general differences between consular and diplomatic functions); U.S. Dep't of State G.P.O. No. 1822 AMERICAN CONSULAR SERVICE 3 [hereinafter AMERICAN CONSULAR SERVICE] (same).

12. The boundaries of this protective function are not easily defined. At its most basic, it is the duty of consuls to visit arrested foreign nationals and to
corporates a wide variety of activities, including: observing trials, attending interrogations, visiting detainees to explain the foreign legal system's relevant aspects, or notifying a detainee's family of his or her arrest. Aliens in the United States, like Faulder, rarely receive these basic consular services. State and local law enforcement officials, unfamiliar with inform them of their predicament. Lee, Consular Law, supra note 1, at 124-27. Perhaps the most important aspect of this duty is that the consul, a fellow national of the sending State who speaks the same language as the arrested national, represents familiarity. Id. at 145 ("The consul's presence may also help assuage the distress of detained nationals."); see also infra notes 13-16 (detailing different aspects of the consular protective function). See generally Bureau of Consular Affairs, U.S. Dept. of State, Pub. No. 9782, U.S. Consuls Help Americans Abroad (1980) (describing some of the protective activities of United States consular officers).

This protective function of consuls has a distinguished history. It existed in almost every consular treaty concluded prior to the Vienna Consular Convention. Lee, Consular Law, supra note 1, at 128. The Vienna Consular Convention, however, altered the right of consular protection from a longstanding practice of "international courtesy" to one of right. Id. at 138. See generally Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad (1915) (offering various descriptions of the importance of diplomatic or consular protection); B. Sen, A Diplomat's Handbook of International Law and Practice (1965) (same).

13. In early 1984, Nigerian authorities arrested Marie McBroom, an American businesswoman, in the capital city of Lagos. Obafemi Oredein, UPI, Feb. 27, 1985, available in LEXIS, Nexis Library, UPI File. Five months after imprisoning her, Nigerian authorities charged her with illegally dealing in oil and gasoline, an offense punishable by death. Id. McBroom's trial took place in early 1985. Id. American consular personnel attended each day of the trial to monitor the case. Id. The trial court acquitted McBroom and consular officials sought to expedite her release. Id.

14. In 1992, Chinese officers searched the Beijing office of Lena H. Sun, a journalist with the Washington Post. Lena H. Sun, Casualties of a Paper War in China; Every Day Citizens Are Arrested; This Time, They Were My Friends, Wash. Post, July 25, 1993, at C1. They also interrogated her for three hours. Id. During the entire search and interrogation, U.S. embassy officials waited outside the door. Id. The Chinese authorities did not allow the U.S. officials inside. Id. Sun, however, shouted in English all the questions which the Chinese authorities asked her loudly enough for the embassy officials to hear. Id.

15. Canadian Amicus Brief, supra note 6, at 7; Lee, Consular Law, supra note 1, at 166 (citing 7 Foreign Affairs Manual § 413.4 (1982)).

16. This list is not exhaustive as functions vary with the circumstances. See American Consular Service, supra note 11, at 5-6 (listing U.S. Department of State guidelines regarding consular services and protective functions); Bureau of Consular Affairs, supra note 12 (same).

17. For example, when New York police arrested a prominent Malaysian businessman, they offered him neither the means nor the opportunity to notify his consular officials. Kalmullah Hassan, US Police Abused Me, Says KL Businessman, Straits Times, Mar. 17, 1993, at 12. If he had received the opportunity, this businessman likely possessed the knowledge or sophistication to demand his right to consular protection. Id.
the right to consular protection, neither inform aliens of their right to seek consular notification, nor inform the alien's consulate of the arrest.

Faulder's situation is far from unique. Each year governments detain or arrest thousands of foreign nationals, and these numbers promise to escalate as the frequency of international travel increases. At a time when the presence of aliens in the United States is not only increasing, but also generating significant debate, the relevant international legal principles applicable to those visiting a foreign country merit examination.


20. In 1990, after registering the first travel surplus ever, the United States Commerce Department's Travel and Tourism Administration predicted that 40 million foreign nationals would visit the United States that year. U.S. Registers a Travel Surplus in 1989 for First Time Ever, BUSINESS AMERICA, Feb. 12, 1990, at 36.


Despite the importance of consular representatives and the international legal principles governing their actions, however, legal literature fails to adequately address the subject.23

This Note considers state and municipal respect for rights arising under international law, specifically addressing whether states should adapt their law enforcement procedures to avoid impinging on federal primacy in the conduct of foreign affairs and comport with international practice. Part I of this Note introduces consular law, the salient aspects of the Vienna Convention on Consular Relations, related facets of international law, and the United States’ current treatment of foreign nationals detained or arrested here. In Part II, this Note demonstrates that this treatment fails to safeguard the international treaty-based rights of the foreign nationals, violates domestic legal principles, and detracts from United States foreign policy. Part III proposes a revised practice for law enforcement in the United States, which will observe the rights stemming from the Vienna Consular Convention. Part III also suggests a standard of review for claims alleging violations of foreign nationals’ consular rights. This Note concludes that only by consistently and scrupulously respecting the rights stemming from the Vienna Convention and the United States’ treaty obligations can the United States fulfill its international legal commitments.

23. Professor Luke Lee of American University’s Washington College of Law has published a book on consular law. LEE, CONSULAR LAW, supra note 1. He has also authored one of the very few books on the Vienna Consular Convention. LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS (1966) [hereinafter LEE, VIENNA CONVENTION]. Although other discussions of consular law exist, they typically offer little more than a cursory treatment of the subject in the context of a larger work. See, e.g., ARTHUR NUSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (2d ed. 1954); L. OPFENHEIM, OPFENHEIM’S INTERNATIONAL LAW (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1992); GRAHAM H. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE (2d ed. 1952). Because it presents a more robust and popular subject, most commentators choose to focus on diplomatic law, although some also offer a modest view of consular law. See, e.g., DIPLOMACY UNDER A FOREIGN FLAG: WHEN NATIONS BREAK RELATIONS (David D. Newsom ed., 1990); DIPLOMACY IN A DANGEROUS WORLD: PROTECTION FOR DIPLOMATS UNDER INTERNATIONAL LAW (Natalie Kaufman Hoven ed., 1986).

24. See supra note 6 and accompanying text (detailing consular duties).

25. This Note will use the words “detention” and “arrest” interchangeably. To arrest someone is to “deprive [that] person of his liberty by legal authority.” BLACK’S LAW DICTIONARY 109 (6th ed. 1990).
pulously honoring foreign nationals' Vienna Convention privileges can the United States expect other nations to reciprocate.

I. INTERNATIONAL LAW AND ALIENS ABROAD

A. Consular Law

"Consular relations" encompasses all relations arising between two States when the sending State establishes consular functions within the receiving State. Consuls function as agents of their respective States, residing abroad to expedite and safeguard their government's interests. The legal principles governing consular law comprise a subset of international law, informed by a significant historical tradition.

26. "Consul" has two meanings, one of rank and one of function. When denoting rank, one refers to the head of a consular post as the "Consul." More specifically, "consul" refers to the functions which the staff of the consular post perform. JULIUS I. PUENTE, THE FOREIGN CONSUL 11 (1987). A consul's duties encompass three broad categories: commercial, administrative, and civil. In her capacity as an agent for her government regarding commercial matters, a consul might ensure that the receiving State observed treaty provisions or oversee the organization of merchant vessels visiting the receiving State's ports. Id. at 57-59. As administrative representatives, consuls issue passports and visas, register the births or deaths of nationals from their home State in the receiving State, and deal with matters arising from contracts, wills, and deeds between nationals of both the sending and the receiving States. Id. at 67-69. The ability to celebrate marriages and act as a notary public represent two of the consul's civil duties. Id. at 70-74. The protective function is the consul's third primary civil duty. Id. at 76, 81.

27. 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 35 (1986). Only sovereign States may exercise consular relations. Id. States establish consular relations only with the consent of the receiving State. Id. Prior to the 1960s, States mandated specific written or oral bilateral agreements between them before undertaking any consular activity. Id. at 32. Any other practice would have violated the receiving State's sovereignty. Id.

These numerous bilateral treaties often conflicted. See LEE, CONSULAR LAW, supra note 1, at 18, 646-57. In response to this proliferation and the conflicting nature of bilateral treaties, several scholars attempted to promulgate draft model codes on the legal position and function of consular representatives. Id. at 18. European and American scholars first attempted drafts between 1868 and 1890, however, they produced highly academic material. 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, supra, at 28 (describing the codes drafted by Bluntschli, Field, and Fiore). The International Law Association law produced more thorough codes in 1928 and 1932. Id.; see Draft Convention on Legal Position and Functions of Consuls, 26 AM. J. INT'L L. 189 (Supp. 1932) (summarizing the Harvard research of 1932, with comment).

28. 2 OPPENHEIM, supra note 23, § 535, at 1133; see supra note 26 and accompanying text (defining consul).

29. International law originates from several sources: customary international law (opinio juris), conventional international law (treaties), general principles of law, judicial decisions, and scholarly opinion. THOMAS BUERGENTHAL, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 22-28 (2d ed. 1990); see also Statute
consular law derives primarily from two major multilateral treaties, the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations. Together, these instruments establish internationally accepted boundaries within which nations conduct their diplomatic and consular efforts.

of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, T.S. No. 993, at 30 (offering the same list). Consular law contains aspects of diplomatic, political, commercial, maritime, and civil legal principles. See generally Puente, supra note 26, at 57-80 (detailing some of the duties of consuls and their domestic equivalents). Early consuls existed to facilitate international trade: a sense of security and confidence was extremely conducive to trade, travel, and residence abroad. See generally Nussbaum, supra note 23 (discussing the historical evolution of consular representatives); Stuart, supra note 23 (same).

At one time monarchs sent consuls abroad to facilitate trade and navigation. See Consular Law, supra note 1, at 3-5. During the Middle Ages, consuls exercised a judicial function, primarily arbitrating commercial disputes. See Oppenheim, supra note 23, § 534, at 1132. Eventually, because foreign merchants were subject to the civil and criminal jurisdiction of the State in which they lived, consular authority devolved into "a general supervision of the commerce and navigation of their home states, and to a kind of protection of the commercial interests of their countrymen." See generally Oppenheim, supra note 23, at 1132-33.

The United Nations defines "treaty" as a "generic term covering all forms of international agreement in writing concluded between states." United Nations Reports of the International Law Commission, 61 Am. J. Int'l L. 248, 287 (1967); see infra notes 45-47 and accompanying text (discussing accession, ratification and adherence to treaties).

Vienna Consular Convention, supra note 6.


The U.S. State Department noted that the "Vienna Convention on Consular Relations ... is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." See Consular Law, supra note 1, at 145 (citing State Department instructions directed to the U.S. Embassy in Syria concerning imprisoned U.S. citizens). The United States gave its advice and consent to the ratification of the Vienna Consular Convention on October 22, 1969. 115 Cong. Rec. 30979 (1969).

The development of international law has long encompassed consular principles. For a discussion of the integration of consuls and consular principles into international law, see Consular Law, supra note 1, at 5-17. As the concept of consular activity developed, an increasing number of nations negotiated consular treaties. See id. at Appendix I, 646-657 (listing modern consular treaties). It is possible, on the basis of the significant integration of consular and international law, to consider consular relations customary international law. An international custom is "a general practice accepted as law." Statute of the International Court of Justice, June 25, 1945, art. 38(1)(b), 59 Stat. 1055, T.S. No. 933. The "general and consistent practice of S[tates] which those States follow from a "sense of legal obligation" reflects customary international law. Restatement (Third) Foreign Relations Law of the United States § 102(2) (1987) [hereinafter Restatement].
The Vienna Consular Convention guarantees and defines consular rights, privileges, and duties among the signatory nations. After World War II, increased international recognition that consular law required codification initiated events which resulted in the Convention. The International Law Commission sent a draft to the United Nations, which, in 1963, convened the International Conference on Consular Relations in Vienna, Austria. This conference established the

35. The Vienna Consular Convention obligates signatory nations to accord consuls certain personal rights including the inviolability of consular officials; immunity from jurisdiction; exemption from taxation; and exemption from customs, duties, and inspection. See Vienna Consular Convention, supra note 6, arts. 21, 41-53; Lee, Consular Law, supra note 1, at 460-61. Sending States regard these rights as central to the ability of the consul to effectively perform his or her duties within the receiving State. Id. at 457. Thus, the Vienna Consular Convention obligates receiving States to “treat consular officers with due respect and . . . take all appropriate steps to prevent any attack on their person, freedom or dignity.” Vienna Consular Convention, supra note 6, art. 40.

36. Consuls and consular posts enjoy numerous privileges in the receiving state. These range from the basic, such as the ability to fly the flag of the home State over the consular premises, to the crucial, such as the inviolability of those premises. See Vienna Consular Convention, supra note 6, arts. 29, 31, 21.

37. The duties of a consul vary tremendously. Article 5 of the Vienna Consular Convention states that consular duties include: protecting the interests of the sending State; furthering commercial, economic, cultural, and scientific relations between the sending and receiving States; issuing passports and other travel documents; performing civil functions, such as acting as a notary; safeguarding the interests of minors or persons with physical or mental disabilities who are nationals of the home State; obtaining representation for nationals of the home State in the receiving State; transmitting judicial or extra-judicial letters (such as letters rogatory) and documents; supervising vessels of all kinds and extending assistance to their crews; and other similar functions. Vienna Consular Convention, supra note 6, art. 5, 21; see also supra note 26 and accompanying text (defining consuls).


39. Lee, Consular Law, supra note 1, at 23. For a detailed description and analysis of the formative process of the Vienna Consular Convention, see generally Lee, Vienna Convention, supra note 23.


The consular conference took place from March 4 to April 22, 1963. A total of 92 states attended, 11 more than in the 1961 Conference. See Final Act,
current Convention to which over 144 countries have become parties.\textsuperscript{42}

1. The Formation of Treaties

A long process of consensus building precedes the emergence of any multilateral treaty.\textsuperscript{43} The Vienna Consular Convention officially began with a resolution of the United Nations' General Assembly which subsequently led to the treaty drafting conference.\textsuperscript{44} Once drafted, a treaty must become binding to effectuate its goal. Although a variety of means exist, treaties generally “enter into force”\textsuperscript{45} through either ratification\textsuperscript{46} or ac-
cession. Once a major multilateral treaty such as the Vienna Consular Convention has been in effect for a certain length of time, many States will consider it customary international law. When this happens, participating States will expect even States that have not ratified, signed, or acceded to abide by the treaty obligations.

2. The Duty to Protect Fellow Nationals

Article 36 of the Vienna Consular Convention states inter alia:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

47. Accession is a "process of becoming a party to, or legally bound by a treaty without formal action, e.g., ratification and without substantial reservation." Fox, supra note 7, at 4. Four categories of States may adhere to the Vienna Consular Convention: member States of the United Nations, member States of any of the specialized agencies, parties to the Statute of the International Court of Justice, and any other States invited by the General Assembly to accede to the Convention. Vienna Consular Convention, supra note 6, arts. 74, 76; Lee, Consular Law, supra note 1, at 637. It does not matter how a State becomes a party to a treaty; once it does, the effect is the same. Vienna Treaty Convention, supra note 43, art. 2(b).

48. See supra note 34 and accompanying text (discussing the Vienna Consular Convention as customary international law).

(a) Consular officials 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 said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph . . . .

Protecting the nationals of his or her sending State is one of a consul's foremost duties. Aliens are subject to the territorial

50. Vienna Consular Convention, supra note 6, (emphasis added). The text of the International Law Commission Draft Convention contained a version of Article 36 which demanded without qualification that arresting authorities inform the appropriate consulate each and every time they arrested a foreign national. Lee, VIENNA CONVENTION, supra note 23, at 109. Many States, however, were unwilling to accept such a principle. See 1 United Nations Conference on Consular Relations: Official Records, at 340, U.N. Doc. A/Conf.25/16 (1963) [hereinafter Consular Relations Off. Rec.] (statement of the Philippine delegation that when an alien entered a foreign country, he accepted the jurisdiction of its laws). Some States strongly contested the very existence of Article 36. Lee, VIENNA CONVENTION, supra note 23, at 107. The debate raised such questions as whether states would respect the requests of arrested individuals who did not wish to involve their consulates and whether the administrative burden of the measure would be too large. 1 Consular Relations Off. Rec., supra, at 35-37, 331-32, 336-37 (statements of the Australian, Thai, Canadian, Japanese, United Arab Republic, West Germany, Italian, Yugoslavian, Philippine, New Zealand, Malay, U.S.S.R., United States, Venezuelan, Vietnamese and Tunisian delegations). The Soviet delegation expressed its concern as to how, on a practical level, the Convention could enforce the rights of States to protect their nationals. See id. at 37 (statement of the Soviet delegation). After much debate and almost at the last minute, the group adopted the present text of Article 36. Lee, VIENNA CONVENTION, supra note 23, at 111-13. Pursuant to an amendment from the British delegation, the group also added the requirement that the competent authorities inform the national of his rights under Article 36 immediately upon arrest. 1 Consular Relations Off. Rec., supra, at 87.

51. In 1888, one distinguished commentator stated that it is "a consul's duty to see that his nationals' rights are respected in a foreign land . . . ." Lee, CONSULAR LAW, supra note 1, at 124 (quoting G.H. Stuart, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 372 (2d ed. 1955) (translating Paul Louis Ernest Fradier-Fodéré, 4 TRAITÉ DE DROIT INTERNATIONAL PUBLIC 555 (1888)). In 1936, the United States noted that the consul's duty to protect is nonderogable. Id. at 137 (citing communications between the then-acting Secretary of State and then Ambassador to Peru). The Vienna Diplomatic Convention declares that the consular protective function "consists inter alia in . . . protecting . . . nationals [of the sending state]." Vienna Diplomatic Convention, supra note 33.

The duty to notify a consular post of the detention of one of its nationals does not imply that consular authorities should behave passively in this protec-
jurisdiction of the State they visit. They also remain, however, under the protection of their home State. The home State's protective power does not imply that an alien merits greater protection than the domestic law affords the local citizenry. Instead, the treaty provisions that embody this protective function recognize that aliens face special difficulties in foreign legal systems which consular assistance can often ameliorate.

Many States instruct their consuls that a national's request for the State's protective efforts binds its consuls to render such aid. Generally, the initial choice to seek that protection lies with the arrested national. Given that no nation may abrogate its duty to inform consular authorities of a foreign national's arrest in certain circumstances, consular efforts within the United States will often depend on the cooperation of state and municipal law enforcement authorities. Absent such cooperation, disputes over whether an individual requested consular notification or whether authorities informed an individual of the right to seek notification are difficult to resolve.

tive role. Most countries authorize their consuls to approach the competent authorities in the receiving State for information and protest the derogation of their nationals' rights or a lack of information. Lee, Consular Law, supra note 1, at 134-35 (giving British requirements of its consuls as an example).

52. See, e.g., Vienna Consular Convention, supra note 6, art. 36 (providing for communication between consuls and their nationals imprisoned in foreign states); Vienna Diplomatic Convention, supra note 33, art. 3(1)(b) (providing for international protection of a national by his or her home State).

53. Lee, Consular Law, supra note 1, at 130.

54. Id. at 145. Hence, a person able to communicate with and for the alien should be available to facilitate the alien's interest in a speedy delivery of justice. Articles 55 and 56 of the United Nations Charter reinforce this position. Read together, these provisions imply a multilateral acceptance of an international legal obligation to "promote... universal respect for, and observance of human rights and fundamental freedoms for all...." U.N. Charter art. 55; see also Lee, Consular Law, supra note 1, at 131 (discussing articles 55 and 56 of the United Nations Charter).

55. Lee, Consular Law, supra note 1, at 124. Oppenheim, however, maintained that States have no obligation to assist their nationals abroad. 1 Oppenheim, supra note 28, § 410, at 934.

56. See supra note 50 and accompanying text (describing the plenary discussion at the Vienna Conference on Consular Relations and the objections to making consul notification obligatory).

57. See Consular Relations Off. Rec., supra note 50, at 337. The United States defended this duty during the drafting process. These circumstances included the arrest of a mentally impaired national, such as Faulder. See id.; see also Lee, Consular Law, supra note 1, at 139 (noting the United States' position that no country may disregard its obligations under certain circumstances to inform sending States of the arrest of their nationals).

58. The Indian delegation initially raised the question of the need for local cooperation. Consular Relations Off. Rec., supra note 50, at 339. The Norwe-
B. Consular Law in the United States: The Supremacy Clause

Any analysis of international law in United States courts must begin with the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.59

1. The Federal Foreign Affairs Powers

The Supremacy Clause mandates that the appropriate authorities treat international law as equal to domestic federal law.60 Only the doctrine of self-executing treaties limits the application of this principle to international treaties.61 Despite the

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59. U.S. CONST. art. VI, cl. 2 (emphasis added).
60. Id.; see, e.g., Whitney v. Robinson, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation.”). The United States Supreme Court construes treaties as contracts between sovereign nations. See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984); Geoffroy v. Riggs, 133 U.S. 258, 271 (1890); Foster v. Nelson, 27 U.S. (2 Pet.) 253, 314 (1828); see also THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES 109-11 (Philadelphia, Parrish, Dunning & Mears 1853) (“Treaties are legislative acts. A treaty is the law of the Land. It differs from other laws only as it must have the consent of a foreign nation, being but a contract with respect to that nation.”).

The Supreme Court, however, has held that when a treaty conflicts with an act of Congress, the congressional decision will prevail. See, e.g., The Head Money Cases, 112 U.S. 580, 599 (1884) (“The Constitution gives [a treaty] no superiority over an Act of Congress . . . .”); United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2nd Cir. 1945). Where Congress has not made its intent clear, courts will assume that Congress did not intend to require violation of international law. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

61. RESTATEMENT, supra note 34, § 111 and cmt. h. Chief Justice John Marshall first recognized the distinction between self-executing and non-self-executing treaties in 1828. Foster, 27 U.S. (2 Pet.) at 314 (“When the terms of a stipulation [in a treaty] import a contract . . . the treaty addresses itself to the political, not the judicial department . . . and the legislature must execute the contract, before it can become a rule for the courts.”). Self-executing treaties, unlike non-self-executing treaties, do not require congressional implementing legislation. See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199, 244 (1796) (finding treaty protecting British creditors to be self-executing). Today, Congress and the courts determine the self-executing nature of treaties on a case-by-case ba-
clause’s apparently direct language, however, both state and federal courts have long hesitated to enforce its mandate and to decide cases on the basis of international legal principles. Moreover, state and municipal officials and courts at all levels have long struggled to resolve problems implicating international law without intruding on federal foreign policy efforts. The power to conduct foreign affairs rests exclusively with the federal government. States must abide by federal foreign policy measures, even when they encroach on areas in which the state would otherwise have concurrent authority to legislate.

sis. See Restatement, supra note 34, § 314 cmt. d; see also supra note 49 (noting the self-executing nature of the Vienna Consular Convention).

62. See Jonathan I. Charney, Judicial Deference In Foreign Affairs, 83 AM. J. INT’L L. 805 (1989) (summarizing the difficulties involved in judicial deference or abstention in cases involving international law).

63. See, e.g., Miller v. Municipal Court, 142 P.2d 297, 311 (Cal. 1943) (examining the relationship between the national government and the state governments regarding principles of international law); People v. Leary, 115 Cal. Rptr. 85 (Cal. Ct. App. 1974) (considering whether the violation of international law in the seizure of a fugitive on foreign soil invalidates the state court’s jurisdiction); Petroleos Mexicanos v. Paxson, 786 S.W.2d 97, 97-99 (Tex. Ct. App. 1990) (considering the immunity of a foreign nation in state court for claims arising out of commercial activity).

64. See, e.g., United States v. Pink, 315 U.S. 203, 233 (1942); Hines v. Davidowitz, 312 U.S. 52, 63 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). Some historical authority suggests that the Founders intended the foreign affairs powers to be the vocation of the federal government. For a detailed discussion of this historical authority, see LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 18-43 (1990); see also Curtiss-Wright, 299 U.S. 304. The text of the Constitution, which precisely denies certain powers to the states, bolsters this assertion. States may not, for instance, enter into alliances with foreign States distinct from those entered into by the federal government. U.S. CONST. art. I, § 10. Only the federal government can regulate in certain areas which affect or concern international affairs, namely commerce among nations and immigration. Id. art. I, § 8, cl. 3-4. In addition, the ability to conclude treaties, belongs only to organs of the federal government, namely the President and the Senate. Id. art. II, § 2; see Curtiss-Wright, 299 U.S. at 319 (quoting with approval Chief Justice John Marshall’s statement as a member of Congress that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”). Finally, states must obtain congressional consent before they may enter into an international agreement, assess charges on imports or exports, keep military forces, or engage in a war. U.S. CONST. art. I, § 10, cl. 2-3.

65. See, e.g., Missouri v. Holland, 252 U.S. 416 (1920); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796). Various state courts have also recognized this potentially conflicting overlap of state and federal authority. See, e.g., K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm., 381 A.2d 774, 778 (N.J. 1977) (holding that New Jersey “buy American” provisions did not impermissibly interfere with the federal government’s conduct of foreign affairs); In re Kish, 246 A.2d 1, 8 (N.J. 1968) (examining whether state law governing inheritance of money or property by foreign nationals infringed upon the
With regard to the right to consular protection, the federal government has exercised the foreign affairs power and displaced a measure of traditional state autonomy in enforcing its substantive law.66

2. Individuals in International Law and Treaty-Based Rights

The Supremacy Clause expressly declares that international treaties bind the states to the same extent that they bind the federal government.67 Historically, courts interpreted the Supremacy Clause to deny individuals standing to press claims under such treaties.68 This traditional view holds that individu-
als are the objects, rather than the subjects, of international law. Recently, however, the notion that treaties create individually enforceable rights has gained credence. Although scholars continue to debate this question, the former view is currently in decline and the view that individuals comprise international law's proper subjects has grown in prominence.

Correspondingly, courts in the United States disagree about

F.2d 1249, 1261 (5th Cir. 1988) (same); United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (same).

In United States v. Vertigo-Urquidez, the Ninth Circuit ruled that when a nation protests a treaty violation which harms individual citizens of that nation, the individuals gain "derivative standing" to protest the violation in United States courts. 939 F.2d 1341, 1356 (9th Cir. 1991). In a related case, United States v. Alvarez-Machain, however, the Supreme Court stated that "a court must enforce [a self-executing treaty] on behalf of an individual." 112 S. Ct. 2188, 2195 (1992).

69. Under a traditional conception of international law, States alone may claim the benefits of international legal precepts. This approach stems from traditional views on the absolute nature of state sovereignty. See MANUEL E. GARCA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 7 (1956). A subject of international law possesses an international legal persona; it possesses rights and duties and may operate on the same level as other subjects of international law. Usually, States comprise the sole subjects of international law and, although individuals may be beneficiaries of international law, it has not historically applied to them. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 58-70 (4th ed. 1990); D.W. GREIG, INTERNATIONAL LAW 115-17 (2d ed. 1976).

70. One scholar has suggested that the Framers intended, through the Supremacy Clause, to enable individuals to enforce treaties in United States courts. Carlos M. Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 COLUM. L. REV. 1082, 1084 (1992). Professor Vázquez posited that the Supremacy Clause should "be read to entitle individuals in our courts to such remedies for treaty violations as would prevent or cure a violation by the United States of its international law obligations to the state of the individual's nationality." Id. at 1085-86. He theorized that if a treaty imposes judicially cognizable and enforceable obligations, and the individual has both standing to invoke enforcement and a right of action, then domestic courts must enforce treaties. Id. at 1084. He further posited that an assumption that the Supremacy Clause "was adopted in part to prevent or cure violations of international law by the United States before they gave rise to international friction" underpins this proposition. Id. at 1161-62.


73. See GARCA-MORA, supra note 69, at 13-14; GERHARD VON GLAHN, LAW AMONG NATIONS 185 (6th rev. ed. 1992); 1 Oppenheim, supra note 23, at 16.
the effect of international treaties on individual rights.⁷⁴ Although the courts have clearly established that treaties constitute part of United States domestic law,⁷⁵ they have encountered difficulty putting this principle into practice.⁷⁶ When interpreting a treaty,⁷⁷ a court could view the instrument as conveying to individuals only those rights and obligations specifically enumerated therein. Under this view, if the treaty fails to explicitly grant the individual the power to enforce its provisions, a court will hold that the individual lacks standing to contest denial or abrogation of those provisions.⁷⁸ Conversely, a court might take a broader view of the treaty. For instance, a court could view treaties as conveying comprehensive rights and obligations to the populace of signatory nations; in turn, individual enforcement of a particular provision would become a means of ensuring the nation’s compliance.

C. THE RIGHTS OF FOREIGN CITIZENS IN THE UNITED STATES

Among all domestic legal provisions in the United States immigration laws most directly affect aliens. Congress enjoys almost absolute power over immigration,⁷⁹ and courts have been

⁷⁴. See also supra note 68 and accompanying text (discussing when individuals have standing to enforce treaties).
⁷⁵. See supra note 60 and accompanying text (discussing the status of treaties in U.S. domestic law).
⁷⁶. See supra note 60 and accompanying text (discussing the construction of treaties by United States courts).
⁷⁸. See supra note 68 and accompanying text (collecting cases holding that a treaty must explicitly grant individual some enforcement power).
⁷⁹. Congress derives its power to regulate immigration from several sources. The Constitution gives broad powers to exclude from entry, expel after entry, and naturalize aliens. U.S. Const. art. I, § 8, cl. 4. The Supreme Court
extremely reluctant to disturb this power.\textsuperscript{80} Hence, as a practical matter, Congress can discriminate as it chooses when formulating immigration policy to effectuate foreign policy.\textsuperscript{81} Conversely, states possess no power over immigration\textsuperscript{82} or foreign policy.\textsuperscript{83} This state incapacity does not, however, guarantee that resident aliens\textsuperscript{84} will not face discriminatory state has traditionally found Congress's power to exclude and expel derives from the foreign commerce power as an incident of the national sovereignty.

In \textit{The Chinese Exclusion Case}, the Court noted that the federal power to exclude non-nationals was an incident of national sovereignty. 130 U.S. 581, 603-04 (1889). Reasoning that each government possessed the inherent authority to supervise matters of concern to the national public, the court considered immigration to be a matter of vital national security and concern. \textit{Id.} at 606; see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (distinquishing between delegated powers and inherent sovereign powers).

The federal government's complete power over foreign affairs constitutes another source of federal power over aliens. \textit{See, e.g.,} Fon Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); The Chinese Exclusion Case, 130 U.S. 581.


83. Zschernig v. Miller, 389 U.S. 429, 432 (1968). In \textit{Zschernig}, the Court struck down an Oregon probate law which mandated a judicial inquiry into the status of political rights in foreign countries before allowing the estates of United States citizens to pass to foreign heirs. \textit{Id.} Although the state regulation had only an indirect effect on foreign policy, the Court held that even indirect effects are the province of the federal government. \textit{Id.} at 433.

84. \textit{See supra} note 7 and accompanying text (defining "aliens").
States retain their other powers, such as general police powers, and may use these powers to discriminate against aliens in certain circumstances.\textsuperscript{86} The Constitution, however, imposes certain limits on state and congressional control over aliens. Although many important constitutional provisions refer to "citizens" instead of "persons,"\textsuperscript{87} the Constitution also guarantees to resident aliens many common protections available to citizens.\textsuperscript{88} The rights which aliens enjoy include the rights of free speech,\textsuperscript{89} freedom of speech, \textsuperscript{85} legislation.\textsuperscript{85} See De Canas v. Bica, 424 U.S. 351 (1976). "[This] Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [the federal immigration power]." \textit{Id.} at 355. In fact, state discrimination against aliens has an extensive history. \textit{See}, e.g., Clarke v. Deckebach, 274 U.S. 392 (1927) (limiting to citizens the ability to acquire a license to operate a pool hall); Heim v. McCall, 239 U.S. 175 (1915) (holding that states may bar aliens from public employment); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (holding that states may bar aliens from hunting and carrying firearms).


87. \textit{See}, e.g., U.S. CONST. art. iv, sec. 2 (entitling citizens of each state to the privileges and immunities of the several states); \textit{id.} amend. XIV, § 1 (defining citizens of the United States), \textit{id.} amend. XV (forbidding the abridgement of a citizen's right to vote because of race), \textit{id.} amend. XIX (forbidding the abridgement of a citizen's right to vote on the basis of sex). \textit{See supra} note 7 and accompanying text (defining "aliens").

88. An alien seems entitled to all of the provisions of the Bill of Rights not specifically reserved for citizens. \textit{See}, e.g., U.S. CONST., amend. I (providing no limitation on First Amendment freedoms); \textit{id.} amend. VI (limiting the Fifth Amendment only to "the accused"); \textit{cf. id.}, amend. XIV (referring to "citizens").


89. \textit{See} \textit{Schneider} v. \textit{New Jersey}, 308 U.S. 147 (1939); \textit{cf. Kleindienst} v. \textit{Mandel}, 408 U.S. 753 (1972) (aliens may be excluded for views held or opinions expressed).
religion, and various criminal procedural protections.90

II. RATIONALES FOR EFFECTIVE DOMESTIC ENFORCEMENT OF THE VIENNA CONSULAR CONVENTION

The issues surrounding individual treaty-based rights and the enforcement of consular treaty provisions present relatively new questions for United States courts and for state and municipal governments. State and municipal governments should effect changes in the procedures for dealing with an arrested foreign national for three reasons: the United States should encourage reciprocal action regarding its citizens arrested abroad, the federal government has promulgated a straightforward policy regarding the Vienna Consular Convention, and the judiciary has acknowledged this policy and enforced the provisions of the treaty.

A. Reciprocity

In the international relations context, reciprocity serves as the golden rule.91 It holds that if one State abides by the international rules to which it has agreed, then other States should abide as well.92 To the extent international law strives for stability and order, reciprocity demands mutual forbearance from deviation from the precepts of international law.93 Moreover, absent a police force to enforce international agreements, compliance becomes a function of the shared expectation that other States will abide by their promises. Each State must weigh the risk of noncompliance against the retaliatory effect of noncompliance by other States.

Article 36 of the Vienna Consular Convention recognizes a

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90. See supra note 88 and accompanying text (discussing rights that the Constitution guarantees to aliens).
91. The Golden Rule states that one should do unto others as you would have them do unto you. See Luke 6:31; Matthew 7:12; 16 ENCYCLOPEDIA BRITANNICA 656 (15th ed. 1989) (discussing Confucius); WEBSTER'S NEW INTERNATIONAL DICTIONARY 975 (3d ed. 1986).
92. Hilton v. Guyot provides a classic, albeit unfortunate, illustration of reciprocity. 159 U.S. 113 (1895). The Supreme Court denied private litigants enforcement of a French judgment in their favor because France would not enforce a foreign judgment. Id. at 227-28. The Supreme Court more recently has disapproved retaliatory judicial diplomacy of this kind. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (holding courts cannot scrutinize the legality of acts of foreign states because such scrutiny could interfere with the executive's conduct of foreign affairs).
broadly accepted right to consular protection and notification.\textsuperscript{94} Many nations, including the United States, regularly employ these principles on their citizens' behalf. According to the State Department, Article 36 obligations are "of the highest order and [should not be] dealt with lightly."\textsuperscript{95} The State Department demands that other nations respect Article 36's mandate. In 1975, for instance, Syrian security authorities detained two United States nationals.\textsuperscript{96} The Syrians neither allowed the two to notify the American embassy nor informed the embassy of their arrest.\textsuperscript{97} The Department told Syrian authorities that "if [Syrian] nationals were detained in the United States the appropriate Syrian offices would be promptly notified and allowed prompt access to those nationals."\textsuperscript{98} Four months later, U.S. officials visited the two detainees.\textsuperscript{99}

The U.S. government recognized early the importance of reciprocity,\textsuperscript{100} as the Department of State stressed in testimony before the Senate Foreign Relations Committee: "The United States Government has to consider the Vienna Convention on


\textsuperscript{95} ROVINE, \textit{supra} note 49, at 161. When submitting the Vienna Consular Convention to the President for his signature, William P. Rogers of the State Department wrote that the Convention "requires that authorities of the receiving state \textit{inform the} person detained of his right to have . . . his detention reported to the consular post concerned. . . .[and that] [i]f he so requests, the consular post \textit{shall} be notified without delay." William P. Rogers, U.S. Dept. of State, Letter of Submittal, Apr. 18, 1969, \textit{reprinted in} \textit{SEN. EXEC. REP.}, \textit{supra} note 49, at vi.

\textsuperscript{96} LEE, \textit{CONSULAR LAW}, \textit{supra} note 1, at 145.

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.} at 146.

\textsuperscript{100} \textit{Id.} at 145 (quoting United States government representations to Syria).
Consular Relations both from the viewpoint of the United States as sending State and from the viewpoint of the United States as receiving State."101 When presenting the Vienna Consular Convention to the Senate for ratification, Senator Fulbright, the Chairman of the Foreign Relations Committee, also recognized the importance of reciprocity in the observance of the Convention's terms.102

The reciprocity principle counsels that the United States should honor consular treaty rights for aliens arrested domestically. It is only a matter of time before a nation decides to retaliate for maltreatment of one of its nationals by the United States.103 Both the Canadian and Mexican governments submitted briefs amicus curiae in recent cases involving their nationals requesting that the United States respect individual defendants' international treaty-based rights.104 If the United States continues to insist that other States abide by the Vienna Consular Convention for the benefit of its citizenry arrested abroad, then compliance must begin at home.

B. Federal Occupation of the Field

The power of the federal executive is at its "maximum" in the area of consular protection because the Congress and the Executive agree in principle and, accordingly, act in tandem.105 After Senate ratification, the Executive, in the form of the Immigration and Naturalization Service and the Department of Justice, issued regulations implementing certain provisions of the Convention, including Article 36.106 These coordinated ac-

103. A recent incident involving a Mexican doctor kidnapped by the United States Drug Enforcement Administration provides a pertinent example of the negative reaction to the United States' disregard for applicable international principles. See Daniel Williams, U.S. and Mexico Plan Talks on Extradition; End to Abduction of Criminal Suspects Sought, WASH. POST, June 22, 1993, at A15. A second kidnapping incident provoked an "energetic protest" by Mexico. Mexico Protests To U.S. In New Kidnap Case, REUTERS, June 18, 1992.
104. Canadian Amicus Brief, supra note 6; Brief of Amicus Curiae, the Government of the United Mexican States, Supporting the Applicant, Ex Parte Guerre, (No. 359805) (Tex. Crim. App. 1993).
105. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
106. See supra note 66 and accompanying text (describing the INS and Department of Justice regulations).
tions indicate a federal occupation of the field regarding a treaty-based right to consular protection and thereby completely preempt the states from contrary action.

Because federal authority in international affairs approaches the absolute, states may not directly or indirectly violate a clear national policy in this area. The United States established a national foreign policy regarding consular protection when the President signed and the Senate ratified the Vienna Consular Convention. Moreover, each time the United States invokes the Vienna Consular Convention on behalf of one of its citizens, it demonstrates a firm policy of observing the Convention. States may not act in any manner that would aggravate relations between the United States and a foreign State. Even if there is no apparent contradiction between a state's actions and an international agreement, the state may not act in any manner that conflicts with such an agreement in practice. A state, thus, may not act so as to deny a foreign citizen his or her right to consular protection.

The issues surrounding the right to consular protection belong under federal control for several additional reasons. A state's limited constituency does not provide an appropriate

107. The courts have found that Congress has preempted state regulation when an "Act of Congress [touches] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (citations omitted).

108. See International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). ("A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal."); see also United States v. Curtiss-Wright Corp., 299 U.S. 304, 317 (1936) (noting that states have no power to negotiate with foreign countries).

109. See supra notes 62-65 and accompanying text (discussing federal primacy in foreign affairs).

110. See supra notes 64, 65 and 108 and accompanying text (describing federal preemption of state law).

111. See supra note 34 (discussing senate ratification of the Vienna Consular Convention).

112. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Court considered whether federal or state law ought to control the application of the "Act of State" doctrine, which commands every State to respect the sovereign acts of every other State, in a federal diversity case. Id. at 421. Having decided that the doctrine was "uniquely federal," the Court also noted that state courts were not "free to formulate their own rules" in this area because state rules would undermine the purposes of the doctrine. Id. at 424.

political context in which to make the required policy judgment regarding the treaty-based rights of aliens. Under the United States Constitution and the Vienna Treaty Convention, individual states may not make alliances with foreign powers nor negotiate or enter into treaties. As a result, states lack the international political experience to make policy judgments about aliens. The political arena of a state is the domestic affairs of state, not international relations.

A state may promulgate general policies that affect the treatment of aliens within its borders. A question arises, however, whether the state decision maker has access to the pertinent information necessary to make a considered decision regarding issues affecting aliens. Because states do not interact on the international level, they cannot adequately judge how their actions may affect the broader federal interests at stake. For instance, an individual state that arrests an East European national is unlikely to be aware that the United States consistently demands that the national's home State adhere to the Vienna Consular Convention when it arrests Americans there. Individual states are therefore ill-equipped to assess the consequences of their actions regarding the right to consular protection.

The consequences of states' policies regarding aliens within their borders may, therefore, adversely affect the entire nation. If a state arrests a foreign national and fails to accord her the appropriate choice of consular notification, the federal government ultimately bears the responsibility to the foreign power aggrieved by the state's actions. As a result, it is the federal efforts on behalf of Americans abroad that will likely suffer, not the state's efforts to punish the alien it arrested.

114. U.S. Const. art. I, § 10, cl. 1 (no state may enter into a treaty); Vienna Treaty Convention, supra note 43, art. 2 (a), (e), & (f) (defining treaties, contracting States and negotiating States).

115. See supra note 85-88 and accompanying text (discussing general state powers and aliens).

116. This is a simple example. A further example of a state's incapacity to deal with the foreign nationals it arrests occurred recently in Florida. Nature's Call Mistaken for Bomb Threat, Cum. Trn., Oct. 24, 1993, at C23. A German student spent nine months in jail for asking to use the bathroom on a plane. Id. Apparently, the inebriated student translated a German slang expression into English when making his request. Id. The slang expression sounded like a bomb threat to the airline officials. Id. A consular official might have ameliorated the misunderstanding before it wasted valuable court time.

117. See infra part III.C and accompanying text (regarding diplomatic notes addressed to the United States from Canada and Mexico regarding treatment of their nationals by state authorities).
C. Judicial Recognition

Some courts have recognized the treaty-based right to consular protection. The first significant example of an alien attempting to nullify legal proceedings against him because authorities initially denied him the right to consular protection occurred in Italy. In that case the Italian court ruled that consular assistance was merely "complementary" to other legal protections and, finding that the defendant had adequately defended himself, denied the appeal.

In contrast, United States courts have held that an individual may seek redress for the denial of rights derived from the Vienna Consular Convention. In *United States v. Calderon-Medina*, a 1979 case involving a Mexican national indicted for illegal reentry into the United States, the Ninth Circuit construed the INS regulation implementing Article 36 of the Vienna Consular Convention. The court specifically found that the INS intended the regulation to fulfill the United States' obligations under the Convention. The court employed a two-part test to determine whether the deportees had met their burden of demonstrating that the government's noncompliance with the regulation should invalidate the conviction. Under this test, the alien must first show that the regulation serves a purpose generally beneficial to the alien and, in addition, the alien must show that the violation prejudiced his interests protected by the regulation.

In the companion case of *Rangel-Gonzales*, the Ninth Circuit reversed a conviction because the defendant presented evidence that, had he known of his right to contact his consulate, he would have done so and that the consulate would then have rendered all possible assistance. Faced with such evidence,
the court held that the defendant had sufficiently demonstrated that the violation prejudiced his defense. The court held that only a showing of actual prejudice resulting from a violation of the regulation will merit reversal of a conviction.

Although most courts have yet to address this issue, the Ninth Circuit has taken the view that the right to consular protection is of considerable importance to aliens arrested within the United States. Judicial recognition of actual prejudice strongly supports the notion that states must respect a defendant’s rights under the Vienna Consular Convention. Calderon-Medina and Rangel-Gonzales offer a positive framework for judicial review of the denial of consular protection.

III. ENHANCING CONSULAR PROTECTION: A PROPOSAL

The participants of the Vienna Conference on Consular Relations did not expressly state that aliens would have the right to appeal the denial of their treaty-based rights. Instead, they sought to define the boundaries of consular activity, not the

126. The evidence included affidavits from the defendant that he would have sought notification and from the local Mexican consul that he would have rendered aid. Id.

127. Id. at 532-33.

128. To show actual prejudice, aliens must “demonstrate prejudice resulting from the INS regulation violations [that] . . . harmed the aliens’ interests in such a way as to affect potentially the outcome of their deportation proceedings.” Calderon-Medina, 591 F.2d at 532.

129. See Rangel-Gonzales, 617 F.2d at 532 (“The right established by the regulation and in this case by the treaty is a personal one.”).

130. During the drafting conference, the delegates were mostly concerned with the obligation of the receiving State to “permit unimpeded communication between consuls and nationals of the sending state, to inform consuls of the imprisonment or detention within their district of such nationals, and to allow consuls to visit them in prison, custody or detention.” Lee, Vienna Convention, supra note 23, at 107. The Italian delegation voiced concern that consuls would be implicitly prevented from performing their protective function unless notified of the arrest of their nationals. 1 Consular Relations Off. Rec., supra note 50, at 338. All the participants, however, seemed committed to the “right of every state to protect its nationals.” Lee, Vienna Convention, supra note 23, at 112-13.
ensuing domestic legal ramifications.\textsuperscript{131} They did intend to ensure that an arrested alien enjoyed the benefit of consular protection, if he or she so desired it.\textsuperscript{132} Nonetheless, the participants left it to the individual States to determine how best to enforce that right.\textsuperscript{133} The important international implications of domestic enforcement and the chance that a single state will disregard the right to consular protection demand a unified approach to enforcement in the United States. As the federal government has developed a clear and decisive approach to consular protection, states should follow this lead.

Any proposed effort to guarantee arrested aliens their Vienna Consular Convention rights must be sensitive to both the realities of law enforcement in the United States and the desires of the individual aliens involved in the process. This Note proposes that state and local authorities adopt a process of standard warnings to inform aliens of their right to consular protection.\textsuperscript{134} Such a system would protect both an alien's right to consular protection and his right not to seek such protection, if he wishes. Moreover, this Note asserts that for this right to be viable, aliens must be granted standing to enforce it against local authorities.

A. Notification of the Alien

Local authorities routinely determine the nationality of those they arrest\textsuperscript{135} to ascertain past criminal or penal histories, the existence of outstanding warrants, and the possible interest of other jurisdictions in the detainee.\textsuperscript{136} Thus, when implementing the notification requirement, law enforcement agencies need only expend a slight additional effort to notify the defendant,

\begin{itemize}
\item \textsuperscript{131} Lee, Vienna Convention, supra note 23, at 107 (describing the efforts made to retain Article 36 in the final document).
\item \textsuperscript{132} Vienna Consular Convention, supra note 6, art. 36(1)(b).
\item \textsuperscript{133} Article 36 contains no reference to domestic enforcement of its provisions. \textit{Id.} art. 36(2).
\item \textsuperscript{134} The authorities should give these warnings after arresting the alien and determining his or her nationality. Obviously, it would make no sense to require police officers to attempt to ascertain the nationality of every individual at the time of arrest. \textit{Cf.} Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Constitution requires police officers to inform arrestees of their constitutional rights before questioning).
\item \textsuperscript{135} See, e.g., Texas Attorney General's Letters, \textit{supra} note 4.
\item \textsuperscript{136} \textit{Id.} See generally James R.E. Younger, Investigating Problems Involving Foreign Nationals, in Transcontinental Crime: Investigative Responses (Harold E. Smith ed., 1989) (discussing mutual legal assistance treaties between the United States and Switzerland, Turkey, the Netherlands and Italy).
\end{itemize}
orally and in writing, in a language he understands, of his right to seek consular protection. If the alien so desires, the authorities should inform the appropriate consulate without delay.137 Under this Note's proposal, the detainee's refusal to seek consular protection would constitute waiver of his treaty-based rights.138

This proposal has the benefit of being simple and easy to implement. The United States State Department makes the information for training arresting officers and other relevant personnel in the Vienna Convention's requirements readily available.139 States may not object that the need for warnings to ensure the guarantee of consular protection is more properly a matter for the federal government. Because criminal law comprises an area of concurrent authority, federal primacy in the foreign affairs field does not prevent concurrent state regulation of alien criminal activity.140 Rather, states should follow federal guidance embodied in the regulations of the Immigration and Naturalization Service and the Department of Justice, which substantially comport with the requirements of the Vienna Consular Convention.141

Both detainees and local authorities would benefit from this routine practice. Detainees would be in a better position to make informed decisions regarding their defense. State and municipal authorities could seek the assistance of consular authorities in learning about the detainee's criminal and penal history and relevant physical and mental characteristics.142

137. See Lee, Consular Law, supra note 1, at 143. According to the State Department, the Vienna Conference requires notification "without delay... It is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days." Rovine, supra note 49, at 161.

138. Of course, detainees could still obtain consular help later if they so desired. Consular representatives are bound by the instructions from their State to help protect nationals. See supra note 37 and accompanying text (describing consular duties). Therefore, if a defendant decided at a later date to seek consular protection, he or she need only ask his or her lawyer to contact the nearest consular office.

139. See, e.g., Bureau of Consular Affairs, supra note 12; Lee, Consular Law, supra note 1, at 164; Marian Nash Leigh, U.S. Dep't of State, Digest of United States Practice in International Law 360-76 (1980).

140. See supra part I.C (discussing general state powers and federal regulation of aliens).

141. See supra note 66 and accompanying text (describing federal regulations implementing Article 36).

142. See supra text accompanying note 136 (noting how law enforcement authorities routinely determine the nationalities of those individuals they detain).
B. Judicial Review

Any effort towards enforcing the right to consular protection will require judicial supervision. Although courts may be reluctant to apply international legal precepts, they do not hesitate to protect the rights of individual defendants against the law enforcement practices of the states. When a state has arrested an alien unfamiliar with a foreign legal system, the need for judicial weight to balance the interests involved assumes great importance. Judicial enforcement, however, requires an appropriate standard of review for claims of inadequate or nonexistent notification of the right to consular protection.

Courts should, in the first instance, act to ensure the adequate delivery of consular services by providing the alien with necessary information regarding consular protection when he or she appears at the preliminary hearing and arraignment. If, however, an alien receives inadequate notice and conviction results, then the alien would have grounds for and should appeal his conviction. The reviewing court should employ the two-part test the Ninth Circuit developed in Calderon-Medina. The first part of the test will almost always be met: any law or regulation codifying the principles of the Vienna Consular Convention serves to benefit the alien. In the second part of the test, the alien must demonstrate either the usefulness of consular aid or that the abrogation of the applicable law or regulation, such as the denial of the rights guaranteed by the Vienna Consular Convention, harmed him. Designed to specifically encompass the denial of the consular protection right, this simple and straightforward test provides the defendant with the ability to demonstrate that particular circumstances, such as his alienage, language disability, or lack of sufficient understanding of the legal proceedings against him, harmed his defense sufficiently to merit reversal.

The necessity of judicial review becomes clear with an examination of the current "system" for guaranteeing delivery of consular protection to aliens in the United States. Currently, no domestic procedure exists for redress of a denial of the right to


144. See supra part II.C (discussing judicial recognition of aliens rights under the Vienna Consular Convention and the Calderon-Medina test).

145. See supra notes 3, 5 and accompanying text (discussing Faulder's disabilities and their possible use at his trial).
consular protection. A formal protest by the home State yields the sole avenue of redress to an injured alien. This protest, however, involves a long and complicated process which would only add to the confusion and repetition congesting the courts in the United States. Individual enforcement of this treaty-based right would significantly reduce the need for the burdensome process of formal protest.

C. APPLICATION OF THIS PROPOSAL TO THE FAULDER CASE

Texas authorities never notified Faulder of his right to seek consular protection. Moreover, Faulder’s unique circumstances, caused by his mental deficiencies, reflect precisely the type of situation foreseen by the United States delegation to the Vienna Conference: namely, situations in which the detainee’s consulate should receive automatic notification of his arrest. Had Texas authorities notified the consulate, it would have visited Faulder and sought to help him understand the charges facing him. The consulate would also have endeavored to assist Faulder’s defense attorney in locating mitigating evidence in Canada. Perhaps most importantly, the consulate would have notified Faulder’s family of his plight and thereby avoided the fourteen years during which they believed Faulder was dead.

Had Faulder been able to seek consular notification in the first instance, significant travail would have been spared officials on both sides of the border. On May 1, 1992 the Canadian Embassy submitted Note 073 to the United States State Department, formally protesting the breach of the Vienna Convention. The State Department asked Texas to investigate, which it did, finding that the law enforcement officials had violated the Vienna Convention. Canada again expressed its disapproval by submitting an amicus curiae brief in support of Faulder’s federal appeal. This cumbersome procedure could have been ameliorated by a simple mechanism to notify arrested nationals of their options with regard to consular protection.

146. See supra notes 3, 5, 57 and accompanying text (discussing Faulder’s organic brain damage and the automatic nature of notification in the case of a mentally or physically handicapped person).
147. See supra note 5 and accompanying text (noting Faulder’s family’s concerns).
148. Canadian Amicus Brief, supra note 6, at 7. The Embassy sent a second note on July 15, 1992. Id.
149. Id.; see also Texas Attorney General’s Letters, supra note 3.
150. See Canadian Amicus Brief, supra note 6.
CONCLUSION

The rationales underpinning the right to seek consular protection demand that states should strictly observe the right. If state practice does not change, violations that threaten the reciprocal nature of consular relations will continue. Individual aliens must have a judicial remedy for the deprivation of their right to consular protection; the lack of enforceability could unjustifiably imperil Americans overseas and undermine the role of consular relations.

Currently, the United States is both a leading champion and violator of the right to consular protection. The United States must act to remedy this grave inconsistency. Justice cannot be equal where, simply as a result of a defendant's nationality and lack of familiarity with our legal precepts, the state denies him the occasion to fully participate in the judicial proceedings against him.