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A New Miranda For Foreign Nationals?

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NOTES

A New *Miranda* For Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of *Printz v. United States*

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I. INTRODUCTION

Consider the following hypothetical: Don Vore is arrested by local police following a bank robbery. Vore, a foreign national of Germany who speaks English, is advised of his *Miranda* rights. He waives these rights and subsequently confesses to armed robbery during a police interrogation. The confession is introduced at trial and Vore is sentenced to prison.

While Vore is in prison, his counsel brings a federal habeas corpus motion.[1] Vore argues that the local police, in obtaining his confession, violated his personal rights under the Vienna Convention on Consular Relations.[2] Vore argues that this confession should have been suppressed. Counsel for the state argues that the protections of the Vienna Convention on Consular Relations do not implicate concerns of fundamental fairness guaranteed by the United States Constitution. Rather, the state urges the court to view the Vienna Convention protections as special rights. In addition, the state, relying on *Printz v. United States*,[3] argues that the federal government lacks authority to impose the mandates of the Vienna Convention on local governments.

Vore urges the court to suppress the confession, arguing that suppression is the only way an alien's Vienna Convention rights can be protected from unlawful police actions. Further, he argues that local governments are bound to follow the terms of the Vienna Convention because of the federal government's constitutional power to enter into treaties with foreign governments. The state responds that even if the imposition of the treaty's affirmative obligations on local governments is constitutional, the treaty addresses interactions with foreign governments and does not create personal rights that Vore could enforce.

Noting that this case encompasses a conflict between an international treaty and domestic policy, the district court judge recesses to consider the legal implications of this conflict. How should a federal court wade its way through this quagmire in an attempt to give force to a federal treaty and at the same time apply the newly-minted federalism principles in *Printz*?

The above hypothetical illustrates the tension between the need of the federal government to direct foreign policy in a meaningful way and the tradition of federalism that allows the federal government and state governments to exercise concurrent authority.[4] Under the

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1. *See* 28 U.S.C. § 2254 (1994) (outlining a state prisoner's right to bring an action in federal court). A habeas corpus motion forces the state to justify its confinement of a state prisoner. The federal court on review will analyze this justification to decide whether the confinement violates the prisoner's rights under the United States Constitution. Thus, habeas corpus effectively moves a state crime into the federal arena. There are two different provisions to habeas corpus law. While 28 U.S.C. § 2254 provides remedies for state prisoners, prisoners who are in federal custody bring their actions under 28 U.S.C. § 2255 (1994).

2. Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, 500 U.N.T.S. 95 (entered into force with respect to the United States of America, Dec. 24, 1969) [hereinafter Vienna Convention].

3. 117 S. Ct. 2365 (1997).

4. *See Printz*, 117 S. Ct. at 2376 (noting that the United States Constitution creates a system of "dual sovereignty") (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).

U.S. Constitution, the federal government has vast powers, but some powers are exclusively reserved for the state governments.[5] In a situation, such as the hypothetical above, this division of power may create a conflict between a state government's right to exercise its reserved powers[6] and the power of the federal government to enter into treaties.

To what extent should the federal government attain the consent of the states before placing new obligations on them via federal treaty? This is an important issue in criminal law because of the potential effects on both the warnings that police would need to give aliens upon arrest and the ability of an alien to suppress evidence acquired in a manner contrary to international treaty. Additionally, the issue is likely to be one of increasing importance in non-criminal areas given the possibility, in the post-Cold War era, that treaties will deal less exclusively with international relations and more with domestic issues, historically the province of state governments.[7]

This Note will explore the conflict between federalism expressed in the U.S. Constitution and the demands that international treaties,

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5. *See id.* at 2376-77 ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' [that] is reflected throughout the Constitution's text . . . . [T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people." (citations omitted)). *See* United States v. Lopez, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring) ("[F]ederalism was the unique contribution of the Framers to political science and political theory . . . it was the insight of the Framers that freedom was enhanced by the creation of two governments.").

6. *See Lopez*, 514 U.S. at 552 (citing Federalist 45) (noting that the federal government is a government defined and limited powers). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, holding that the federal government lacked the authority to pass the Act despite the government's contention that it had such power under the Commerce Clause. *Id.* The Court's reassertion of federalist principles in *Lopez* came two years before the decision in *Printz* and was a departure from how the Court addressed the federalism principle just eleven years before. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court ruled that the limited powers of the Commerce Clause, allowing the federal government to regulate commerce among states, did not prohibit the federal government from applying federal overtime and minimum wage laws to state and local governments. 469 U.S. 528 (1984). The Court previously had held, in an effort to preserve federalist principles, that the federal government could not apply such provisions against state and local governments. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). Thus, in the period leading up to *Printz*, the Court pushed some limitations on the power of the federal government, then retreated eight years later by overturning *National League of Cities* in *Garcia*, and finally re-embraced federalism again in *Lopez*.

7. *Cf.* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1442 (1994) ("As the world gets smaller, it will become more difficult to separate the domestic and foreign spheres. Domestic regulation increasingly has an impact on the international sphere, just as international integration has important implications for domestic activities.").

entered into by the federal government, make on local governments. Part I will explain the current state of the issues addressed in the Note, including the Vienna Convention, and the relevant provisions relating to the arrests of foreign nationals. The Note will then examine whether, given that international treaties have been interpreted as providing rights and provisions that are only enforceable by countries, a private party, such as a foreign national, has the power to invoke the provisions in his defense when faced with a criminal action or a habeas corpus motion. Part II will explore the structure in the U.S. Constitution that divides powers between the federal and state governments, granting certain powers to state governments and imposing limits on the power of the federal government. It is this allocation of power that may pose an obstacle to a federal attempt to mandate state compliance with affirmative obligations under an international treaty such as the Vienna Convention.

The remainder of the Note will analyze the issues involved in determining whether a foreign national can rely on a federal court to apply the Vienna Convention against state governments to suppress evidence. Part III will analyze whether the federal government can impose duties on local governments through international treaties, such as the Vienna Convention on Consular Relations (Vienna Convention). Assuming that federal governments can impose these duties on local governments, Part IV will examine whether suppression of evidence would be a justifiable remedy for the violation of these duties.

II. REQUIREMENTS OF THE VIENNA CONVENTION THAT A PETITIONER MIGHT RAISE ON FEDERAL HABEAS CORPUS REVIEW

The Vienna Convention addresses what a member state must do when a foreign national is arrested within its jurisdiction. United States habeas corpus review is designed to protect individual rights under the United States Constitution and federal law. Before addressing the question of whether the provisions of the Vienna Convention can be raised on federal habeas corpus review and whether such action would conflict with federalist principles in the Constitution, it is important first to outline the provisions of the Vienna Convention, the scope of federal habeas corpus review, the question of whether treaty provisions create personal rights, and the constitutional relationship between the powers of federal and state governments.

A. *The Requirements of the Vienna Convention*

The Vienna Convention, entered into by the United States on November 24, 1969, was negotiated under the direction of the United Nations International Law Commission and it binds more than one hundred countries.[8] Before the Vienna Convention, the provisions addressing the protection of foreign nationals were contained in bilateral treaties[9] with individual countries.[10]

Article 36 of the Vienna Convention outlines several requirements governing the arrest of a foreign national.[11] First, the Vienna Convention requires that foreign nationals under arrest and their respective consulates be allowed to communicate with one another.[12] Second, the foreign national can require the host country to inform his foreign consulate of the arrest.[13] Third, the treaty requires a foreign national to be informed of his right to contact his consulate without delay.[14] Finally, consular officers can visit the foreign national and send his communications, which are to be delivered without delay.[15] The obligations of the Vienna Convention apply to all signatories.[16]

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8. *See* Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 384 (1997).

9. *See id.*

10. For an example of a bilateral treaty signed after the Vienna Convention, see Consular Relations Convention, Sept. 17, 1980, U.S.-P.R.C., art. 35 § 3, 33 U.S.T. 2973 (Treaty between the United States and China outlining provisions that require authorities to inform foreign nationals of the other country of their right to contact their consulate upon arrest).

11. *See* Vienna Convention, *supra* note 2, art. 36, 21 U.S.T. at 100 (outlining the relevant provisions).

12. *See id.*

13. *See id.*

14. *See id.* The foreign national in the hypothetical would allege that he was not informed by the local government of his ability to contact and communicate with his country's consulate.

15. *See id.*

16. *See id.* (requiring all member countries to carry out these obligations). This could be important in understanding the rationale behind the treaty. The treaty not only places obligations on the United States but serves to protect United States citizens abroad, since it binds other governments in their treatment of American citizens. This may be an important consideration for the analysis in this Note. If the United States government does not have the constitutional power to bind state governments to the obligations of the treaty, then other countries might avoid the provisions of the treaty on somewhat analogous grounds.

B. *The Role of Habeas Corpus Review in Protecting Individual Rights*

Under 28 U.S.C. § 2254, a prisoner held in the custody of a state government can bring a writ of habeas corpus in federal court, forcing the state to justify the prisoner's confinement.[17] To bring a habeas corpus motion, a prisoner must allege that he is being held in custody "in violation of the Constitution or laws or treaties of the United States."[18] If a federal court rules in favor of an individual making a habeas corpus motion, the court may either grant a retrial on certain issues,[19] or order the release of the prisoner.[20]

To be cognizable issues for a federal habeas corpus proceeding, any alleged violations of federal law and treaty must be of a serious magnitude.[21] In evaluating these allegations, habeas corpus reviews typically focus on procedural defects in the trial process, particularly in the gathering of evidence.[22] As a result, evidence obtained in a manner violative of a defendant's constitutional rights is excluded from trial.[23] The rationale behind this exclusionary rule is to enforce the police's obligation to respect the rights of citizens.[24] The federal courts are able to grant habeas corpus review because of the power the federal government holds under the U.S. Constitution to enforce federal constitutional rights against the states.[25] *Miranda v.*

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17. 28 U.S.C. § 2254. To bring a writ of habeas corpus, the prisoner must first exhaust all state remedies. *See* 28 U.S.C. § 2254(b).

18. 28 U.S.C. § 2254(a).

19. *See* Fisher v. Rose, 757 F.2d 789, 791-92 (6th Cir. 1985).

20. *See* Hilton v. Braunskill, 481 U.S. 770 (1987). The factors to consider in deciding whether to order a release include whether the prisoner is likely to succeed on the merits, whether the prisoner will be irreparably harmed without a release, whether others in the proceeding will be injured, and whether a release would serve the public interest. *See id.* at 776.

21. *See* Pulley v. Harris, 465 U.S. 37, 41-42 (1984) (denying habeas corpus relief when a trial error did not constitute a fundamental defect that would result in a complete miscarriage of justice and that did not impair the rudimentary demands of fair procedure); Hill v. United States, 368 U.S. 424, 428 (1962) (holding that prisoner's claim that a judge violated a federal rule at sentencing was not a cognizable claim on habeas corpus because the error was not a "fundamental defect").

22. *See Pulley*, 465 U.S. at 41-42 (denying habeas corpus review when there was no error of serious magnitude at trial).

23. *See* Weeks v. United States, 232 U.S. 383, 398 (1914); Boyd v. United States, 116 U.S. 616, 638 (1886).

24. *See* United States v. Leon, 468 U.S. 897, 906 (1984) (holding that in the context of the Fourth Amendment, the purpose of the exclusionary rule is to deter the government from violating a person's Fourth Amendment rights and explaining that the exclusionary rule is not a personal right but rather a judicially created remedy designed to safeguard rights through its deterrence effect).

25. Federal courts have the power to enforce constitutional rights against states because constitutional rights are generally protected against state action

Arizona,[26] which requires state and local police to inform arrested individuals of their right to remain silent under the Fifth Amendment, is based on the authority that federal courts have to enforce this constitutional right against local governments.[27] Thus, if the provisions of the Vienna Convention are construed to implicate rights of a constitutional nature, federal courts may be able to use habeas corpus review and suppression of evidence to remedy violations of the Vienna Convention.

C. *The Legal Background of the Effect of Treaties on Personal Rights*

International treaties are not presumed to create rights that are privately enforceable.[28] Treaties generally create obligations between countries, not between countries and individuals.[29] In order for private individuals to assert rights under a treaty, the treaty clauses must specifically confer such rights upon private individuals.[30] Thus, typically when a party incurs an injury from the failure of the United States to follow a treaty with another country, that party generally does not have standing to sue the U.S. government.[31] However, in cases where treaty provisions do confer private rights, an individual may assert them.[32] Whether the provisions do confer such rights is determined by looking at the intent of the parties as evidenced by the language of the treaty.[33] A treaty conferring such private rights is often termed a "self-executing" treaty.[34]

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under the 14th Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that constitutional rights are applicable against the states when the rights implicate fundamental principles of liberty and justice).

26. 384 U.S. 436 (1966).

27. *See id.* at 463-64 (noting that protection of rights under the United States Constitution's Fifth Amendment is applicable to the laws and actions of states) (citing Malloy v. Hogan, 378 U.S. 1 (1964)).

28. *See* Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (citing Head Money Cases, 112 U.S. 580, 598-99 (1884)).

29. *See* Committee of U.S. Citizens v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (citing U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (1982)).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *Id.* This terminology can be confusing because "self-executing" is sometimes also used to describe a treaty that does not require any implementing legislation for it to take effect. *Id.*

D. *The Constitutional Relationship Between the Powers of the Federal and State Governments*

The federal government of the United States is a government of limited powers that are specifically granted by the Constitution, with all other powers left to state governments.[35] A law passed by Congress may be unconstitutional if it implicates a power not given to the federal government.[36] Thus, in an effort to define the reach of federal power, it is necessary to first look to the language of the Constitution.

1. The United States Constitution's Division of Powers Between the Federal and State Governments

The specific powers of the legislative branch of the federal government are set out in Article I, Section 8 of the U.S. Constitution.[37] These powers include, among others, the power to tax, to borrow money, to regulate interstate commerce, to coin money, to establish post offices and roads, to punish felonies committed on the "high seas" and offenses against the law of nations, to declare war, and to maintain a military.[38] In addition, under Article II, Section 2, the President of the United States has the power to make treaties, subject to the approval of two-thirds of the United States Senate.[39] If a specific power is not granted to the federal government in the Constitution, that power is left to the states.[40] Because some powers belong to the federal government, while others are reserved to the states, the United States Constitution has been described as creating a system of "dual sovereignty."[41]

Such dual sovereignty results in an inherent tension between state and federal power. That is, if the enumerated powers of the federal government are interpreted broadly, the power of the states is diminished. Conversely, a narrow interpretation of enumerated federal powers weakens federal authority. The federal court system has been called upon repeatedly to alleviate this tension, attempting to create a workable balance between federal and state power.

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35. *See* U.S. CONST. amend. X. *See also* United States v. Lopez, 514 U.S. 549, 552 (1995).

36. *See Lopez*, 514 U.S. at 552.

37. U.S. CONST. art. I, § 8.

38. *Id.*

39. *See* U.S. CONST. art. II, § 2.

40. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

41. Printz v. United States, 117 S. Ct. 2365, 2376 (1997).

During the latter part of the Great Depression, the Supreme Court broadly interpreted the powers enumerated to the federal government.[42] Recently, however, the Supreme Court has begun to reemphasize the role of federalism inherent in the U.S. Constitution. To this end, in the 1997 opinion of *Printz v. United States*, the court explained:

> Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty" [that] is reflected throughout the Constitution's text. . . . [T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people.[43]

Outside of the New Deal era, the Supreme Court has struggled to define the boundaries between the powers allocated to state governments and those allocated to the federal government.[44] The Supreme Court's firmest statement of federalist principles concerning the division of power between the federal and state governments came in the 1995 decision of *United States v. Lopez*. In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990 on the ground that the power to pass the Act did not fall into the enumerated powers granted to the federal government in the Constitution.[45] The Supreme Court rejected the federal government's argument that it possessed the power to pass the Act under its Article I powers to regulate interstate commerce.[46] *Printz* discussed more fully below, provided the Court with another opportunity to address the division of powers between the federal and state governments in a different context.

2. The Power of the Federal Government to Develop Law and Policy in Foreign Relations

Unlike most of its powers, the federal government's sole authority to engage in foreign relations with other countries does not depend on the presence of a specific grant of such power in the Constitution.[47] Instead, this power is derived from the fact that the

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42. *See Lopez*, 514 U.S. at 554-55.
43. *Printz*, 117 S. Ct. at 2376-77.
44. *See* discussion *supra* note 6.
45. *Lopez*, 514 U.S. at 567.
46. *See id.*
47. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.").

states in the time period preceding the Constitution were not considered sovereign entities.[48] Because they were not sovereign entities, they could not deal in any way with foreign sovereigns. Thus, the federal government was, and is, vested with the exclusive power to conduct the foreign affairs of the country. The limitations on the scope of federal power are present when a federal action concerns the internal affairs of the country, but not when such an action concerns foreign affairs.[49]

Generally, when a state law and an international treaty conflict, the international treaty overrides the state law.[50] This rule of law is based on Article VI of the Constitution, the Supremacy Clause.[51] The Supreme Court applied the Supremacy Clause in *United States v. Pink*.[52] The focus in that case was an international agreement with the Soviet Union which granted the United States rights to the funds of a nationalized Russian insurance company.[53] Despite these rights, a New York state court declined to disburse the assets of the Russian corporation, which the state of New York possessed, to the United States government.[54] New York effectively did not recognize the federal government's right to the assets under the international agreement[55] and tried to distribute the assets to other parties in accordance with state law.[56] On appeal, the U.S. Supreme Court

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48. *See id.* at 317 ("The states were not 'sovereigns' . . . . They did not possess the peculiar features of sovereignty,--they could not make war, nor peace, nor alliances, nor treaties . . . they could not speak to any foreign sovereign whatever . . . they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.") (quoting 5 Elliot's Debates 212).

49. *See id.* at 315-16 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."); *see also* United States v. Belmont, 301 U.S. 324, 330 (1937) ("Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.").

50. *See* Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1088 (2d Cir. 1982) (citing *Curtiss-Wright Export Corp.*, 299 U.S. at 316-17).

51. *See* U.S. CONST. art. VI ("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."); Reid v. Covert, 354 U.S. 1,16 (1957) (upholding the supremacy of treaties over state law as long as the treaties comply with relevant provisions of the Constitution).

52. 315 U.S. 203 (1942).

53. *See id.* at 211-13.

54. *See id.* at 210-11.

55. *See id.* at 217 (The agreement in question was referred to as the Litinov Assignment).

56. *See id.*

ruled in favor of the United States. The Court explained that New York was refusing to recognize acts of the Soviet government that the United States, as a matter of foreign policy, decided to recognize and that the state's policy collided with federal policy.[57] The Court held that New York courts could not refuse to enforce the rights that the United States possessed under federal policy, as evidenced by treaty, international compact, or agreement.[58] However, the Court cautioned that "even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States . . . unless clearly necessary to effectuate the national policy."[59] In this case, if New York had distributed the assets in question in accordance with state law, it would have directly interfered with the rights of the United States under international agreement.[60]

For a state law to be invalid under the Supremacy Clause, the law need not directly conflict with a treaty. Even an indirect conflict is sufficient for invalidation if the effect of the state law is to frustrate or adversely affect a treaty provision.[61] This raises the question, however, as to whether the federal government has the power to create law in a treaty that has substantial impact on internal affairs, while evading the usual constitutional restrictions on its law making power.

In the 1920 case of *Missouri v. Holland*,[62] the Supreme Court implied that the restrictions on federal power only applied to acts of Congress and not to international treaties, meaning that treaties would automatically constitute supreme law without interference from the normal division of powers between the federal and state governments.[63] As the Court stated: "Acts of Congress are the

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57. *See id.* at 231.

58. *See id.*

59. *Id.* at 230. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.").

60. *See Pink*, 315 U.S. at 231.

61. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 320 (1994) (analyzing whether a state law impaired federal uniformity or prevented the federal government from speaking with one voice in foreign policy, in order to decide if the state law conflicted with federal trade policy); Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (striking down an Oregon statute regulating descent and demise to aliens on the ground that it would impair and adversely affect the federal government's ability to deal with foreign policy, and deciding that such a statute interfered with constituted foreign policy favoring the passing of estate property to individuals residing in foreign countries); *Pink*, 315 U.S. at 230-31 (holding that "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement").

62. 252 U.S. 416 (1920).

63. *See Holland*, 252 U.S. at 434-35.

supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[64] The *Holland* opinion raised the question of whether the federal government can act outside its Article I powers via international treaty. As one commentator queried: "Whenever Art. I powers prove insufficient to reach a local problem, may the national government overcome that obstacle simply by making a treaty with a cooperating foreign government?"[65]

Holland produced fears that constitutional limitations on the power of the federal government could be overridden by international treaty.[66] In response to these fears, the Senate Judiciary Committee proposed what became known as the Bricker Amendment to the Constitution,[67] which read, "[a] provision of a treaty which conflicts with this Constitution shall not be of any force or effect."[68] However, the Supreme Court quieted fears that it would allow international treaties to circumvent the constitutional limits on the federal government with a decision handed down in 1957.[69]

In that case, *Reid v. Covert*,[70] the Supreme Court addressed whether the federal government had the power to evade constitutional provisions under its otherwise broad treaty-making power.[71] *Reid* involved a military dependent tried before a military tribunal under the Uniform Code of Military Justice, instead of in a civilian court, for an alleged murder that took place at a U.S. military base in England.[72] At the time of the alleged offense, an executive agreement existed between the United States and Great Britain that permitted U.S. military courts to exercise exclusive jurisdiction over criminal offenses committed in Great Britain by U.S. servicemen or their dependents.[73]

The Supreme Court ruled that the provision in the treaty arranging for military trials of U.S. dependents could not escape the requirements of the Constitution.[74] In doing so, the Court rejected the government's argument that following the requirements of the military code was necessary and proper to carrying out the United

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64. *Id.* at 433. The Court also explained the qualifications to the treaty-making powers, but such qualifications would not refer to matters of national action. *See id.*

65. GERALD GUNTHER, CONSTITUTIONAL LAW 206 (12th ed. 1991).

66. *See id.*

67. *See id.* Attempts to amend the Constitution in this manner repeatedly failed during the mid-1950s. *See id.*

68. *Id.*

69. *See id.*

70. 354 U.S. 1 (1957).

71. *See id.* at 15-16.

72. *See id.* at 3.

73. *See id.* at 15.

74. *See id.* at 16.

States obligations under international agreement.[75] The Court reasoned that there was nothing in the language of the Supremacy Clause that implied that treaties and laws enacted pursuant to these treaties do not have to comply with the provisions of the Constitution.[76] As the Court explained, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[77] The treaty powers could not be said to authorize what the Constitution forbids or change the character of government without the consent of the states.[78] As the Court concluded:

> It would be manifestly contrary to the objectives of those who created the Constitution . . . let alone alien to our entire constitutional history and tradition—to construe Article IV [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.[79]

The Court pointed out that its result in *Reid* did not contradict the holding in *Holland*.[80] The Court explained that *Holland* held that the Tenth Amendment presented no bar to the federal government's power to make a treaty since the power to make treaties was allocated it in Article II.[81] *Reid* merely clarified that while the federal government clearly had treaty-making powers, these powers needed to be exercised in a manner that did not contradict other provisions of the Constitution.[82]

Thus, when a state law conflicts with international treaty, the state law will be judged invalid with one caveat—the treaty must first comply with the requirements of the Constitution.

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75. *See id.*
76. *See id.*
77. *Id.*
78. *See id.* (citing Geofroy v. Riggs, 133 U.S. 258, 267 (1890)).
79. *Id.* at 17.
80. *See id.* at 18 ("There is nothing in State of Missouri v. Holland . . . which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government.").
81. *See id.*
82. *See Reid*, 354 U.S. at 18 ("*To the extent that the United States can validly make treaties*, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.") (emphasis added).

3. The Power of Congress to Define and Punish Crimes Against the Law of Nations

There is another potential avenue which may allow the federal government to enhance its ability to comply with international treaties, such as the Vienna Convention. In addition to its treaty making powers, the federal government is granted in Article I the power to define and punish piracies and felonies on the high seas and offenses against the "law of nations." [83] Thus far, the federal government has not used its power to define and punish offenses against the law of nations in defense of a treaty. The inclusion of "offenses against the law of nations" in a clause with piracy and felonies committed on the high seas suggests that the Constitution gives the federal government the power to punish acts that constitute crimes under an international agreement.[84]

Although few cases address Congress' power to define and punish offenses against the law of nations, the Supreme Court did address the rationale of the Article I, Section 8, Clause 10 power in the context of a case addressing the authority of the United States to punish counterfeiting of foreign currency.[85] In *United States v. Arjona*, the Supreme Court rejected arguments that Congress did not have the constitutional power to punish the counterfeiting of foreign currency.[86] The Court reasoned that the counterfeiting of currency, which was prohibited by federal law, fell within Congress' power to define and punish crimes against the law of nations.[87] The Court noted that it was international practice for countries to prohibit, within their domain, the counterfeiting of another country's currency, since such counterfeiting affected international commerce, which was tied in an important way to domestic economies.[88]

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83. U.S. CONST. art I, § 8.

84. *See id.* ("Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high seas, and offences against the law of nations[.]").

85. *See* United States v. Arjona, 120 U.S. 479 (1887).

86. *Id.* at 488.

87. *See id.* at 484.

88. The Court noted:

> [N]ational intercourse includes commercial intercourse between the people of different nations. It is as much the duty of a nation to protect such an intercourse as it is any other . . . . [T]he amount of national and corporate debt . . . and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, [are] something enormous. Such being the case, it is easy to see that the same principles that developed . . . the rule of national conduct which was intended to prevent,

In a passage addressing the clause specifically, the Court commented on the justification and meaning of the clause.[89] The Court pointed out that official relations between a state and a foreign nation were prevented by Article I, Section 10 of the Constitution.[90] Exclusive power to deal with foreign nations was left to the federal government.[91] The Court further noted that, accordingly, "[t]he national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized to 'define and punish . . . offenses against the law of nations . . . .'"[92] The Court then explained what offenses against the law of nations encompassed: "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this."[93]

It is important to note that the above language refers to an offense against the law of nations as more than an offense against another country. It seems that such an offense can be directed against the *people* of another country.[94] In addition to the crimes of piracy and counterfeiting, the Court has ruled that Congress also has the power to define and punish war crimes under this clause.[95]

In a modern context, one influential court has implied that Congress enjoys broad deference in deciding what constitutes a crime against the law of nations.[96] *Finzer v. Barry*, a decision by the U.S. Court of Appeals for the District of Columbia, addressed a situation where individuals were protesting outside a foreign embassy.[97] The protesters claimed that Congress, through use of a District of Columbia provision, did not have the power to constitutionally

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> as far as might be, the counterfeiting of the money of one nation within the dominion of another . . . .

See id. at 485-86.

89. *See id.* at 483-84.

90. *See id.* at 483.

91. *See id.* at 483 (citing U.S. CONST. art. I, § 10, cl. 1).

92. *Id.*

93. *Id.* at 484.

94. *See id.* ("or to the people thereof . . .").

95. *See* In re Yamashita, 327 U.S. 1, 7 (1946).

96. *See* Finzer v. Barry, 798 F.2d 1450, 1459 (D.C. Cir. 1986), *rev'd in part and aff'd in part on other grounds sub nom.* Boos v. Barry, 485 U.S. 312 (1988). In *Finzer*, the Court held that the wording of the District of Columbia provision violated the First Amendment, but the Court also explained that the manner in which it was interpreted and applied by the Court of Appeals for the District of Columbia did not violate the First Amendment. The Court did not address the power of Congress to define crimes against the Law of Nations in reaching these dispositions.

97. *See id.* at 1452.

prohibit them from protesting within 500 feet of the foreign embassy.[98]

The court explained that the principle of protecting foreign embassies from threats and intimidation was well-entrenched in both the law of nations by tradition and by international treaty.[99] The court then reasoned that the restrictions on the protests were constitutional under the power of Congress to define and punish crimes against the law of nations.[100] The court discussed the practical effect of the power to define crimes against the law of nations: "[A]rticle I, section 8 of the Constitution authorized Congress to derive from the often broadly phrased principles of international law a more precise code, as it determined that to be necessary to bring the United States into compliance with rules governing the international community."[101] When Congress has developed such a code, the court claimed, the United States is to enjoy deference in determining whether the code fits within its constitutional power to define crimes against the law of nations:

> When a provision is enacted in order to bring the United States into compliance with international law, and when those obligations are reaffirmed by treaty, a court must give careful consideration before it sets aside that which the legislative and executive branches have deemed necessary to fulfill the nation's international responsibilities.[102]

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98. *See id.*

99. *See id.* at 1455-58.

100. *See id.* at 1454-55, 1476. This result may seem to contradict the result mandated by *Reid v. Covert*, 354 U.S. 1 (1957), which held that the constitutional authority of Congress to conduct international relations could not be used to evade other provisions of the Constitution. *See supra* notes 71-79 and accompanying text. The First Amendment is a provision of the Constitution and it may appear that Congress was using its foreign policy powers to negate a Constitutional provision despite the holding in *Reid*. However, the *Finzer* Court explained that the First Amendment had been interpreted by the Supreme Court as holding that the scope of the right to demonstrate is dependent in part upon the site of the protesting activity. *See Finzer*, 798 F.2d at 1462 (citing Cox. v. Louisiana, 379 U.S. 559, 562 (1965); *see also* Greer v. Spock, 424 U.S. 828, 838 (1976); Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (each case upholding the restriction of expressive activity within certain limited confines); Adderley v. Florida, 385 U.S. 39, 41 (1966). The *Finzer* Court then explained that the restrictions on demonstrations near embassies fell within such narrowly-defined confines, thereby avoiding a direct conflict with the First Amendment. *See Finzer*, 798 F.2d at 1462 ("The Statute that Congress has crafted proscribes an opposition demonstration only within a narrowly defined locus. Plaintiffs are free under [the statute] to hold an anti-Soviet demonstration anywhere in the city but within 500 feet of the Soviet Embassy . . . . [T]he First Amendment does not guarantee an optimal setting for speech . . . .").

101. *Finzer*, 798 F.2d at 1455.

102. *Id.* at 1460.

The court did state that such deference is by no means absolute; however, it implied that the argument for deference is strengthened when the crime in question would adversely affect the interests of the United States.[103]

Thus, Congress may enhance its efforts to comply with international treaties by defining certain acts as crimes against the law of nations. The power of Congress to define and punish such offenses is limited by whether the act "made punishable is one which the United States are [sic] required to prevent by their international obligations to use due diligence to prevent,"[104] or in the words of one circuit court, whether the act is likely to "adversely affect the interests of the United States" in foreign affairs.[105] However, the fact that Congress has the power to define crimes against the law of nations does not mean that Congress is constitutionally obligated to pass legislation under this power to facilitate compliance with treaties.[106]

4. The Difference Between the Federal Government's Power to Develop Law and Its Ability to Require Local Governments to Administer It

As discussed above, except where limited by the Constitution, the federal government has exclusive power to conduct foreign relations. However, there are some situations, such as that presented in the hypothetical, in which internal and foreign affairs are intertwined. The mixing of internal and external affairs presents a unique opportunity for the federal courts to address the balance of power between the federal and state governments.

There is also a second issue in federalism distinct from the issue of whether the federal government has the general power to legislate in an area. *Lopez* addressed a claim that the federal government lacked authority to legislate in a certain domestic area, the possession of guns near schools.[107] A separate issue emerges: when

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103. *See id.* at 1459 ("Deference to the judgment of Congress and the President in these matters is, of course, by no means absolute. But this is not a case in which we are asked to believe any implausible thing. It is obvious that ill treatment of ambassadors to the United States will adversely affect the interests of the United States.").

104. United States v. Arjona, 120 U.S. 479, 488 (1887).

105. *See Finzer*, 798 F.2d at 1459.

106. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (noting that treaties are of no greater legal importance than statutes and that Congress could even pass laws that would have the effect of contradicting a treaty). *See also Arjona*, 120 U.S. at 488 (examining not only whether an offense is one that Congress is required by international obligations to use due diligence to prevent, but also whether the offense is defined in a statute).

107. *See* United States v. Lopez, 514 U.S. 549, 551 (1995).

the federal government does have the power to legislate in a certain area—such as one involving interstate commerce—to what extent, if at all, can it require local governments to carry the burden of effectuating the requirements of federal law?

Printz[108] wrestled with this very question. At issue in *Printz* were the Brady Act[109] amendments to The Gun Control Act of 1968. The Gun Control Act of 1968[110] provides a scheme of federal law that governs the distribution of firearms.[111] The Brady Act amendments contain several provisions addressing background checks of prospective firearm purchasers. Under the Brady Act, a firearms dealer must obtain the name, address, and date of birth of an individual wishing to purchase a firearm; verify the identity of the buyer; and provide the identification forms to the chief law enforcement officer (CLEO) of the buyer's residence.[112] The dealer must then wait five business days before completing the sale, with some exceptions.[113] During the five-day period, the Brady Act requires that a CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General."[114] The requirement that local law enforcement officers carry out federal law was described by the Supreme Court as "the forced participation of the States' executive in the actual administration of a federal program."[115]

The Supreme Court concluded that the federal government could not require local law enforcement officials to carry out the background checks since the structure of the Constitution forbids the federal government from compelling the states to enact or administer

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108. 117 S. Ct. 2365 (1997).

109. The Brady Act was passed by Congress in 1993.

110. 18 U.S.C. § 921 et seq.

111. For example, The Gun Control Act of 1968 prohibits firearms dealers from distributing handguns to certain classes of buyers, which include, among others, convicted felons, fugitives, and individuals who have been convicted of domestic violence. *See Printz*, 117 S. Ct. at 2368 (citing 18 U.S.C. § 922(d), (g)).

112. *See id.* at 2368-69 (citing 18 U.S.C. § 922(s)(1)(A)(i)(I)-(IV)).

113. *See id.* at 2369 (citing 18 U.S.C. § 922(s)(1)(A)(ii)). The provisions for the five day waiting period are temporary, to be replaced with a national system for instant background checks by November 30, 1998, as required by Pub. L. 103-159, as amended, Pub. L. 103-322. *See id.* at 2368. The dealer may go ahead and sell the firearm without waiting five days if the chief law enforcement officer (CLEO) determines that he has no reason to believe that the sale would be illegal, or that the buyer possesses a state handgun permit that was issued after a background check, or if the relevant state law provides for an instant background check. *See id.* at 2369 (citing 18 U.S.C. § 922(s)(1)(A)(ii), (C), (D)).

114. *Id.* (citing 18 U.S.C. § 922(s)(2)).

115. *Id.* at 2376.

federal law.[116] The Court reasoned that allowing federal control of state officers would threaten the division of power between state and federal governments.[117] As the Court explained, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[118]

The Supreme Court also reasoned that allowing Congress to impose the burden of carrying out federal law on local officials would also upset the separation and equilibrium of powers between the three branches of government. The Court pointed out that the Constitution states that the President has the duty of administering the laws enacted by Congress and explained that the Brady Act unconstitutionally transferred Presidential responsibility to local government officials without "meaningful Presidential control."[119] The Court observed that "the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[120] The Court stressed that the division of power between the federal and local governments and the division of power between the three federal branches of government are important because they act in the Constitution as structural protections of liberty.[121] Thus, the Supreme Court relied on the structure of the United States Constitution, rather than the absence of enumerated powers, to hold that the federal government could not conscript local officials into administering federal law.[122]

In analyzing the legal questions encompassed in *Printz*, the Supreme Court pointed out that even when Congress has the authority under the Constitution to pass a law, it lacks the power to compel the states to carry out the law.[123] Thus, the Court seems to

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116. "The Federal Government may not compel the States to enact or administer a federal regulatory program'. . . . The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." *Id.* at 2383 (quoting New York v. United States, 505 U.S. 144 (1992)).

117. *See id.* at 2378.

118. *Id.*

119. *Id.* (citing U.S. CONST. art. II, §§ 2-3).

120. *Id.*

121. *See id.*

122. *See id. Compare Printz*, 117 S. Ct. at 2378 *with id.* at 2385 (Thomas, J., concurring) (writing separately to articulate his opinion that some of the requirements of the Brady Act are invalid under the Tenth Amendment because they do not fall within the powers specifically enumerated to the Federal Government).

123. *Id.* at 2379 (citing *New York*, 505 U.S. at 166). "Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . ." *Id.*

be treating the question of whether the federal government has the power to pass a law, the question addressed in *Lopez*, as a question separate from whether the federal government can require a local government to carry out the provisions of federal law. In *Printz*, the federal government apparently had the power to regulate the sale of firearms under its Constitutional power to regulate interstate commerce.[124] Nevertheless, the Supreme Court still held the challenged Brady Act unconstitutional on different federalism grounds—grounds that did not address the federal government's power to regulate the subject in question, but rather its alleged power to require local governments to actively carry out the terms of its laws.

While a *Lopez* argument has merit in the domestic arena, it would likely fail in an international context. The notion that the federal government lacks the Constitutional authority to engage in a specific treaty or conduct foreign policy in a certain matter lacks validity. The Supreme Court has ruled that the federal government's authority to make law governing international affairs does not rest on powers enumerated in the Constitution.[125] However, the question of whether the federal government has the power to pass a law or develop policy seems to be a different one from whether the federal government can force states to carry out that policy. The broad powers that the federal government has to engage in foreign affairs may not be determinative of whether the federal government has the power to compel local governments to carry the burden of administering federal law in an international context.[126] While there is case law from the Supreme Court addressing the first question,[127] there is none addressing the second question with respect to foreign affairs. Thus, it remains to be seen how a *Printz* argument would be treated by the Supreme Court in an international context.

III. DOES THE FEDERAL GOVERNMENT POSSESS THE POWER TO REQUIRE LOCAL GOVERNMENTS TO CARRY OUT THE TERMS OF AN INTERNATIONAL TREATY?

There are two issues to consider in determining whether the federal government can require local government officials to carry out the terms of the Vienna Convention. First, does the Vienna Convention create personal rights of a constitutional nature? If so,

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124. *Id.* at 2385 (Thomas, J., concurring) (criticizing the Court's position that the sale of all firearms can be regulated by the federal government under its Constitutional power to regulate interstate commerce).

125. *See* discussion *supra* note 49.

126. *See Printz*, 117 S. Ct. at 2379.

127. *See* sources *supra* note 49.

the federal government might be able to place an affirmative obligation on local police to inform arrested aliens of such rights under the power that the federal government possesses under the Fourteenth Amendment, which was the justification for *Miranda*.[128] Second, if the treaty does not create personal rights of a constitutional nature, the federal government might try to rely on its constitutional powers to make foreign policy. However, this might be barred due to restrictions posed by *Printz* on the federal government.[129]

A. *The Duty of Administering Provisions of the Vienna Convention Cannot Likely Be Forced Upon the States Under a* Miranda *Framework*

There are two separate points of analysis to examine in determining whether the Vienna Convention creates personal rights of a constitutional nature. For the federal government to place an affirmative obligation under the Fourteenth Amendment on local police to inform aliens of the treaty provisions, the provisions of the treaty must not only create personal rights but such rights must be of a constitutional nature.[130] Thus, it is necessary to determine first, whether the Vienna Convention creates personal rights and second, whether these rights implicate fundamental fairness of a constitutional proportion.

B. *The Vienna Convention Has Been Generally Interpreted as Not Creating Personal Rights*

Treaties that create personal rights are often referred to as "self-executing" treaties.[131] However, the term "self-executing" can be misleading because it is also used to describe a treaty that does not require implementing legislation before becoming effective as federal law.[132] The term "self-executing" is used most frequently in reference to the latter definition.[133] In this latter sense, the Vienna Convention is considered to be "self-executing" since the provisions of the treaty did not require implementing legislation before becoming effective as

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128. *See* Section II.B.
129. *See* Section II.D.3.
130. *See* U.S. CONST. amend. XIV.
131. *See* Committee of U.S. Citizens v. Reagan, 859 F.2d 929, 937(D.C. Cir. 1988); Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (describing the two meanings of "self-executing" in international law).
132. *See* discussion *supra* note 34.
133. *See Allen*, 949 F. Supp. at 1274.

federal law.[134] One federal district court, in *Republic of Paraguay v. Allen*,[135] addressed the issue of whether the Vienna Convention is self-executing in the context of creating private rights that can be enforced by individuals. The court clearly explained the difference between two sometimes confusing definitions of self-executing and concluded that the Vienna Convention was not "self-executing" in the sense of creating privately enforceable rights:

> The term "self-executing" has two distinct meanings in international law . . . . Most frequently, the term is used to refer to a treaty that does not require implementing legislation before becoming federal law . . . . However, the term "self-executing" also denotes a treaty that confers rights of action on private individuals . . . . Absent such language, a private party may not seek redress for treaty violations . . . . Defendants correctly note that the Vienna Convention . . . [is] not "self-executing" in this sense.[136]

The view expressed by the district court in *Allen*, however, that the Vienna Convention does not create private rights of action, is dicta.[137] The determination of whether the Vienna Convention created privately enforceable rights was not determinative of the issues before the court in *Allen*. The plaintiff in *Allen* was not a private individual, but, instead, was a foreign country that clearly had enforcement rights as a signing party to the Vienna Convention.[138] Also, the district court in *Allen* did not cite any authority or engage in any analysis to support its conclusion that the Vienna Convention does not create privately enforceable rights.[139]

However, treaties must expressly confer a right of standing on private individuals to be enforceable by them.[140] To determine

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134. *See* United States v. Enger, 472 F. Supp. 490, 542 (D.N.J. 1978) ("The Vienna Convention entered into force for the United States on December 13, 1972 . . . . Its detailed provisions, and the absence of language requiring implementing legislation, lead me to hold that it is a self-executing treaty. . . . Thus, upon entry into force, it at once became operative as domestic law of the United States."); *Allen*, 949 F. Supp. at 1274 (noting that the parties agreed that the Vienna Convention was "self-executing" in the sense of not requiring implementing legislation before taking effect as federal law).

135. *Allen*, 949 F. Supp. at 1274.

136. *Id.* at 1274.

137. *See id.*

138. *See id.* The issue of whether a private party has enforcement rights under the Vienna Convention "has no bearing on the issues before this Court. Paraguay is not a private individual seeking enforcement of the treaty. It is an actual party to the contract and it has standing based on this status." *Id.* (citing United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986) ("[U]nder international law, it is the contracting foreign government that has the right to complain about a violation.")).

139. *See id.*

140. *See* Committee of U.S. Citizens v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988). *See also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (denying relief to a private party under an international treaty

whether private enforcement of a treaty is available, one should look at the intent of the signing parties as evidenced by the language of the treaty.[141] The language of the Vienna Convention clearly avoids giving private parties the personal rights to enforce the provisions of the treaty. The Preamble of the Vienna Convention states that the treaty was not created "to benefit individuals but to ensure the efficient performance of . . . consular posts on behalf of their respective States."[142] Since the treaty was not designed to benefit individuals, but rather the respective states who are signatories,[143] arguing that the treaty creates individual rights would be difficult. Furthermore, the language of the treaty not only indicates a disposition against personal rights, but also fails to include any specific provisions allowing private enforcement.[144]

However, one Federal Court of Appeals may have implied that the Vienna Convention creates personal rights that are privately enforceable.[145] The Fifth Circuit Court of Appeals, addressing a situation in which an arrested alien was not advised of his ability to contact his foreign consulate, referred to the alien's ability to contact his consulate as "his rights under the Convention."[146] Although the court did not state that the Convention created personal rights, it did seem to treat the rights as being privately enforceable as the arguments pertaining to the Vienna Convention were brought to the court by the criminal defendant in his individual capacity.[147] In responding to the defendant's arguments, the court did not state that the defendant did not have the ability to present the claims; rather, it

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when the treaty merely set "substantive rules of conduct" and stated that compensation shall be paid for certain wrongs); *supra* Section II (C).

141. *See Committee of U.S. Citizens*, 859 F.2d at 937. *See also Allen*, 949 F. Supp. at 1274 (stating that absent language in a treaty conferring rights of action on private parties, a private party may not seek redress for treaty violations).

142. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79.

143. *See* discussion *supra* note 2.

144. *See generally supra* note 2 (failing to include provisions in the treaty allowing private enforcement). One United States Court of Appeals has allowed private enforcement of alien rights. *See* United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979). However, these private enforcements were not based on the Vienna Convention but rather on federal regulations governing Immigration and Naturalization Services proceedings that were issued to comply with the Vienna Convention. *See Rangel-Gonzales* at 530. The Court, however, made the determination that the regulations, which are separate from the treaty, were issued principally to benefit the alien. *See id.*

145. *See* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.), *cert. denied* 117 S. Ct. 487 (1996).

146. *Id.*

147. *See id.* at 517 ("Faulder . . . seeks relief from the federal courts . . . Faulder claims he is entitled to relief because . . . Faulder's right to compulsory and due process was violated when law enforcement officials violated the Vienna Convention on Consular Relations.").

dismissed the claims on other grounds[148] which will be discussed in Section IV. It is worth noting, however, that since the claims were readily dismissable on other grounds,[149] the court may have felt that it was unnecessary to examine whether the rights were privately enforceable.

The language of the Convention suggests that the provisions of the treaty do not create personal rights that are privately enforceable.[150] There is also some precedent implying that the treaty does not create personal rights that are privately enforceable, as seen in *Paraguay*.[151] However, the treatment of these treaty provisions in federal courts has not been entirely clear.[152]

For example, recently the United States Supreme Court addressed this issue in a high-profile case involving a foreign national of Paraguay who attempted to suppress a confession that he had given in connection with his 1993 murder conviction, on the ground that he had not been informed of the Vienna Convention provisions.[153] The Court did not directly address whether the foreign national could use the Vienna Convention to attack and suppress his confession, explaining that his claims did not need to be addressed on their merits because they were procedurally barred.[154] However, the Court did comment directly on the issue of whether the Vienna Convention created individual rights, by referencing the treaty as follows: "[T]he Vienna Convention—which *arguably* confers on an individual the right to consular assistance following arrest."[155]

The federal courts have followed the general rule that treaties are not presumed to create privately enforceable rights.[156] Even in a

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148. *See id.* at 520 ("While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained. . . . The violation, therefore, does not merit reversal.").

149. *See id.*

150. *See* Vienna Convention *supra* note 2, pmbl., 21 U.S.T. at 79 (stating that the purpose of the provisions is not to benefit individuals).

151. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996).

152. *See Faulder*, 81 F.3d at 520 (entertaining a claim of a violation of the Convention without discussing the issue of standing); United States v. Esparza-Ponce, 1998 WL 258432 at *12-13 (S.D. Cal. May 18, 1998) (describing the question of whether the Vienna Convention confers personal rights as a murky one and declining to answer it).

153. *See* Breard v. Greene, 118 S. Ct. 1352 (1998).

154. *See id.* at 1355.

155. *Id.* (emphasis added). The Clinton Administration in the *Breard* case took the view that the treaty did not create personal rights and was a matter for country-to-country diplomacy. Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. TIMES, April 14, 1998, at A14.

156. *See* Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (citing Head Money Cases, 112 U.S. 580, 598-99(1884)); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989).

context that deals with the rights of criminals under foreign treaty, the courts have declined to view such rights as privately enforceable.[157] In cases where an individual was extradited from a foreign country and claimed violations of the United States' obligations under the relevant extradition treaty, courts have generally held that an individual does not have standing to raise violations of that treaty in his defense, unless the extraditing country formally objects to the treaty violation.[158]

An extraditing country has the right to object to the violations of the extraditing treaty. However, an extraditing country is held to have waived its right by failing to object to the treaty violation.[159] Such a waiver creates a situation where an individual cannot raise the violations of the treaty.[160] Because the individual cannot raise the violations of an extradition treaty herself, it appears that any provisions that a defendant could use in his defense are not enforceable as private rights. Raising the violations would require the involvement of the signing country to the extradition treaty.[161] It is important to note that, in this context, a defendant cannot by herself raise violations of an extradition in his defense even if the provisions would otherwise appear to grant his personal rights.[162]

To interpret the Vienna Convention as granting personal rights would run against the presumption that international treaties do not create such rights.[163] It also seems contrary to the language of the treaty, which indicates that the purpose of the Vienna Convention was to aid relations between countries and not to benefit individuals.[164] Furthermore, it would break with the manner in which violations of international treaties usually are treated in

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157. *See* United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995).

158. *See id.* ("The extradited individual, however, enjoys this right [to object to violation of an extradition treaty] at the sufferance of the requested nation. As a sovereign, the requesting nation may waive its right to object to a treaty violation and thereby deny the defendant standing to object to such an action.") (citing United States v. Riviere, 924 F.2d 1289, 1300-01 (3d Cir. 1991); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986)). *Cf.* United States v. Alvarez-Machain, 504 U.S. 655, 665 (1992) (holding that abductions conducted outside the scope of an extradition treaty do not necessarily constitute violations of such a treaty). *But see* United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988) (holding that an individual may assert the objections to an extraditing treaty that the extraditing country would be entitled to raise).

159. *See Puentes*, 50 F.3d at 1575.

160. *See id.*

161. *See id.*

162. *See id.* at 1571, 1576 (rejecting a defendant's attempt to raise a provision in an extradition treaty with Uruguay that mandates that a person can be tried only for the offense extradited).

163. *See* Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (citing Head Money Cases, 112 U.S. 580, 598-99 (1884)).

164. *See* Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79.

criminal trials.[165] However, at least one United States Court of Appeals did not object when a criminal defendant personally raised violations of the Vienna Convention on a federal habeas corpus motion.[166]

Even if an individual criminal defendant can raise provisions of the Vienna Convention in his defense as personal rights, this alone is not enough to justify placing an obligation on local police to inform aliens of their rights under a *Miranda* framework. The *Miranda* rationale can be justified on the grounds that the federal government has the constitutional power to impose such an affirmative duty on local police under the Fourteenth Amendment because of the constitutional nature of *Miranda* rights.[167] A determination of whether the federal government can impose an affirmative duty on states to carry out the provisions of the Vienna Convention requires analyzing whether any personal rights that might be present in the Vienna Convention are of constitutional magnitude.

C. *The Vienna Convention Does Not Likely Implicate Constitutional Rights*

One recent United States Court of Appeals explicitly addressed whether the provisions of the Vienna Convention implicated constitutional rights. The Fourth Circuit, in *Murphy v. Netherland*,[168] held that a violation of the Vienna Convention is not the equivalent of a denial of a constitutional right:

> [E]ven if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty.[169]

In *Faulder*, the defendant had asserted a constitutionally-based argument that the failure of local police to inform him of his "rights"

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165. *See* United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995).

166. *See* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.), *cert. denied* 117 S. Ct. 487 (1996) (allowing a criminal defendant to raise the claim that his rights were violated when law enforcement officials failed to advise him of his rights under the Vienna Convention).

167. *See supra* text accompanying note 27.

168. 116 F.3d 97, 99-100 (4th Cir.), *cert. denied* 118 S. Ct. 26 (1997).

169. *Id.* at 100.

under the Vienna Convention violated his right to due process.[170] The Fifth Circuit did not discuss the due process aspects of the defendant's argument. Rather, the court dismissed the defendant's Vienna Convention arguments on the grounds that the defendant could not show that he was prejudiced by the police failure to inform him of the relevant Vienna Convention provisions.[171] However, the Fifth Circuit's focus on prejudice indicates that any rights that may exist under the treaty do not rise to the level of being constitutional. A showing of prejudice is not required to suppress evidence that is gained in violation of constitutional rights, such as those conferred by *Miranda*. In *Murphy*, the Fourth Circuit did not address the defendant's constitutional argument that the Vienna Convention provisions impacted his constitutional rights.[172]

However, even if a defendant argues that the failure of police to inform his of "rights" under the Vienna Convention infringes on due process or fundamental fairness, as guaranteed by the Constitution, that argument is unlikely to succeed. The Second Circuit has squarely addressed the issue of whether the failure to inform an arrested alien of his ability to contact his consulate undermined his fundamental liberties. The court in *Waldron v. INS*[173] held that it did not, explaining that the failure of the Immigration and Naturalization Service (INS) to inform the defendant of the Vienna Convention, as required by an INS regulation, did not constitute a violation of fundamental liberties with constitutional origins.[174] The *Waldron* court took care to distinguish its decision from another Second Circuit case, *Montilla v. INS*,[175] where a deportation proceeding was invalidated because of the INS' failure to abide by an INS regulation requiring a defendant to be informed of his right to counsel.[176]

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170. *Faulder*, 81 F.3d at 517.

171. *See id.* at 520:

> The district court correctly concluded that Faulder or Faulder's attorney had access to all of the information that could have been obtained by the Canadian government. While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained . . . . The violation, therefore, does not merit reversal.

172. *Murphy*, 116 F.3d at 99-100 (stating that the defendant merely claimed that his conviction and resulting death sentence were constitutionally invalid because of the failure of local police to inform him that he had a right under the Vienna Convention to contact his consulate).

173. 17 F.3d 511 (2d Cir. 1993).

174. *See id.* at 518.

175. 926 F.2d 162 (2d Cir. 1991).

176. *See Waldron*, 17 F.3d at 517.

Thus, at least one circuit appears reluctant to use "due process" under the Fourteenth Amendment to expand constitutional protections beyond those specifically enumerated in the Constitution to cover violations of the Vienna Convention. A judicial posture that holds that a criminal defendant can receive due process even though provisions of the Vienna Convention concerning his arrest are violated presumably views any rights that a defendant may have under the treaty as special rights, not as fundamental rights of constitutional importance.[177] Such a posture may make sense, considering that the Vienna Convention would create "rights" for aliens above and beyond the constitutional safeguards afforded to citizens.

While an alien may have personal rights under a treaty, the courts seem to hold that these rights do not implicate rights guaranteed on a constitutional level.[178] *Miranda* requires that arrested aliens be informed of their right to remain silent and their right to counsel,[179] and courts apparently feel that following this duty meets what is required by the Constitution.[180] Any rights derived from the Vienna Convention that are violated by local officials are not violations of constitutional rights but rather rise only to the level of statutory rights that one may have under federal law.[181] Nor the do the rights that an alien may have under the Vienna Convention have any constitutional origins.[182]

In sum, the position that the Vienna Convention creates personal rights is untenable considering the language in the preamble of the treaty[183] and the treatment that the treaty has received thus far in case law.[184] In addition, no circuit court has held that the protections of the Vienna Convention must be followed for a criminal defendant to have due process under the

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177. *See id.* (holding that a right under the Vienna Convention allowing an alien to communicate with his consulate is not a fundamental, constitutional right).

178. *See Murphy*, 116 F.3d at 99-100; *Waldron*, 17 F.3d at 517.

179. *See* Miranda v. Arizona, 384 U.S. 436 at 463-64 (1966).

180. *Compare Waldron*, 17 F.3d at 517-18 (declining to invalidate a deportation proceeding even though the defendant-alien was not informed of his ability to communicate with his consulate) *with Montilla*, 926 F.2d at 169 (invalidating a deportation proceeding when a defendant-alien was not informed of his right to communicate with legal counsel, a constitutional right under the Fifth Amendment).

181. *See* United States v. Esparza-Ponce, 1998 WL 258432 at *14 (S.D. Cal. May 18, 1998) ("The Court holds that a violation of the Convention does not rise to the level of a Miranda violation."); Murphy v. Netherland, 116 F.3d 97, 99-100 (4th Cir.) *cert. denied* 118 S. Ct. 26 (1997).

182. *See Waldron*, 17 F.3d at 518.

183. *See* Vienna Convention *supra* note 2, pmbl., 21 U.S.T. 79.

184. *See supra* Part III.A.1.

Constitution.[185] Because the courts are hesitant to hold that the Vienna Convention creates personal rights, and even more hesitant to attach constitutional due process importance to any such rights, reliance on a *Miranda* framework to impose the duty of informing aliens of their "rights" under the Vienna Convention would likely fail.

If the federal government were to affirmatively require local government officials to carry out the provisions of the Vienna Convention, it would probably have to rely on its constitutional power to conduct foreign policy and make treaties. The conflict between the limitations on the ability of the states to contradict foreign policy and the limitations on the power of the federal government posed by *Printz* merits analysis.

D. *It is Not Clear that the Federal Government Can Force the Administrative Duties of International Treaties on State Governments*

There seems to be a tension in the Constitution between the ability of the federal government to formulate coherent national policy in the areas that it is entitled to do so under the Constitution, and the power of states to formulate their own policy and maintain a degree of independence from the federal government.[186] The federal government does have broad treaty-making powers and the case law is clear that the state governments cannot effectively contradict international treaty through state law. The interesting question is: to what degree can the federal government avoid constitutional limits on its power to act in internal affairs by placing new duties on states via international treaty?

If state law conflicts with an international treaty in a direct sense, the state law or practice is likely to be struck down by a federal court. However, current federal law does not address the degree to which a state must engage in affirmative acts to effectuate the policy or provisions of an international treaty. The first part of this section will address the conflict between state arrest practices and treaty law and whether any such conflict could justify the federal government imposing affirmative duties on states. The second part will address whether the distribution of power between the three branches of government in the Constitution would forbid the imposition of such affirmative duties. Lastly, this section will analyze the effect of the federal government's Article I powers to define and

185. *See Murphy*, 116 F.3d at 99-100 (holding that violations of the Vienna Convention do not constitute constitutional violations); *Waldron*, 17 F.3d at 518 (holding that any rights under the Vienna Convention do not implicate fundamental rights with constitutional origins).

186. *See* Friedman, *supra* note 7, at 1471-72.

punish offenses against the law of nations and the ability of the federal government to regulate state government actions regarding practices covered in an international treaty.

1. It Is Questionable Whether There Is a Conflict Between State Arrest Practices and the Vienna Convention Requirements that Would Justify Voiding State Arrest Practices

If a state law or practice conflicts with the terms of a valid treaty, that law or practice is void under the Supremacy Clause.[187] It is clear that there is no direct conflict with international law when a state government arrests aliens without informing them of provisions in the Vienna Convention that give them the right to contact their consulate. The United States is still free to carry out its obligations under the Vienna Convention by informing the aliens of their ability to contact their foreign consulates.[188] An example of a direct conflict is if a local government fails to inform an alien of his right to communicate with his consulate, or prevents the alien from exercising this right. Such a policy or state law would directly conflict with the provisions of international law as determined by federal law,[189] and such local practice or law would be void under the Supremacy Clause.[190] However, the absence of a direct conflict with federal treaty law does not mean that a state practice or law is valid under the Supremacy Clause.[191]

Even in the absence of a direct conflict with a treaty provision, if a state practice or law impedes the policy behind a federal treaty provision, it will be void under the Supremacy Clause.[192] The United States would likely find out that a foreign national is arrested before he goes to trial.[193] The federal government could, at that time, inform his of the relevant Vienna Convention provisions in accordance with Vienna Convention requirements.[194] Arguably, however, relying on the federal government to inform foreign nationals of the treaty provisions would cause too much delay. Thus, it may be useful to uncover the policy behind the relevant Vienna

187. *See supra* notes 50-51 and accompanying text.

188. *See* Vienna Convention, *supra* note 2, art. 36, 21 U.S.T. at 100 (requiring a foreign national to be informed of his ability to contact his consulate).

189. *See id.* (requiring that a foreign national be able to freely communicate with his consulate).

190. *See supra* text accompanying note 51.

191. *See supra* note 61 and accompanying text.

192. *See id.* Assuming, of course, that the treaty provision conforms with the requirements of the Constitution. Reid v. Covert, 354 U.S. 1, 1, 6 (1957).

193. Criminal proceedings are generally a matter of public record and the federal government could do a search of such records to facilitate any efforts that it might undertake in bringing the matter of an alien arrest to its attention.

194. *See* Vienna Convention *supra* note 2, art. 36, 21 U.S.T. at 100.

Convention provisions to determine whether failing to inform aliens of their "rights" under the treaty upon arrest would conflict with this policy. Once the policy is known, it will be easier to consider the relevance of the timing of notification.

In determining the policy behind the relevant Vienna Convention provisions, it may be useful to refer to the somewhat similar policies behind the *Miranda* decision. *Miranda*, like the Vienna Convention, deals with rights that an arrested individual must be informed of while in custody.[195] The policy behind the *Miranda* requirements is to ensure the protection of the rights that an individual in custody has under the Fifth Amendment to the Constitution.[196] In order to effectuate protections for an individual's right to remain silent,[197] the policies of the *Miranda* rule dictate that an individual in custody be informed of such rights prior to questioning.[198] To inform an individual in custody of his rights after questioning would greatly undermine the policy of protecting the individual's Fifth Amendment rights.[199]

The policy of the Vienna Convention as a whole is "to ensure the efficient performance of . . . consular posts on behalf of their respective States."[200] The drafters of the Vienna Convention apparently thought, as evidenced by Article 32 of the Convention, that for consulars to act efficiently, it was necessary for such consulars to have the opportunity to consult with arrested foreign nationals.[201] One might argue that it is important that the consulars be contacted immediately so as to inform aliens of their relevant constitutional rights.[202] However, aliens already receive such notification of their rights as part of their *Miranda* warnings.[203] Also, an argument could be made that since aliens are presumably less familiar with the legal system in this country, it is necessary for someone of their own country to explain the importance of any constitutional right that they may waive. However, *Miranda* is sufficient to provide this type of protection. *Miranda* holds that any

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195. *See* Miranda v. Arizona, 384 U.S. 436, 436-37 (1966).

196. *See id.* at 444 ("As for the procedural safeguards to be employed . . . . Prior to any questioning, the person must be warned that he has a right to remain silent . . . and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

197. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

198. *See Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent . . . .").

199. *See id.*

200. *See* Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79.

201. *See id.* art. 36, 21 U.S.T. at 100.

202. *See* U.S. CONST. amend. V.

203. *See Miranda*, 384 U.S. at 444.

waiver of constitutional rights must be done not only voluntarily, but "knowingly and intelligently" as well.[204] Thus, if a consulate makes contact with an arrested alien of his country after questioning, it is hard to see how the alien is prejudiced, since *Miranda* lays down broad, sweeping protections that all individuals in custody enjoy.

Regardless, the policy of the Vienna Convention seems to be focused on something other than the protection of individual rights. The Preamble of the Vienna Convention holds that the treaty was not created "to benefit individuals."[205] Such an attitude is reflected in regulations issued by the U.S. Department of Justice to effectuate compliance with Vienna Convention provisions.[206] Such regulations require federal officers to inform an arrested alien that his consulate will be notified of the arrest.[207] However, the regulation does not require federal officers to inform an arrested alien of his right to communicate with the consulate,[208] evidencing a focus away from the individual and toward the relevant foreign government. Thus, both the preamble of the Vienna Convention, and the regulations issued by the federal government to comply with the treaty, suggest that the policy behind the Vienna Convention provisions is not one of safeguarding individual rights.

Faulder indicates that the policy of the Vienna Convention is to allow *countries* an opportunity to assist in the defense of one of their citizens before trial.[209] In *Faulder*, the Fifth Circuit refused to overturn state criminal proceedings, explaining that the evidence that could have been obtained by an alien's home country in preparation for trial would have had no effect on the trial process because it would have been duplicative of evidence that his domestic defense had gathered.[210] The court did not apply the Vienna Convention to the defendant's due process claim that his personal rights were violated.[211] The approach adopted by the Fifth Circuit is consistent with the Vienna Convention's policy of providing an opportunity for countries to participate in foreign processes involving their citizens, as opposed to a focus centered on granting individual rights.

Thus, the policy goals of the Vienna Convention seem not to require that an alien be informed of the relevant provisions as quickly as he would be informed of his *Miranda* rights. *Miranda* concerns personal, constitutional rights and requires that an alien be informed

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204. *Id.*
205. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79.
206. *See* 28 C.F.R. 50.5 (1997).
207. *See id.*
208. *See id.*
209. *See* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.) *cert. denied* 117 S. Ct. 487 (1996).
210. *Id.*
211. *See id.*

of his constitutional rights at least before questioning, since the rights include the right to remain silent.[212] The Vienna Convention concerns the rights of nations and is designed to give a country the opportunity to represent itself at the alien's trial, which comes later in the criminal process.[213]

However, there is a compelling counterargument. A delay would have a negative effect on the efficiency of foreign consulars. The efficiency of consular posts is a concern expressed in the preamble of the Vienna Convention for the treaty's creation.[214] Thus, this delay might pose a conflict. This argument is strengthened by another provision of the Vienna Convention, which holds that an alien is required to be informed of his ability to contact the relevant foreign consulate without delay.[215] However, the state governments are not prohibiting the federal government from fulfilling its role under the treaty. Furthermore, state governments would likely argue that they are under no obligation to help the federal government administer its duties, and that any failure of the federal government to comply with Vienna Convention provisions would result from the federal government's laxity in finding out about arrests of aliens.[216] The state practices would not necessarily *counter* federal practices, though they could possibly be *supplemented* by federal practices to effectuate effective compliance with the treaty.[217] However, the fact that the treaty requires notification without delay implies that there are some important policy implications that would be undermined by any delay. The answer to this legal quandary may lie in a court's determination of how quickly the federal government could notify an alien of Vienna Convention provisions in the absence of the state compliance.

2. Even If a Conflict Exists, Imposing Affirmative Duties on Local Officials Might Not Be Constitutional Because of the Separation of Powers Doctrine

When the federal government imposes affirmative duties on local governments to effectuate federal law, there is another constitutional issue that arises, besides the division of power between local and

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212. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent . . .").

213. *See* Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79; *Faulder*, 81 F.3d at 520.

214. *See* Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79 (stating that "the purpose of such privileges . . . is . . . to ensure the efficient performance of . . . consular posts . . .").

215. *See id.* art. 36 (1)(c), 21 U.S.T. at 101.

216. Perhaps the federal government could efficiently meets its obligations by creating a federal reporting system for arrests of aliens.

217. *See id.* art. 36, 21 U.S.T. at 100-01.

federal government.[218] The federal government cannot transfer the duties of enforcing federal law from the Executive Branch to local governments. Doing so, in the opinion of the Supreme Court, as evidenced by *Printz*, would upset the constitutionally structured division of power between the three branches of government.[219] Thus, determining whether the federal government can void state arrest procedures, despite the traditional division of power between federal and state governments, would be determinative of whether the federal government can impose the obligations of effectuating treaty provisions on local governments.

Imposing the burdens of carrying out federal treaty law[220] on state governments would clearly violate the division of power between the three branches of the federal government.[221] This would likely be the effect even if imposing the duties of the Vienna Convention on state governments was judged to be consistent with the division of power between federal and state governments.[222] Placing the administrative burden of effectuating federal law on states instead of the executive branch would dilute the power of the executive branch, allowing Congress or the courts to bypass the role of the executive in administering federal law by placing that role on state governments.[223] This is precisely what the Supreme Court criticized in *Printz*.

The federal government's traditional powers would not override the separation of powers concerns expressed in *Printz*. It is important to note that *Miranda* addresses constitutional law, through which the federal government can impose on the states constitutional duties under the Fourteenth Amendment.[224] This is why the determination of whether any "rights" under the Vienna

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218. *See* Printz v. United States, 117 S. Ct. 2365, 2378 (1997).

219. *See id. See also supra* Part II.D.3.

220. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (referring to treaty law as "law of the United States" and according it the same status as statutes passed by Congress). *See also* U.S. CONST. art. I, § 10, cl. 1 (forbidding state treaties as a matter of law); U.S. CONST. art. II, § 2, cl. 2 (granting Congress the power to make treaties); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

221. *See supra* text accompanying notes 117-19.

222. *See id.*

223. *See Printz*, 117 S. Ct. at 2378 (citing U.S. CONST. art. II, § 3). Even if one were to argue that the division of power between the federal and state governments relied solely on the Tenth Amendment, and that this Amendment, because of *Holland*, was inapplicable to foreign policy, it is important, as noted in Section II.D.3 of this Note, that the Court in *Printz* did not rely on the Tenth Amendment. Instead, the Court relied on the structure of the Constitution as a whole in addressing the division of power between the branches of government and the division of power between the federal and local governments. *See id.*

224. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

Convention would rise to a constitutional nature[225] may have important implications. One may try to argue that the Necessary and Proper Clause in Article II, Section 8 would give Congress the power to impose affirmative duties on state governments, when necessary, to carry out an international treaty.[226] However, the Supreme Court in *Printz* firmly rejected the idea that the Necessary and Proper Clause could be used to impose affirmative obligations on states. As explained by the Court, "[e]ven where Congress has the authority under the Constitution to pass laws requiring . . . certain acts, it lacks the power directly to compel the States to require . . . those acts."[227]

3. Congress Might Have the Ability to Impose Duties on Local Governments Under Its Power to Define and Punish Crimes Against the Law of Nations

Since Congress has the power under Article I, Section 8, Clause 10, to define and punish crimes against the law of nations, Congress might be able to pass federal legislation expanding on the Vienna Convention. Congress can derive from broad principles of international law a more precise federal code, if such a code is necessary "to bring the United States into compliance with rules governing the international community."[228] The Supreme Court has ruled that the law of nations holds that every national government should use "due diligence" to prevent wrongs being done in its own territory against another country or citizens of that country.[229] This suggests that Congress could distill from the Vienna Convention precise code provisions regulating the arrest of foreign nationals.

The above reasoning may be problematic. First, if the Vienna Convention does not create personal rights, and the analysis and case law in Section III (A) suggest that it does not,[230] it may be difficult to argue that arresting an alien without informing him of the relevant Vienna Convention provisions is a wrong that the federal

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225. *See supra* Section III.A.2.

226. U.S. CONST. art. I, § 8, cls. 1, 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States . . .").

227. *Printz*, 117 S. Ct. at 2379 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

228. Finzer v. Barry, 798 F.2d 1450, 1455 (D.C. Cir. 1986), *rev'd in part and aff'd on part on other grounds sub nom.* Boos v. Barry, 485 U.S. 312 (1988).

229. United States v. Arjona, 120 U.S. 479, 488 (1887).

230. *See supra* Section III.A.

government would be justified in preventing by federal law.[231] However, in *Finzer*, the U.S. Court of Appeals for the District of Columbia held that the legislative and executive branches of the federal government are to be given deference when they deem that a provision under Congress' power to define and punish crimes against the law of nations is necessary to bring the United States into compliance with international law.[232] This discretion indicates that the courts are reluctant to second-guess Congress' judgment that such a law is necessary to prevent a wrong done to citizens of foreign countries.[233]

Defining arrests of aliens not advised of Vienna Convention provisions as crimes would present an even greater conflict with *Printz*. Normally, criminal law prohibits negative acts, as has been seen in examples where Congress has used its Clause Eight power to define and punish crimes against the law of nations, such as counterfeiting.[234] Criminal law does not normally require one to engage in affirmative acts. Nevertheless, if Congress legislated that local governments must inform aliens of Vienna Convention provisions upon being arrested, with the failure to do so constituting a crime, it would be using federal criminal law to impose affirmative duties on local governments.

At first glance, this might conflict with *Printz*.[235] *Printz*'s holding regarding the division of power between federal and local governments[236] may or may not be applicable here. The power of Congress to define and punish crimes against the law of nations does not expressly exclude state governments from exercising this power.[237] If Congress could, under its broad discretion in Article I, Section 8, Clause 10,[238] define what actions on the part of states constitute crimes against the law of nations, then Congress would, in effect, have the power to void state practices under the Supremacy Clause that are not in conflict with an international treaty.[239]

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231. *See Arjona*, 120 U.S. at 484 (noting that a national government can use due diligence to prevent a "wrong" being done within its territory against a foreign country or citizens of that country).

232. *Finzer*, 798 F.2d at 1460.

233. *See id.*

234. *See Arjona*, 120 U.S. 479.

235. *See supra* Section II.D.3.

236. *See* Printz v. United States, 117 S. Ct. 2365, 2378 (1997).

237. *See* U.S. CONST. art I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish . . . Offenses against the Law of Nations.").

238. *See* Finzer v. Barry, 798 F.2d 1450, 1460 (D.C. Cir. 1986) (noting, in a case addressing the use of Congress' powers under Article I, Section 8, Clause Ten, that when the federal government passes a law designed to bring the United States into compliance with international law, broad deference is to given to the legislative and executive branches), *rev'd in part and aff'd in part on other grounds sub nom.* Boos v. Barry, 485 U.S. 312 (1988).

239. *See supra* Section III.B.2.

When analyzing whether a state practice constitutes a conflict with international treaty under the Supremacy Clause, a court must determine whether a conflict actually exists with an international treaty.[240] However, the application of Article I, Section 8, Clause 10 to state governments would essentially allow Congress to make this determination.[241] Congress would be able to expand treaty law via federal code to the point where there was a conflict between state practices and an international law, even if there was no conflict with the express provisions of a treaty itself.[242] Then it would be able to determine, in its sole discretion, whether a state practice contradicted international law.[243] This would seemingly remove the role of the courts in mediating such a conflict.

Thus, there may be constitutional dangers to the separation of federal and state governments in allowing Congress to apply this clause against state governments. The application of Article I, Section 8, Clause 10 against states would give federal law a broader power to override state law without meeting the conflict test used by the courts in determining whether a state law must yield to an international treaty under the Supremacy Clause.[244] In the case of the Vienna Convention, the federal government would be using its power to define crimes against the law of nations to punish the absence of affirmative acts by states, which might heighten the concerns expressed in *Printz*.[245] The resolution of the conflict here would depend on whether the power of Congress under a specific provision of the Constitution is judged to outweigh the Constitution's structural devices for protecting the balance of power between the federal government and the states.

Of course, it is possible that a court could decide that the power of Congress to define crimes against the law of nations was not intended to be applied against the actions of states in an effort to resolve conflicts between state practices and international treaty. The court could reason that the Supremacy Clause, instead, was designed to appropriately resolve federal and state conflicts.[246] A

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240. *See supra* Section II.D.2.

241. U.S. CONST. art. I, § 8, cl. 10.

242. *See Finzer*, 798 F.2d at 1455 ("[A]rticle I, section 8 of the Constitution authorized Congress to derive from the often broadly phrased principles of international law a more precise code . . . .").

243. *See* U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power to define offenses); *Finzer*, 798 F.2d at 1455 (noting that Congress determines under Article I, Section 8 whether making a certain act illegal is necessary to bring the United States into conformance with international rules of conduct).

244 *See supra* Section III.B.2.

245. *See* Printz v. United States, 117 S. Ct. 2365, 2378 (1997).

246. *See supra* Section III.B.2 (analyzing how courts use the Supremacy Clause in determining whether a federal law overrides state law in the context of international treaties).

court might come to such a conclusion in attempting to interpret Article I, Section 8, Clause 10 in a manner consistent with the Constitution's structural division of power between the federal and state governments and between the branches of the federal government itself.

Printz's concern about the balance of power between the branches of the federal government would also be relevant to this situation.[247] If Congress used its power to define crimes against the law of nations as a way of imposing on states the duties of administering international law, this would weaken the power of the executive branch in administering federal law. Reducing the role of the President in administering federal law would unconstitutionally undermine the division of power between the three branches.[248]

A second concern about the separation of powers would arise if Congress used its power to define offenses against the law of nations against the actions of state governments. Normally, the federal judiciary determines whether state actions or laws undermine federal law.[249] However, if Article I, Section 8, Clause 10 is applied against the states, then Congress would, as discussed above, have the sole power to determine whether restricting a state action was necessary to conform to international law. Thus, the role of an independent judiciary in evaluating disputes between federal law enactments of Congress and state law would be reduced, with Congress gaining a corresponding increase in power.

The reduction of the power of the judicial branch would raise the same concerns that a reduction in the power of the executive branch did in *Printz*.[250] Just as the reduction of the power of the President in *Printz* allowed Congress to "act as effectively with the President as without him,"[251] the use of Article I, Section 8, Clause 10 against the states would seem to allow Congress to act as effectively with the courts as without them. Use of this power against the states to require affirmative acts on the part of state governments would raise concerns that both the power of the executive branch in administering federal law and the power of the judicial branch interpreting conflicts in the law were being unconstitutionally reduced.

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247. *Printz*, 117 S. Ct. at 2378.

248. *See id.*

249. *See supra* Section III.B.2.

250. *See Printz*, 117 S. Ct. at 2378 (explaining the importance of "the separation and equilibration of powers between the three branches of the federal government itself" and criticizing a reduction in the power of the President that would allow Congress to "act as effectively without the President as with him").

251. *Id.*

4. Violation of Vienna Convention Duties Would Not Justify the Use of the Exclusionary Rule

If evidence is obtained in a manner that violates a defendant's constitutional rights, it is excluded from trial.[252] Thus, a determination of whether the Vienna Convention implicates rights of a constitutional nature[253] may have bearing on whether the suppression of evidence rule should be invoked to remedy possible violations of the treaty. However, the suppression of evidence rule is sometimes used in limited cases where the defendant's constitutional rights have not been violated.[254] If evidence is obtained in a manner that is illegal but not in violation of the Constitution, it still may be excluded if the purpose of the statute making it illegal was to allow for exclusion.[255]

Because the Vienna Convention arguably does not create personal rights,[256] it seems unlikely that the Vienna Convention was intended to provide for suppression of evidence. The purpose behind the exclusionary rule is to deter the government from violating a person's Fourth Amendment rights.[257] Since the Vienna Convention does not seem to create personal rights, the policy purpose of the exclusionary rule would be inapplicable.

Foreign countries have the right to enforce a treaty regardless of whether the treaty creates personal rights for individuals.[258] However, in protesting a treaty violation, a foreign country would have a difficult time trying to introduce the suppression of evidence rule as a third party. The exclusionary rule can only be asserted by the victim of a rights violation.[259] In the context of unwarranted searches, the Supreme Court has ruled that the search must have been directed against the person who is asserting the exclusionary rule.[260] Thus, the exclusionary rule cannot be asserted vicariously.[261]

A cost-benefit approach is taken by the courts in deciding whether to apply the exclusionary rule.[262] The courts consider the

252. *See* Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* Boyd v. United States, 116 U.S. 616 (1886).

253. *See supra* Section III.A.2.

254. *See* United States v. Giordano, 416 U.S. 505, 528 (1974).

255. *See id.*

256. *See supra* Section III.A.1.

257. *See* United States v. Leon, 468 U.S. 897, 906 (1984).

258. *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957).

259. *See* United States v. Salvucci, 448 U.S. 83, 85 (1980).

260. *See id.*

261. *See id.*; Alderman v. United States, 394 U.S. 165, 174 (1969).

262. *See Leon*, 468 U.S. at 907-08 (weighing the costs and benefits of preventing the prosecution from using otherwise trustworthy information gained from an illegal search); *see also* Stone v. Powell, 428 U.S. 465, 489 (1976)

substantial social costs that would be posed by an unbending application of the exclusionary rule,[263] and the effect that such an application would have on the truth-finding functions of the judge and jury.[264] Thus, the principles advanced by the exclusionary rule are balanced against the harm that would result from its indiscriminate application. This balancing is done to prevent disrespect for the law, which would result in a windfall for the defendant.[265] Thus, the exclusionary rule has been confined to areas where the remedial objectives of it are "most efficaciously served."[266] Therefore the application of the exclusionary rule has principally been used when rights violations are those of a constitutional nature; it has not been used as a personal right for defendants or as an across the board privilege.[267]

One court addressed whether a violation of a Vienna Convention provision would be a reason to apply the exclusionary rule.[268] In *United States v. Enger*, a defendant alleged that evidence had been obtained in violation of his diplomatic immunity under a different provision of the Vienna Convention.[269] The Court declined to suppress the contested evidence.[270] The court held that the treaty does not support using the exclusionary rule as a remedy for a violation.[271] As explained by the court, "No exclusionary rule is explicated by . . . the Vienna Convention . . . . I decline to infer such a rule from the Vienna Convention in the absence of a clear indication that the draftsmen of the Convention . . . intended to engraft such a rule on the statutes or the treaty."[272]

(weighing the "utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims").

263. *See Leon*, 468 U.S. at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

264. *See Payner*, 447 U.S. at 734. *See also Stone*, 428 U.S. at 490 (stating that applying the exclusionary rule "deflects the truthfinding process and often frees the guilty").

265. *See Stone*, 428 U.S. at 490-91 (stating that the rule, if applied indiscriminately, may generate "disrespect for the law and the administration of justice").

266. *Leon*, 468 U.S. at 908 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

267. *See id.* at 906-07 (explaining that the exclusionary rule is not a personal right but rather a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrence effect).

268. *See* United States v. Enger, 472 F.Supp. 490, 545 (D.N.J. 1978).

269. *Id.* This claim addressed Article 3 of the Vienna Convention. *See id.* at 544.

270. *See id.* at 545.

271. *See id.*

272. *Id.*

Because the exclusionary rule was not provided in the treaty, it would be difficult to justify its use.[273] The court explained the policy rationale for not invoking the exclusionary rule:

> [A] judicial application of the exclusionary rule in an area so pervaded by legislative and executive interests, [sic] foreign affairs, would be unwise when the rule cannot be said to be of universal application in the nations of the world or, in the case of the Convention, in the 122 signatory nations. Of all the major civil and common law countries, the United States is the only nation that has developed a comprehensive exclusionary rule. Other common law jurisdictions have generally followed the traditional English view of admitting all evidence, regardless of whether it has been obtained in an illegal search and seizure.[274]

One implication of the above passage is that if the United States applied the exclusionary rule to violations of the Vienna Convention, aliens in this country would have greater privileges than would Americans in other signatory countries.

IV. CONCLUSION

The Vienna Convention cannot conclusively be construed as creating personal rights that are enforceable against the states. Allowing the creation of new personal rights by international treaty, enforceable against the states, would bypass the Article V mandate of consent and participation of the states that is supposed to be used for amending rights that individuals have against the government.[275] It is unclear whether state arrest practices conflict with the Vienna Convention and whether the federal government can impose affirmative duties on states in an attempt to remedy any such conflict. Using the power of Congress to define crimes against the law of nations might be a valid means for enforcing the obligations of international treaties against the states. However, using this power to encompass acts by state governments may upset the balance of power between the federal government and states, and the separation of powers in the federal government, in a manner that is not constitutionally viable. If affirmative duties under the Vienna Convention can be enforced against states, the policies behind the

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273. *See* United States v. Giordano, 416 U.S. 505, 528 (1974) (noting that outside the scope of constitutional violations, the exclusionary rule may be used if the purpose of the statute was to allow for its exclusion).

274. *Enger*, 472 F. Supp. at 545 n. 26 (opinion on motion for reconsideration) (citations omitted).

275. *See* U.S. CONST. art. V (providing for state participation in amendment of the Constitution); Reid v. Covert, 354 U.S. 1, 17 (1957) (criticizing the use of treaties that would change the Constitution outside the manner sanctioned in Article V).

application of the exclusionary rule would not support the use of the rule to suppress evidence when a provision of the treaty is violated.

The above analysis may have crucial implications outside the scope of criminal law at a time when international treaties are becoming less concerned about foreign policy affairs, as was the case during the Cold War, and more concerned about traditionally domestic matters such as the environment.[276] As treaties move away from a foreign policy focus, they will touch upon areas of the law that have traditionally been left under the control of state governments[277]—state governments which are having their sovereignty buoyed by the Supreme Court's recent reassertion of federalism.

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276. *See* Friedman, *supra* note 7, at 1444-45.

277. *See id.* (observing that globalization puts increasing strain on the power dynamic between the federal government and the states).

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