

Help or Hindrance? The Relevance of States in Implementing International Criminal Treaties

CINDY G. BUYS*

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I. INTRODUCTION

In the United States' federalist constitutional system, the states still retain primary responsibility for the creation and enforcement of criminal law.¹ States are said to have a general police power to act in this regard.² By contrast, the U.S. Constitution only gives the federal government certain enumerated powers, which do not include a general police power.³ If the federal government wishes to regulate criminal behavior, it must tie any federal statutes punishing domestic crimes to one of Congress's enumerated powers, such as the Commerce Clause.⁴ Increasingly, however, the United States has used its treaty-making power⁵ and its power to regulate foreign commerce to enter into international agreements that proscribe various kinds of criminal behavior, such as conventions on hijacking planes,⁶ fighting

* Cindy G. Buys, Professor of Law and Director of International Law Programs, Southern Illinois University School of Law. The author would like to thank the organizers of the *Ohio State Law Journal* Symposium entitled *Re-Thinking State Relevance* for their great work in putting together this symposium issue.

¹ See, e.g., *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 96 (1964), *abrogated by* *United States v. Balsys*, 524 U.S. 666 (1998) (“[T]he States still bear primary responsibility in this country for the administration of the criminal law”); see also Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 293 n.186 (2011) (citing *Murphy* to explain the “historical state primacy in criminal law”).

² See Chin, *supra* note 1, at 266 (discussing the states' implied police power).

³ Congress does, however, have the power, “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.

⁴ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), *superseded by statute*, 18 U.S.C. § 922(q), Pub. L. No. 104–208, Div. A, Title I, § 101(f), 110 Stat. 3009–369, 3009–372 (1996) (amending the Gun-Free School Zones Act of 1990).

⁵ U.S. CONST. art. II, § 2, cl. 2.

⁶ See Convention for the Suppression of Unlawful Seizure of Aircraft, art. I, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

corruption,⁷ prohibiting the sale and prostitution of children,⁸ and engaging in terrorist activities.⁹ Much of this behavior is also a crime under various state laws and it is often state law enforcement authorities who are the front line personnel in identifying and arresting persons who could be charged with crimes under both U.S. and international law.¹⁰ As a result, state law enforcement is increasingly intersecting with international crimes.¹¹

In addition to treaties proscribing criminal behavior, the United States belongs to a number of treaties that regulate the treatment of foreign defendants in U.S. custody, such as the International Covenant on Civil and Political Rights, which provides for certain procedural rights, such as a right to a fair trial before an independent decision-maker.¹² Other international agreements provide for cooperation with other countries' law enforcement authorities in pursuing criminals across international boundaries.¹³ While most of this formal cooperation in fighting international crimes occurs at the federal level, the federal government often asks state and local law enforcement agencies to assist in these efforts in their local jurisdictions.¹⁴

Sometimes, states work harmoniously together with the federal government to carry out the United States' treaty obligations; other times, states resist compliance with those international obligations because of conflicting state policies or objectives.¹⁵ Either way, states continue to retain significant relevance in the area of criminal law and the federal government would do well to consider states' views when joining and implementing international treaties that pertain to criminal conduct if the federal government wants to ensure state cooperation.

⁷ See United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41.

⁸ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. I, *adopted* May 25, 2000, S. TREATY DOC. NO. 106-37, 2171 U.N.T.S. 227.

⁹ See COMMITTEE ON FOREIGN RELATIONS, INTER-AMERICAN CONVENTION AGAINST TERRORISM, S. EXEC. DOC. NO. 109-3, at 1, 2 (2005).

¹⁰ See *Guide to Criminal Prosecutions in the United States*, INFO. EXCHANGE NETWORK FOR MUTUAL ASSISTANCE CRIM. MATTERS & EXTRADITION, https://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html [<https://perma.cc/PCS6-VNVP>] (explaining that states prosecute most crimes against persons and property).

¹¹ See *id.*

¹² See International Covenant on Civil and Political Rights, art. 9, art. 14, *adopted* Dec. 19, 1966, S. EXEC. DOC. NO. 102-23, 999 U.N.T.S. 171.

¹³ For example, pursuant to the Merida Initiative, the United States and Mexico share resources and information to combat cross-border criminal issues. See CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 9 (2017), <https://fas.org/sgp/crs/row/R41349.pdf> [<https://perma.cc/N3PE-QLFL>].

¹⁴ See discussion *infra* Parts II and III (providing examples of international criminal cases in which the federal government asked for the assistance of state and local enforcement agencies).

¹⁵ See discussion *infra* Parts II and II (same).

Two illustrative examples of international treaty obligations that frequently involve states in their enforcement are consular notification and extradition. The following parts describe the United States' treaty obligations in these two areas and how states do or do not assist the federal government in the implementation of those obligations. This discussion also highlights the consequences when states and the federal government fail to work harmoniously together, both domestically and with respect to the impact on the United States' foreign relations. Finally, the Article concludes with some suggestions as to why and how federal and state governments can work better together to ensure that U.S. treaty obligations are respected and criminals are held accountable for their actions.

II. CONSULAR NOTIFICATION AND ACCESS

The duty to provide consular notification and access to foreign persons who are arrested and detained in the United States is a prime example of the continuing relevance of states in ensuring compliance with the United States' international obligations in criminal matters. Consular notification and access has ancient roots.¹⁶ Today, the United States' duty to provide consular notification and access derives primarily from Article 36 of the Vienna Convention on Consular Relations (VCCR),¹⁷ as well as from approximately sixty bilateral consular treaties.¹⁸ Specifically, Article 36(1)(b) of VCCR requires that the competent authorities of a receiving state inform a foreign national who is arrested or detained in that state of his or her consular notification rights without delay.¹⁹ Further, if requested by a foreign national, the receiving state's authorities shall, also without delay, notify the consular post of the sending state that the receiving state's authorities have arrested or detained a national of the sending state.²⁰ The purpose of consular notification

¹⁶See United Nations Conference on Consular Relations, *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, ¶¶ 55, 57–58, 61, U.N. DOC. A/CONF.25/16 (Mar. 4, 1963) (providing statement on historical roots by President Stephan Verosta). For a description of the historical development of consular relations, see also Jaroslav Zourek (Special Rapporteur), *Consular Intercourse and Immunities*, [1957] 2 Y.B. Int'l L. Comm'n 71, 72–77, U.N. DOC. A/CN.4/108 (Apr. 15, 1957).

¹⁷Vienna Convention on Consular Relations, art. 36 (1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) [hereinafter VCCR or Vienna Convention].

¹⁸See U.S. Dept. of State—Bureau of Consular Affairs, *Bilateral Consular Conventions*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/legal-considerations/international-treaties-agreements/bilateral-consular-conventions.html> [<https://perma.cc/SG4E-3EEX>] (providing list of bilateral consular treaties).

¹⁹VCCR, *supra* note 17, at art. 36(1)(b).

²⁰While the Vienna Convention requires consular notice only if requested by the foreign national, see VCCR, *supra* note 17, many of the bilateral treaties mandate consular notice of all arrests or detentions regardless of the wishes of the foreign defendant. See

and access is to allow the consulate to provide assistance to its nationals, who may not speak English, understand the U.S. legal system, have access to legal counsel, or who may require other assistance.²¹

Litigation regarding the duty of consular notification under the VCCR exploded in many state and federal courts in the late 1990s.²² Foreign defendants arrested in the United States routinely were not being given consular notice and access by local and state law enforcement authorities.²³ Foreign defendants sought a variety of remedies, including exclusion of evidence,²⁴ dismissal of an indictment,²⁵ and civil damages.²⁶ The issue of lack of timely consular notification went to the U.S. Supreme Court on several occasions, most recently in the case of *Medellin v. Texas*.²⁷

The issue of consular notification and access is illustrative of the both the possibilities and perils of state cooperation or lack of cooperation with U.S. treaty obligations and the *Medellin* case is a prime example.²⁸ As is the case in most criminal matters, local law enforcement authorities arrested and charged Ernesto Medellin with rape and murder in Texas.²⁹ Medellin was a national of Mexico but the arresting and detaining officers never notified Medellin of his right to contact the consulate or let the Mexican Consulate know that Texas police had arrested and charged one of their nationals.³⁰ It was not until after conviction when the case was on appeal that the issue of the lack of consular notification came to light.³¹ The Texas courts took the position that it was too late to raise the issue on appeal and thus the issue was procedurally defaulted.³² Although Texas law enforcement officers had failed in their obligation to notify a foreign national whom they had arrested and detained of

U.S. Dept. of State—Bureau of Consular Affairs, *Countries and Jurisdictions with Mandatory Notifications*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/consularnotification/QuarantinNationals/countries-and-jurisdictions-with-mandatory-notifications.html> [<https://perma.cc/6PQQ-AMTB>] (providing list of such countries and jurisdictions).

²¹ Cindy Galway Buys et al., *Do unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 DUKE J. COMP. & INT'L L. 461, 467–69, 471–72 (2011).

²² *Id.* at 461.

²³ See *infra* notes 24–26 (providing examples of cases in which defendants were not given consular notice).

²⁴ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 340 (2006).

²⁵ See *United States v. De La Pava*, 268 F.3d 157, 160 (2d Cir. 2001).

²⁶ See *Jogi v. Voges*, 480 F.3d 822, 824, 835–36 (7th Cir. 2007).

²⁷ See *Medellin v. Texas*, 552 U.S. 491, 498 (2008) (determining whether international law and judgments are directly enforceable as domestic law); see also *Breard v. Greene*, 523 U.S. 371, 376–78 (1998) (holding that Vienna Convention claims are subject to procedural defaults).

²⁸ See *Medellin*, 552 U.S. at 501.

²⁹ *Id.*

³⁰ *Id.* at 500, 501.

³¹ *Id.* at 501.

³² See *id.* at 501–02.

his right to consular notification and access, Texas refused to correct the wrong.³³

Medellin attempted to have his murder conviction overturned on the basis of lack of consular notification and access, twice taking his case to the U.S. Supreme Court.³⁴ Mexico also tried to enforce the VCCR by suing the United States at the International Court of Justice (ICJ) on behalf of Medellin and fifty-one other Mexican nationals who also had been arrested, detained, and convicted of capital charges in various states in the United States without consular notice and access.³⁵ Mexico does not use the death penalty and opposes its use on its citizens elsewhere.³⁶ The United States did not deny that it had violated the VCCR by failing to provide consular notice and access in most of these cases, but argued that an apology to Mexico should be a sufficient remedy.³⁷ The ICJ disagreed, finding in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* that the proper remedy for the United States' violation of its treaty obligations would be for the United States to provide, "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."³⁸

Then U.S. President George W. Bush determined that the United States should discharge its international obligations under the ICJ's decision in *Avena* by having state courts give effect to the decision in accordance with general principles of comity.³⁹ Accordingly, he issued a Presidential Memorandum addressed to the Attorney General containing this instruction.⁴⁰ The Attorney General then forwarded that Memorandum to the affected states.⁴¹ While some states did comply,⁴² Texas flatly refused.⁴³ In fact, the Governor and Attorney

³³ See Allan Turner & Rosanna Ruiz, *Medellin Executed for Rape, Murder of Houston Teens*, HOUS. CHRON. (Aug. 5, 2008), <http://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php> [<https://perma.cc/RD47-BVAT>].

³⁴ The Supreme Court initially granted, then dismissed, Medellin's first petition for certiorari due to the ongoing litigation in other forums. *Medellin v. Dretke*, 544 U.S. 660, 662 (2005).

³⁵ See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 15, ¶ 14 (Mar. 31) [hereinafter *Avena*].

³⁶ See, e.g., Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 22, Diario Oficial de la Federación [DOF] 1917, 27 May 2015; Gabriel Stargardter, *Mexico Says Upcoming U.S. Execution of National Is 'Illegal'*, REUTERS (Nov. 6, 2017), <https://www.reuters.com/article/us-mexico-usa-deathpenalty/mexico-says-upcoming-u-s-execution-of-national-is-illegal-idUSKBN1D62WP> [<https://perma.cc/3E78-H3LZ>].

³⁷ *Avena*, 2004 I.C.J. at ¶ 120–21.

³⁸ *Id.* at ¶ 153.

³⁹ Memorandum for Attorney General from George W. Bush on Compliance with the Decision of the Int'l Court of Justice in *Avena* (Feb. 28, 2005), <https://www.state.gov/s/l/2005/87181.htm> [<https://perma.cc/JY99-TK68>] [hereinafter Bush Memorandum].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g., *Gutierrez v. State*, No. 53506, 2012 WL 4355518, at *3 (Nev. Sept. 19, 2012) (illustrating Nevada's compliance with the Bush Memorandum); *Torres v. State*, No.

General of Texas both rejected the idea that international law should trump the law of Texas, despite the Supremacy Clause to the U.S. Constitution making treaties the Supreme Law of the Land.⁴⁴ When Medellin challenged Texas' refusal to comply before the U.S. Supreme Court, that Court ruled that Texas' criminal procedure laws prohibiting defendants from raising new claims on appeal prevailed over the obligation to comply with the VCCR, the decision of the ICJ, and the Presidential Memorandum.⁴⁵ Texas proceeded with Medellin's execution a short time after the Supreme Court's judgment.⁴⁶

Professor McGuinness has written about treaties such as the VCCR acting as a "norm portal" through which international norms, such as the right of consular notice and access, are incorporated into U.S. law.⁴⁷ She is correct that U.S. law and practices at both the federal and state level have been changing in response to litigation over consular notice and access rights.⁴⁸ There are significantly fewer cases involving claims of lack of consular notification today than there were ten years ago.⁴⁹ This drop in litigation is likely due in part to the publicity surrounding the Supreme Court cases, which raised awareness of consular notification rights among both law enforcement and the bar. The drop also may result from greater education and outreach efforts by

PCD-04-442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004) (illustrating Oklahoma's compliance with the Bush Memorandum).

⁴³ See Mike Tolson & Rosanna Ruiz, *Hearings Ordered for Death Row Mexican Nationals*, HOUS. CHRON. (Mar. 9, 2005), <https://www.chron.com/news/houston-texas/article/Hearings-ordered-for-death-row-Mexican-nationals-1668623.php> [<https://perma.cc/FZ5R-GTVL>].

⁴⁴ Following the issuance of the ICJ's decision in *Avena*, Governor Rick Perry's spokesman stated: "Obviously the governor respects the world court's right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas." Polly Ross Hughes, *Texas Unmoved by Ruling on Death Row Cases*, HOUSTON CHRON. (Apr. 1, 2004), <https://www.chron.com/news/houston-texas/article/Texas-unmoved-by-ruling-on-death-row-cases-1985717.php> [<https://perma.cc/7T23-S3LV>] (quoting Robert Black, spokesman for Gov. Rick Perry). Likewise, the Texas attorney general stated that: "The [S]tate of Texas believes no international court supersedes the laws of Texas or the laws of the United States." Tolson & Ruiz, *supra* note 43 (quoting Greg Abbott, Texas attorney general).

⁴⁵ *Medellin v. Texas*, 552 U.S. 491, 522-23, 530, 532 (2007).

⁴⁶ See Turner & Ruiz, *supra* note 33.

⁴⁷ See Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 824, 828 (2006).

⁴⁸ See *infra* note 49.

⁴⁹ Between 1998 and 2003, there were 166 federal cases involving claims under the VCCR. That number rose to 214 between 2003 and 2008 and remained essentially flat immediately after the Supreme Court's *Medellin* decision in the period between 2008 to 2013, then fell to 123 between 2013 and 2018. Lexis Advance Search, LEXIS ADVANCE, <https://advance.lexis.com/firsttime?crd=4edc914f-8b22-488d-92d2-da6d13d6434c> (search the phrase "Vienna Convention on Consular Relations" in all federal cases, except Tribal cases, between 1998 and August 2018).

the federal government to state and local law enforcement.⁵⁰ In addition, both states and the federal government have enacted new rules to better define and implement the duty of consular notification for arresting and detaining by law enforcement officers at the state and local level.⁵¹ For example, Illinois enacted a law in 2015 that specifies which law enforcement officer is required to give the consular notice and exactly when it must be given.⁵² It also requires that Illinois judges check to ensure consular notice and access has been provided to a defendant at the first appearance of that defendant in court.⁵³ Similarly, Rule 5 of the Federal Rules of Criminal Procedure was recently amended to provide that a foreign defendant be advised of his or her right of consular notification and access.⁵⁴

Despite these changes, however, the incorporation of this international norm has been far from complete. States also have successfully pushed back against this norm incorporation, as is demonstrated by the *Medellin* case described above.⁵⁵ There, Texas refused to review and reconsider Medellin's death sentence despite the ruling from the ICJ or the Presidential Memorandum from the Bush Administration directing Texas to give effect to the ICJ's judgment.⁵⁶ And when Texas' refusal to comply was challenged before the U.S. Supreme Court, that Court ruled that Texas's criminal procedure laws prohibiting defendants from raising new claims on appeal trumped the obligation to comply with the VCCR, the decision of the ICJ, and the Presidential Memorandum.⁵⁷ The State of Texas's refusal to comply with these international obligations put the United States in a very difficult position vis-à-vis its VCCR treaty partners.⁵⁸ It has hurt U.S.-Mexican cooperation in fighting crime and the tension has not been resolved to this day.⁵⁹

The *Medellin* saga illustrates that states still have quite a bit of relevance in determining whether the United States will comply with its international obligations, particularly in the area of criminal law. Because most arrests and

⁵⁰ The U.S. Department of State provides educational training and resources relating to consular notification and access on its website here: *A Brief Introduction to Consular Notification*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/consular_notification.html [<https://perma.cc/D3ZP-3WHW>] [hereinafter TRAVEL.STATE.GOV].

⁵¹ See *infra* notes 52–54.

⁵² 725 ILL. COMP. STAT. 5/103-1 (2015).

⁵³ 725 ILL. COMP. STAT. 5/109-1 (2015).

⁵⁴ FED. R. CRIM. P. 5(d)(1)(F).

⁵⁵ See *supra* text accompanying notes 28–46.

⁵⁶ See *supra* text accompanying notes 35–46.

⁵⁷ See *Medellin v. Texas*, 552 U.S. 491, 522–23, 530, 532 (2008).

⁵⁸ See Emily Stephenson, *How Ted Cruz Win in Supreme Court Hurt U.S.-Mexico Relations*, REUTERS (Apr. 5, 2016), <http://www.reuters.com/article/us-usa-election-cruz-medellin/how-ted-cruz-win-in-supreme-court-hurt-u-s-mexico-relations-idUSKCN0X20ZH> [<https://perma.cc/RG6W-ATQF>].

⁵⁹ *Id.*

detentions occur at a state or local level—not at the federal level⁶⁰—implementation of the right of consular notification and access, like other procedural rights, requires reliance on state and local law enforcement agencies. If the United States wishes to ensure compliance with its treaty obligations, and ensure reciprocal rights of consular notice and access for Americans arrested or detained abroad, it must do a better job of working with states to implement these treaty obligations.

III. EXTRADITION

Another area of criminal law where states may be called upon to assist in the implementation of international agreements is with respect to extradition treaties. Extradition is the process by which one country formally surrenders an individual to another country for prosecution and punishment.⁶¹ Extradition normally occurs pursuant to a treaty that sets forth the criteria for extradition.⁶² As of 2010, the United States was a party to bilateral extradition treaties with 112 countries, in addition to several multilateral treaties.⁶³

Most extradition treaties require that the offense for which extradition is sought be punishable as a serious crime in both the requesting and requested state.⁶⁴ This requirement is known as “dual criminality.”⁶⁵ United States’ policy favors interpreting treaties in favor of honoring extradition requests.⁶⁶ Accordingly, the crime does not have to have exactly the same name in both states and the scope of liability does not have to be identical.⁶⁷ “It is enough if the particular act charged is criminal in both jurisdictions.”⁶⁸ Subject to some exceptions, crimes are generally defined by the “laws of the place where they are committed.”⁶⁹ Thus, state criminal law will often determine whether particular conduct is a crime subject to extradition.

A foreign country that wishes to obtain custody of a person in the United States usually initiates the extradition process by submitting a request for

⁶⁰ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, NCJ 251149, PRISONERS IN 2016, 4 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/PWB9-QPWC>] (comparing prisoners under jurisdiction of state and federal correctional authorities).

⁶¹ See MICHAEL J. GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98–958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1 (2010) [hereinafter CRS Report] (defining extradition and discussing extradition procedures).

⁶² *Id.*

⁶³ *Id.* at 35–42, app. A.

⁶⁴ *Id.* at 9–10.

⁶⁵ Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 191 (1992).

⁶⁶ *Id.* at 203 (quoting *Factor v. Laubenheimer*, 290 U.S. 276, 298–300 (1933)).

⁶⁷ CRS Report, *supra* note 61, at 10.

⁶⁸ *Id.* (quoting *Collins v. Loisel*, 259 U.S. 309, 312 (1922)).

⁶⁹ *Id.* at 12.

extradition to the U.S. Department of State.⁷⁰ The Secretary of State has the discretion to decide whether to forward the request to the U.S. Department of Justice (DOJ).⁷¹ Assuming the Secretary of State does so, the DOJ will examine the request for sufficiency and, if appropriate, forward the request to the district where the fugitive may be found.⁷² The Assistant U.S. Attorney in that district will obtain a warrant for the fugitive's arrest.⁷³ Once arrested, the fugitive will be brought before the magistrate judge or district court judge, who will schedule a hearing to determine if the fugitive is extraditable.⁷⁴ If the fugitive is extraditable, the court will enter an order of extradition and certify the record to the U.S. Secretary of State, who will decide whether to surrender the fugitive to the requesting government.⁷⁵

The extradition hearing is not a criminal trial and constitutional guarantees available to defendants in a criminal trial do not apply.⁷⁶ Instead, the court in an extradition hearing is to determine whether:

- (1) There exists a valid extradition treaty between the United States and the requesting state;
- (2) The relator is the person sought;
- (3) The offense charged is extraditable;
- (4) The offense charged satisfies the requirement of double criminality;
- (5) There is 'probable cause' to believe the realtor committed the offense charged;
- (6) The documents required are presented in accordance with United States law, subject to any specific treaty requirements, translated and duly authenticated ...; and
- (7) Other treaty requirements and statutory procedures are followed.⁷⁷

It is often the case that the persons who are sought for extradition are in state custody rather than federal custody.⁷⁸ Thus, although the federal government is primarily responsible for the extradition process, the U.S. government often relies upon the cooperation of state governments to assist in carrying out extradition requests.

For example, in the case of *In re Extradition of Fulgencio Garcia*,⁷⁹ police in Hodgkins, Illinois arrested and detained Nicolas Fulgencio Garcia on state

⁷⁰ *Id.* at 19.

⁷¹ *Id.*

⁷² *Id.* at 20.

⁷³ CRS Report, *supra* note 61, at 20.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 22–23.

⁷⁷ *Id.* at 21 (citing *In re Extradition of Valdez-Mainero*, 3 F.Supp 2d 1112, 1114–15 (S.D. Cal. 1998)).

⁷⁸ *See, e.g., In re Extradition of Fulgencio Garcia*, 188 F. Supp. 2d 921, 924 (N.D. Ill. 2002) (discussing extradition of a Mexican foreign national while in state custody); *In re Extradition of Cheung*, 968 F. Supp. 791, 796 (D. Conn. 1997) (discussing extradition of a Hong Kong foreign national while in state custody).

⁷⁹ *In re Fulgencio Garcia*, 188 F. Supp. 2d at 921.

law charges.⁸⁰ While in state custody, the authorities learned of an outstanding warrant for his arrest in Mexico for the crimes of injury and homicide against his wife.⁸¹ Mexico submitted a formal request for extradition pursuant to the 1978 U.S.-Mexico Extradition Treaty.⁸² Garcia was transferred from state custody into federal custody and an extradition hearing was held.⁸³ The U.S. District Court for the Northern District of Illinois found that there was sufficient evidence for both crimes to create probable cause to extradite Garcia to Mexico.⁸⁴

The United States government also sought the assistance of a state in carrying out an extradition request by the United Kingdom on behalf of Hong Kong in the case of *In re Extradition of Cheung*.⁸⁵ There, Hong Kong sought the defendant, John Cheung, in connection with thirty-three counts of financial deception and theft in Hong Kong.⁸⁶ Because the United States and Hong Kong do not have an extradition treaty directly between them, the United Kingdom made the request on behalf of Hong Kong, which the U.S. district court found to be proper.⁸⁷ U.S. Magistrate Judge Margolis issued a warrant for Cheung's arrest pursuant to a U.S. statute authorizing such action when a person who is the subject of an extradition request is found within the court's jurisdiction.⁸⁸ Cheung was arrested in December 1996 and held at a state facility, the New Haven Correctional Facility in Connecticut, while the extradition hearing was conducted.⁸⁹ Ultimately, the magistrate judge found the terms of the extradition treaty to be met and ordered Cheung's extradition to Hong Kong to answer the charges there.⁹⁰ Thus, once again, the United States government relied on local law enforcement to assist in carrying out obligations under an extradition treaty.

On the other side of the coin, the United States may be the requesting state seeking extradition of a fugitive who committed a crime in the United States, but the fugitive fled the country before being prosecuted, convicted, and punished.⁹¹ One famous example is the case of Jens Soering, a German national living in the United States, who was accused of killing his girlfriend's parents in Virginia.⁹² After the murder, Soering and his girlfriend fled to the

⁸⁰ *Id.* at 924.

⁸¹ *Id.*

⁸² *Id.* at 924-25.

⁸³ *Id.* at 924, 931.

⁸⁴ *Id.* at 935.

⁸⁵ *In re Extradition of Cheung*, 968 F. Supp. 791, 793-94 (D. Conn. 1997).

⁸⁶ *Id.* at 796-97.

⁸⁷ *Id.* at 796, 799.

⁸⁸ *Id.* at 800; 18 U.S.C. § 3184.

⁸⁹ *See in re Cheung*, 968 F. Supp. at 796.

⁹⁰ *Id.* at 809.

⁹¹ *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

⁹² *Id.* at 4.

United Kingdom, where they came to the attention of the U.K. authorities when they were caught attempting to pass a fraudulent check.⁹³

The United States requested that the United Kingdom extradite Soering back to the United States to stand trial for murder in Virginia pursuant to a bilateral extradition treaty between the United States and the United Kingdom.⁹⁴ Germany intervened and requested that the United Kingdom refuse the request because Germany opposed the death penalty, which was likely to be sought in Soering's case.⁹⁵ Germany claimed that imposition of the death penalty on one of its nationals would violate the European Convention on Human Rights and Fundamental Freedoms to which the United Kingdom belonged.⁹⁶

In response, the United Kingdom asked for an assurance from the United States that the death penalty would not be sought.⁹⁷ The United States explained that it was not the proper entity to make that decision because the State of Virginia was prosecuting Soering under state law, but agreed to make the request of the State of Virginia, where the murder occurred and the trial would take place.⁹⁸ The Commonwealth attorney of Bedford County, Virginia refused to give the requested assurance, stating only that he would make the court/jury aware of the views of the United Kingdom and Germany.⁹⁹ The dispute went to the European Court of Human Rights, which held that the United Kingdom would violate its obligations under the European Convention on Human Rights and Fundamental Freedoms if it extradited Soering to the United States due to the "death penalty phenomenon" that existed in the United States.¹⁰⁰ The European Court of Human Rights determined that this phenomenon constituted cruel, inhuman or degrading treatment or punishment in violation of Article 3 of the European Convention.¹⁰¹ Facing the prospect of not being able to try Soering for the murders, the Virginia prosecutor ultimately relented and agreed not to seek the death penalty.¹⁰² The United Kingdom then extradited Soering to the United States to stand trial, where he was convicted and sentenced to life imprisonment.¹⁰³ The Soering case is

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 23.

⁹⁷ *Soering*, at 5.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 38, 44.

¹⁰¹ *Id.* at 29.

¹⁰² *See* Susanne Zühlke & Jens-Christian Pastille, *Extradition and the European Convention – Soering Revisited*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 749, 750 (1999), http://www.zaoerv.de/59_1999/59_1999_3_a_749_784.pdf [<https://perma.cc/NRS2-ULQT>] (detailing the final sentencing outcome in *Soering*).

¹⁰³ *Id.*

another example of state reluctance to comply with international law, but this time, the state had to relent to obtain the international cooperation it sought.

IV. CONSEQUENCES OF STATE BEHAVIOR

When states work harmoniously with the federal government to carry out U.S. treaty obligations, the system can work as intended to bring criminals to justice in the appropriate or agreed upon forum. However, when states resist compliance with U.S. treaty obligations, the consequences for U.S. foreign relations can be severe. Foreign countries may not be willing to enter into treaties with the United States if the United States cannot guarantee that those treaty commitments will be respected. In addition, the United States may be unable to obtain extradition of fugitives abroad who committed crimes in the United States if the United States cannot carry out its extradition promises to its treaty partners when foreign fugitives are found in the United States. Further, treaty partners may be unwilling to accord certain rights guaranteed by these treaties to U.S. citizens who may be arrested or detained abroad, such as consular notification and access and other due process guarantees, if the United States does not provide those rights to foreigners in the United States.

Consequently, it is imperative that the U.S. government create positive working relationships with state and local law enforcement to ensure that these international treaty obligations relating to the criminal process work smoothly and as intended. This obligation should begin by consulting states when treaties are being negotiated so that state officers understand what obligations are being undertaken and why. This early consultation would allow states to raise any objections, potential conflicts with state laws, or procedural difficulties that may exist at a time when those problems may still be addressed in the treaty negotiations. Once a treaty is finalized, further federal-state consultations should take place to educate state officials about the treaty's terms and the state's potential role in assisting the United States to comply with its treaty obligations.

Post-adoption federal-state consultation is expressly provided for in some trade treaties such as the World Trade Organization Agreement and the North American Free Trade Agreement, so there is precedent for and some experience with the process.¹⁰⁴ However, more and better consultation prior to treaty conclusion would also be helpful in eliminating potential problems and ensuring state cooperation. Engaging in such an ongoing consultation process also would demonstrate respect for our federalist system of government, which continues to recognize the traditional police powers of the states.

Once a treaty is ratified, the federal government must engage in an extensive educational campaign, in which it provides information and training to state and local law enforcement officers so they understand their role and

¹⁰⁴ See Cindy Galway Buys, *The Supreme Court Misses the Mark: Towards Better Implementation of U.S. International Obligations*, 24 CONN. J. INT'L L. 39, 73 (2008).

how to carry it out. For example, in the context of consular notification and access, the U.S. State Department maintains a website with extensive materials that are available to state and local police officers about how and when to give consular notice, consular notice statements in several foreign languages, a consular notice pocket card, contact information for the various foreign consulates, and other relevant information.¹⁰⁵ In addition, the U.S. State Department conducts training sessions for state and local law enforcement officers around the country to ensure their understanding and compliance. While compliance remains far from perfect, improvements are being seen.

V. CONCLUSION

For many decades, the federal government has been increasing the scope of its authority and sphere of action and, some would argue, intruding on the reserved power of the states under the Tenth Amendment. One way the U.S. government has done so is through the use of the treaty power.¹⁰⁶ Ever since *Missouri v. Holland* in 1920, it has been accepted that the federal government may use its treaty power to regulate in areas traditionally reserved to the states, as long as the subject of the treaty is of international concern and no other U.S. Constitutional provisions are violated.¹⁰⁷ As persons, goods, and money increasingly move across international boundaries, crime must be addressed at the international level to be effective, despite the traditional view that criminal behavior is for state regulation. Accordingly, the U.S. government has entered into dozens of treaties that address crime and criminal procedure. As has been shown herein, however, such treaties will only be effective in the U.S. federalist system if the federal government works closely with state and local law enforcement agencies to carry out those international obligations.

¹⁰⁵ TRAVEL.STATE.GOV, *supra* note 50 (providing information on consular notification and access).

¹⁰⁶ *See supra* notes 6–9 (citing examples of treaties the U.S. government has entered into that address crime and criminal procedure).

¹⁰⁷ *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

