Leal's Execution was Legal (Sort Of), But That Doesn't Make it Right

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MONICA HAYMOND, JUL 16 2011

The international community watched with muted anger Friday afternoon as Texas executed Mexican national Humberto Leal Garcia after the Supreme Court refused to stay his sentence[1] despite compelling evidence that his rights were violated under the 1963 Vienna Convention on Consular Relations. [2]

Little doubt remains[3] that the United States violated the treaty it ratified[4] with 172 other countries to protect a foreign national's right to consular access. [5] Under Article 36 of the Vienna Convention,[6] foreign citizens are provided the right to contact their embassy when arrested or detained. Receiving state officials, in this case the Texan police officers, are bound to "inform the person concerned without delay of his rights" to seek counsel through the national's consulate.

Leal Garcia was never notified of this right. When the police questioned Humberto Leal in 1994 regarding witness accounts that identified him as the last person seen with the murder victim, Leal's statement disclosed several incriminating details that led to his arrest.[7] Once in custody, Texan officials, who maintain they were unaware that Leal was a Mexican national at the time, failed to advise him of his right to seek counsel through the Mexican embassy. It was not until after Leal had been tried and sentenced that he invoked his rights under the Vienna Convention.

Leal was not the first to question whether his Vienna Convention rights had been violated. In 2004, Mexico brought suit against the United States in the International Court of Justice (ICJ) in The Hague, alleging on behalf of 51 incarcerated Mexican nationals that the United States had failed to notify them of their consular rights. In*Avena and Other Mexican Nationals (Mexico v. United States of America)* [8] the ICJ agreed that the United States had violated the treaty, but left it to the U.S. legal system to "find an appropriate remedy."[9] Shortly following the ruling in March, 2005 Secretary of State Condoleeza Rice withdrew from the "Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes," effectively stripping the ICJ's authority to adjudicate accusations of violations. **[10]**

The reason the United States violated the treaty comes down to a division between federal responsibility to comply and state obligation to conform. The U.S. legal system's relationship with international law abides by "dualist" principles, where domestic law eclipses international provisions except when Congress appropriates a treaty into domestic law.[11] This is not all encompassing. A treaty's language determines how Congress and the courts perceive it, and "self-executing treaties" can include specifications that require it to be domestically valid upon ratification, while other "non-self-executing treaties" do not. This latter category, in which both the Vienna Convention and the 2004 *Avena* ruling belong, requires Congress to take the additional step of passing legislation to constrain the states to the treaty's provisions. Despite the nearly half a century afforded to Congress to pass such a law, it has failed to do so.

President Bush attempted through a Memorandum to the Attorney General[12] to force compliance nationwide. In a case that might seem familiar, Mexican national Jose Medellin, sentenced to death in the state of Texas, appealed to the Supreme Court after the Texas Court of Criminal Appeals refused to grant a writ of *habeas corpus* based on his

violated rights under the Vienna Convention. In *Medellin v. Texas*[13], he cited Bush's recent memorandum and the ICJ's *Avena* decision as evidence that the Supreme Court should compel Texas to comply.

In a 6-3 decision, the Court rejected both President Bush's and Medellin's argument that the memorandum constituted "directly enforceable federal law." Chief Justice Roberts wrote for the majority,

"The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[14]

Like Leal, Medellin's execution rested on the Supreme Court ruling. Three years later, one fact differentiated Leal's case – Senator Patrick Leahy had recently proposed legislation that would bring the states into compliance with the *Avena* decision. Wouldn't it only be reasonable to stay his execution until Congress passed the law and Texas held a hearing to decide if his rights under international law had been violated?

President Obama agreed. Writing on behalf of the State Department and Department of Justice, Solicitor General Donald Verrilli urged the Court to stay the execution until Congress could consider the Consular Notification and Compliance Act.[15] Verrilli appealed to the Court's historical deference to the president on matters of foreign policy and expressed deep concerns for the "serious repercussions" the violation would have on "foreign relations" and the "ability of American citizens traveling abroad to have the benefits of consular assistance."[16]

In the Solicitor General's brief, he included a letter from the Ambassador of Mexico to Hillary Clinton (statements that were echoed in an *Amicus* brief filed by the Mexican government) detailing the liability it would present to "joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."[17]

Nevertheless, in an unsigned per curiam decision last Friday, the Supreme Court ruled that without supporting legislation neither the court nor the federal government could force Texas to comply with the ICJ ruling:

"Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation, and we will follow the law as written by Congress. We have no authority to stay an execution in light of an "appeal of the President," presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim."[18]

The Supreme Court was correct. Regardless of the persuasive claims conveyed by the Solicitor General, Mexican officials, and several supporting parties,[19] without Congressional action the Court's hands were tied. But while the Court is often regarded as the last bastion of defense for justice, Leal should never have had to leave Texas to receive reasonable redress.

In 2008, Justice John Paul Stevens authored an eloquent concurrence to his vote in *Medellin v Texas*. In it, he cited Texas for failing to provide a solution to the problem it produced:

"One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that – by failing to provide consular notice in accordance with the Vienna Convention – ensnared the United Sates in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another."[20]

This was not a heavy burden for Texas to bear. The ICJ ruled that a procedure should be established to give each violation due examination. The procedure could have been as simple as holding a hearing so the defense could air its grievances, and Texan officials could present their evidence that the violation was negligible to his conviction and sentence. Either the inquiry would judge the omission of consular access to be a harmless error, in which case Texas could proceed with their punishment accordingly, or a grave oversight would be discovered and Leal would once

again stand trial.

Regardless of the consequences, it should hardly be considered an imposition upon the Texan justice system to grant Leal what is plain under international regulation. Texas lacked a legal obligation to provide a remedy, but that did not absolve it of its ethical responsibilities. The Supreme Court did not rule that a legal remedy was unwarranted for Leal, only that they lacked the authority under domestic law to force Texas to provide one. It was by Texas' own volition that they blatantly disregarded even the simplest resolution.

It is common for death penalty convicts to sit on death row for more than a decade, waiting for their date to be assigned. One reason for this delay is that the appeal process examines even the minutest of details substantiating a criminal conviction. The principles of our justice system do not condone the use of execution when lingering doubts remain.[21] In a perfect world this tenet would always be upheld, but the justice system is an imperfect institution. There is a crucial distinction between noble intentions that can fail in practice, and patently discounting a plea deemed credible by a wide swath of federal and international officials.

It is one of the first principles the United States laid out when crafting the privileges afforded to the U.S. people – the right to petition the government for a redress of grievances. When the government inflicts the harshest punishment upon a person, its ethical responsibility is to ensure they received the most thorough judicial consideration. In this, Texas has failed.

Monica Haymond *is a graduate of the University of California, Davis and is currently working in Washington D.C. She is an avid Supreme Court follower and has authored several academic papers on domestic and international judiciaries.*

[1] *Humberto Leal Garcia v. State of Texas*, No. 11-5001 (2011). <http://www.supremecourt.gov/opinions/10pdf/11-5001.pdf>.

[2] Specifically, Article 36 (b) to notify the consular post if the detained national requests, and to notify the individual detained that they have a right to contact the consulate.

[3] "UN speaks out against pending execution of Mexican national in United States." UN News Centre. July 1, 2011. <http://www.un.org/apps/news/story.asp?NewsID=38909&Cr=human+rights&Cr1=>.

[4] The United States ratified the Vienna Convention in 1969, but because the international agreement is not "self-executing" (see *Medellin v. Texas*) and Congress has not passed a law binding the agreement to the states, it is not considered valid domestic law, despite the common understanding of the word "ratify," in which all states are bound.

[5] United Nations Treaty Collection. "Vienna Convention on Consular Relations." <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants>.

[6] Vienna Convention on Consular Relations, United Nations, April 24, 1963. Treaty Series. Vol. 596, p. 261. <http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf>.

[7] July 2, 2011. Obama and U.N. seek delay in execution of Mexican national. *CNN*. <http://edition.cnn.com/2011/CRIME/07/01/texas.death.row.inmate>.

[8] Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America). March 31, 2004. General List No. 128. International Court of Justice. <http://www.humbertoleal.org/docs/Avena-Judgment-full-text.pdf>.

[9] *Ibid.* Pg. 4.

[10] Quigley, John. "The United States' Withdrawal From International Court Of Justice Jurisdiction In Consular Cases: Reasons And Consequences." Duke Journal of Comparative and International Law. <http://www.law.duke.edu/shell/cite.pl?19+Duke+J.+Comp.+&+Int'l+L.+263#H1N1>.

[11] As opposed to "Monism" where international law is treated with equivalent weight to domestic law. For more information, see Brînduşa Marian's "The Dualist and Monist Theories. International Law's Comprehension of These Theories." <http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf>.

[12] George W. Bush to Alberto Gonzales, Memorandum Regarding Compliance with the Decision of the International Court of Justice in *Avena*. February 28, 2005. President of the United States. <http://www.humbertoleal.org/docs/Bush-memorandum.pdf>.

[13] Medellin v. Texas , 552 U.S. 491 (2008). <http://www.supremecourt.gov/opinions/10pdf/11-5001.pdf>.

[14] *Ibid.* Pg. 30.

[15] Consular Notification and Compliance Act, S. ___, 112th Cong., 1st Sess. (2011). <http://leahy.senate.gov/imo/media/doc/BillText-ConsularNotificationComplianceAct.pdf>.

[16]Verrilli, Donald B. Brief for the United States as Amicus Curiae In Support of Applications for a Stay. Nos. 11A1, 11A2. Humberto Leal Garcia v. State of Texas. Pg. 12. <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-11.pdf>.

[17] *Ibid.* Pg. 13a-14a.

[18] *Humberto Leal Garcia v. State of Texas*, No. 11-5001 (2011). Pg. 3. <http://www.supremecourt.gov/opinions/10pdf/11-5001.pdf>. Citations Omitted.

[19] "Supporters: Prominent Bipartisan Supporters Call for Stay of Execution." Leal Family Website. <http://www.humbertoleal.org/supporters.html>.

[20] Medellin v. Texas , 552 U.S. 491 (2008). Justice John Paul Stevens. Concurrence. Pg. 4-5. <http://www.law.cornell.edu/supct/pdf/06-984P.ZC>.

[21] The United States allows executions to take place when unsatisfactory evidence has been convincing enough for a conviction, even when it is scientifically questionable or otherwise disputed. The U.S. is unique among first world countries in its disregard for certainty, and has refused to sign human rights treaties that would limit this occurrence, such as the "Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty." <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en>.