

**MEDELLÍN v. DRETKE AND MEDELLÍN v. TEXAS:  
INTERNATIONAL LAW CAN'T MESS WITH TEXAS**

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INTRODUCTION

In *Medellín v. Dretke*,<sup>1</sup> the 2005 case that “launch[ed] a thousand law-review articles,”<sup>2</sup> the United States Supreme Court sidestepped the question of what effect the decisions of international tribunals will have on United States law.<sup>3</sup> The International Court of Justice (ICJ), in *Case Concerning Avena and Other Mexican Nationals*,<sup>4</sup> ordered the United States to ignore its procedural default rules and to “review and reconsider[]” the convictions and sentences of fifty-one Mexican nationals on death row in ten American states.<sup>5</sup> Mexico claimed that the United States had repeatedly violated the Vienna Convention on Consular Relations<sup>6</sup> (“Consular Convention”) by failing to notify the Mexican nationals of their rights under the treaty and by failing to notify the Mexican consulate of their detention.<sup>7</sup> The ICJ determined, by fourteen votes to one, that the United States had violated individually-enforceable

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\* J.D., Capital University, 2006. The author wishes to thank Professor Daniel C. Turack for his helpful comments and to remember the late Professor Max Kravitz as the inspiration behind this Note.

<sup>1</sup> *Medellín v. Dretke* (*Medellín I*) 544 U.S. 660 (2005).

<sup>2</sup> Transcript of Oral Argument at 27, *Medellín I*, 544 U.S. 660 (2005) (No. 04-5928), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-5928.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-5928.pdf).

<sup>3</sup> See *Medellín I*, 544 U.S. at 664.

<sup>4</sup> *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf> (last visited Sept. 22, 2008).

<sup>5</sup> *Id.* at 72. At the time Mexico brought suit against the United States on January 9, 2003, fifty-four Mexican nationals awaited execution in Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon, and Texas. Pieter H.F. Bekker, *World Court Consular Notification and Death Penalty Challenge Revisited: Mexico v. United States*, ASIL INSIGHTS, Jan. 2003, <http://www.asil.org/insigh95.cfm> (last visited Sept. 22, 2008).

<sup>6</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

<sup>7</sup> See generally Memorial of Mexico, *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2003 I.C.J. Pleadings 70 (June 20, 2003), available at <http://www.icj-cij.org/docket/files/128/8272.pdf> (last visited Sept. 22, 2008).

rights guaranteed by the Consular Convention.<sup>8</sup> If the *Avena* decision had been binding on the United States, fifty-one Mexican nationals would have been entitled to an automatic “clean slate” review and reconsideration of their convictions and sentences, despite prior and repeated review of the merits of their cases in state and federal courts in accordance with domestic criminal procedure.

However, in *Medellín v. Texas*,<sup>9</sup> the Supreme Court declined to give binding effect to the *Avena* judgment.<sup>10</sup> This Note argues that this is the correct position. The decisions of the ICJ, standing alone, do not create individually-enforceable rights in United States courts.<sup>11</sup> United States jurisprudence should not yield to a decision of the ICJ when that decision is contrary to established principles of federal statutory law and constitutional precedent. Giving the *Avena* decision binding effect would have conflicted with the Antiterrorism and Effective Death Penalty Act,<sup>12</sup> a federal statute enacted in 1996, as well as with other established criminal procedure doctrines.

This Note will examine the historical background of the Consular Convention and the rights afforded to signatory states. Additionally, it will provide an in-depth look at the cases in the ICJ that involve alleged violations of the treaty and the domestic response in the United States to each. Finally, the Note will consider the effect of the *Avena* judgment in *Medellín*'s cases and the impact of both *Medellín* cases on domestic law in the United States.

## I. BACKGROUND: THE CONSULAR CONVENTION AND THE ICJ

### A. *The Consular Convention*

The Vienna Convention on Consular Relations, perhaps “the single most important event in the entire history of the consular institution,”<sup>13</sup>

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<sup>8</sup> *Avena*, 2004 I.C.J. at 71–72.

<sup>9</sup> *Medellín v. Texas (Medellín II)* 128 S. Ct. 1346 (2008).

<sup>10</sup> *Id.* at 1353. *Medellín v. Texas* was decided on March 25, 2008. *Id.* at 1346. Having exhausted all of his appeals, *Medellín* was executed by the State of Texas on August 5, 2008. James C. McKinley Jr., *Texas Executes Mexican Despite Objections From Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A19.

<sup>11</sup> Statute of the International Court of Justice, art. 59, 59 Stat. 1055, 1062 (1945).

<sup>12</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C. § 2254(a), (e)(2) (2000)).

<sup>13</sup> LUKE T. LEE, CONSULAR LAW AND PRACTICE 26 (2d ed. 1991).

governs “the establishment of consular relations, [and] defin[es] a consulate’s functions in a receiving nation.”<sup>14</sup> Codification of consular relations had been on the agenda of the International Law Commission (ILC) since 1949.<sup>15</sup> The ILC began work on the text of an agreement in 1955, completed the first draft in 1960, and submitted it to governments worldwide for comments.<sup>16</sup> Representatives of ninety-two states considered the final draft at a diplomatic conference in Vienna in 1963.<sup>17</sup> The text adopted at the conference became the Consular Convention and entered into force in 1967 after twenty-two states became signatories.<sup>18</sup>

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<sup>14</sup> *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 988 (S.D. Cal. 1999).

<sup>15</sup> See Hon. N.H. Bowen, Q.C., M.P., Minister for Foreign Affairs, Second Reading Speech Before the Australian House of Representatives on the Consular Privileges and Immunities Bill (1972), *available at* <http://law.ato.gov.au/atolaw/print.htm?DocID=srs/19720062/00001> (last visited Sept. 22, 2008).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Despite objections by a number of delegations<sup>19</sup> and rejection of proposed amendments, a much-debated Article 36 was added to the Convention in the Vienna Conference's "eleventh hour."<sup>20</sup> The most contested and modified provision of the treaty,<sup>21</sup> Article 36 affords triple rights to signatory states: (1) a state that arrests a foreign national (the "receiving state") must permit unimpeded communication between the arrestee and the state of his nationality (the "sending state"); (2) the receiving state must inform consuls "without delay" of the imprisonment or detention of nationals of the sending state; and (3) the receiving state must allow consuls to visit their nationals in prison, custody, or detention.<sup>22</sup> Although such rights are a frequent subject of international treaties, they are not considered a part of customary international law.<sup>23</sup> Article 36 states that its purpose is to facilitate consular function, not to benefit individuals: the provision is to be construed "[w]ith a view to facilitating

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<sup>19</sup> Among the objections registered during the Vienna Conference were the following:

(a) The wishes of the individuals involved who might not want consular help or the fact of their imprisonment to be known to the authorities of the sending state should be respected;

(b) The question of the right of the nationals of the sending state to communicate with and have access to their consuls fell more properly within the scope of the Declaration of Human Rights or a convention on establishment of residence than that of a convention on consular relations;

(c) An excessive administrative burden would be imposed upon a receiving state with a large number of alien immigrants dispersed throughout the country;

(d) As a matter of principle, when an alien entered a country, he accepted its jurisdiction and should not claim a higher degree of protection than that accorded to nationals of the receiving state; and

(e) The internal laws of certain countries prohibited the communication to a third person of the name of a detained person without the latter's consent.

LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 110–11 (1966) (citations omitted).

<sup>20</sup> *Id.* at 107.

<sup>21</sup> *See id.*

<sup>22</sup> Consular Convention, *supra* note 6, art. 36(1).

<sup>23</sup> *See* LEE, *supra* note 19, at 105.

the exercise of consular functions relating to nationals of the sending State.”<sup>24</sup>

As of March 10, 2006, 169 countries were parties to the Consular Convention.<sup>25</sup> The United States and Mexico, parties to a bilateral consular agreement since 1942,<sup>26</sup> both signed the Consular Convention, understanding that “the purpose of [the] privileges and immunities [herein] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”<sup>27</sup>

Both Mexico and the United States also ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes (“Optional Protocol”), the Consular Convention’s dispute resolution mechanism.<sup>28</sup> The Optional Protocol gives the ICJ compulsory jurisdiction over disputes “arising out of the interpretation or application” of the treaty,<sup>29</sup> a role proposed by the United States delegation pursuant to the compulsory jurisdiction provision of the ICJ Statute.<sup>30</sup> The Optional Protocol provides the necessary agreement to enable the ICJ to hear cases arising under the treaty ; without this agreement between the parties, the ICJ would not have compulsory jurisdiction over Consular Convention claims.<sup>31</sup> The ICJ has no compulsory jurisdiction unless parties agree to submit a dispute to the court.<sup>32</sup>

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<sup>24</sup> Consular Convention, *supra* note 6, art. 36(1).

<sup>25</sup> MARK WARREN, DEATH PENALTY INFORMATION CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE UNITED STATES (2006), *available at* <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited Sept. 22, 2008).

<sup>26</sup> William J. Aceves, *Consular Notification and the Death Penalty: The ICJ’s Judgment in Avena*, ASIL INSIGHTS, Apr. 2004, *available at* <http://www.asil.org/insigh130.cfm> (last visited Sept. 22, 2008).

<sup>27</sup> Consular Convention, *supra* note 6, pmb1.

<sup>28</sup> Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 361–62; 596 U.N.T.S. 488 [hereinafter *Optional Protocol*].

<sup>29</sup> *Id.* at 326.

<sup>30</sup> U.N. Charter art. 36(3).

<sup>31</sup> The ICJ Statute provides that “[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the International Court of Justice, art. 36(1), 59 Stat. 1055, 1060 (1945).

<sup>32</sup> *Id.*

Because the Consular Convention is a ratified, self-executing international treaty, the rights afforded therein supersede inconsistent domestic law.<sup>33</sup> According to United States law, Congress must enact legislation before a non-self-executing treaty becomes effective; until a treaty of this kind is implemented, it does not preempt inconsistent state law.<sup>34</sup> Self-executing treaties, by contrast, become effective upon ratification and require no implementing legislation.<sup>35</sup>

*B. Consular Convention Cases in the ICJ*

The Optional Protocol has supplied the basis for ICJ jurisdiction in three cases alleging violations of the Consular Convention.<sup>36</sup> In all three cases, the ICJ held that the United States had violated the treaty by not allowing consular access to foreign nationals.<sup>37</sup> However, when nationals of two of the three sending states attempted to seek redress in the United States for the treaty violations, they were met with operation of the procedural default rule.<sup>38</sup> The rule, which typically applies in both state and federal proceedings, operates to bar a defendant from raising a claim not raised in an earlier proceeding.<sup>39</sup> To defeat this bar, a defendant must show cause for not raising the claim in a timely manner.<sup>40</sup> Thus far, state courts have generally refused to accept a failure to inform foreign nationals of their Consular Convention rights as valid cause.<sup>41</sup> Federal courts apply the doctrine of procedural default in habeas proceedings; therefore, a

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<sup>33</sup> See U.S. CONST. art. VI, cl. 2 (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

<sup>34</sup> Note, *Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2657 (2003) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3), (4) (1987)).

<sup>35</sup> *Cf. id.*

<sup>36</sup> The three cases are: *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 17 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 446, 474 (June 27); and *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, 249 (Apr. 9). These cases are described more fully below.

<sup>37</sup> *Avena*, 2004 I.C.J. at 71; *LaGrand Case*, 2001 I.C.J. at 515; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 256–57.

<sup>38</sup> See *LaGrand Case*, 2001 I.C.J. at 474; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249.

<sup>39</sup> See *Gray v. Netherland*, 518 U.S. 152, 161–62 (1998).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *State v. Reyes-Camarena*, 7 P.3d 522, 524–26 (Or. 2000) (denying a Mexican national’s Consular Convention claim because he failed to raise it at trial).

foreign national held to have procedurally defaulted his Consular Convention claim in state court cannot raise the claim collaterally in a habeas proceeding in federal court.<sup>42</sup>

1. *Paraguay v. United States*<sup>43</sup>

Angel Breard, a Paraguayan national, entered the United States in 1986 at age twenty.<sup>44</sup> In 1993, Breard was convicted of attempted rape and capital murder and sentenced to death in Virginia.<sup>45</sup> At trial, Breard testified in his own defense.<sup>46</sup> According to his testimony, he wanted to “try to do someone,” meaning that he “wanted to use [a] knife to force a woman to have sex with [him].”<sup>47</sup> He admitted that after stabbing the victim, he “removed her pants and got ‘on top of her.’”<sup>48</sup> He defended his actions by stating that, at the time of the crime, his former father-in-law had placed him under a curse.<sup>49</sup>

After his convictions were affirmed<sup>50</sup> and the Commonwealth of Virginia denied collateral relief,<sup>51</sup> Breard filed a federal habeas petition with the assistance of Paraguayan officials, in which he raised a Consular Convention claim for the first time.<sup>52</sup> Breard argued that his conviction and sentence should be overturned because (1) the Convention afforded foreign nationals an individual right to consular assistance following arrest, and (2) despite knowing that he was a foreign national, the arresting authorities in Virginia failed to inform him of his right to consular assistance.<sup>53</sup> The federal court dismissed Breard’s habeas petition, holding that Breard procedurally defaulted the claim when he failed to raise it initially.<sup>54</sup>

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<sup>42</sup> See, e.g., *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998).

<sup>43</sup> Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

<sup>44</sup> *Breard v. Greene*, 523 U.S. 371, 372–73 (1998).

<sup>45</sup> *Id.* at 373.

<sup>46</sup> *Breard v. Commonwealth*, 445 S.E.2d 670, 674 (Va. 1994).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 682.

<sup>51</sup> *Breard v. Netherland*, 949 F. Supp. 1255, 1260 (E.D. Va. 1996), *aff’d*, 134 F.3d 615 (4th Cir. 1998).

<sup>52</sup> See *id.* at 1260, 1263.

<sup>53</sup> *Id.* at 1263; see also *Breard v. Greene*, 523 U.S. 371, 373 (1998) (discussing Breard’s Consular Convention claim in the federal district court).

<sup>54</sup> *Breard*, 949 F. Supp. at 1263.

In a separate action, the Republic of Paraguay, the Paraguayan consul general, and Paraguay's ambassador to the United States brought suit on behalf of Paraguay against Virginia state officials in United States District Court.<sup>55</sup> The Paraguayan officials alleged that Paraguay's rights under the Consular Convention had been denied when (1) Breard was not notified of his rights under the treaty, and (2) Paraguay's consul general was not notified of Breard's arrest, conviction, or sentence.<sup>56</sup> Additionally, Paraguay's consul general alleged that his own rights under the Convention had been denied.<sup>57</sup> The district court dismissed Paraguay's claim for lack of subject matter jurisdiction,<sup>58</sup> and the Fourth Circuit affirmed.<sup>59</sup> In July 1997, the United States sent a letter to the Government of Paraguay apologizing for its failure to inform the consul of Breard's arrest and detention and assured that failures of this kind would not be repeated.<sup>60</sup>

Almost five years after Breard's convictions became final, Paraguay turned to the ICJ to pursue its Consular Convention claim.<sup>61</sup> Five days before Breard's scheduled execution, the ICJ ordered that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in [the ICJ] proceedings. . . ."<sup>62</sup>

Just hours before his scheduled execution, Breard filed a habeas petition and a stay application in the United States Supreme Court, seeking to "enforce" the ICJ's order.<sup>63</sup> Paraguay also filed a motion for leave to file a bill of complaint in the Supreme Court, "citing [the] Court's original jurisdiction over cases 'affecting Ambassadors . . . and Consuls.'"<sup>64</sup>

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<sup>55</sup> Republic of Para. v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998).

<sup>56</sup> See *id.* at 1271-72.

<sup>57</sup> *Id.* at 1272.

<sup>58</sup> *Id.* at 1272-73. (The district court found that it lacked subject-matter jurisdiction because of Virginia's Eleventh Amendment sovereign immunity as established in *Ex parte Young*, 209 U.S. 123 (1908)). *Id.*

<sup>59</sup> Republic of Para. v. Allen, 134 F.3d 622, 629 (4th Cir. 1998).

<sup>60</sup> Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 261 (Apr. 9) (Declaration of J. Oda). In Judge Oda's view, the letter was a complete remedy for any violation of the Consular Convention and the United States was thus released from its responsibility for violating the treaty. *Id.*

<sup>61</sup> See *Breard v. Greene*, 523 U.S. 371, 374 (1998).

<sup>62</sup> *Vienna Convention on Consular Relations*, 1998 I.C.J. at 259.

<sup>63</sup> *Breard*, 523 U.S. at 374.

<sup>64</sup> *Id.* at 374-75 (quoting U.S. CONST. art. III, § 2).

The Supreme Court first stated that Breard had “clear[ly]” procedurally defaulted any Consular Convention claim by failing to raise it at his state-court trial.<sup>65</sup> The doctrine of procedural default prevents a defendant from raising a claim on appeal that was not raised in earlier proceedings—“a fancier version of ‘you snooze, you lose.’”<sup>66</sup> Thus, assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas.<sup>67</sup> Claims not so raised are considered defaulted.<sup>68</sup>

Both Breard and Paraguay argued that the Convention, as a self-executing treaty, is the “‘supreme law of the land’ and thus trumps the procedural default doctrine.”<sup>69</sup> The Supreme Court dismissed this argument as “plainly incorrect for two reasons.”<sup>70</sup>

First, domestic procedural rules control implementation of international treaties:

[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.<sup>71</sup>

In fact, the Court noted, the Consular Convention itself stated that the rights established in the treaty “‘shall be exercised in conformity with the laws and regulations of the receiving State[]’ . . . .”<sup>72</sup> Because Breard failed to raise his Consular Convention claim in state court, the procedural default rule operated to bar a claim of violation of those rights on federal habeas review.<sup>73</sup>

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<sup>65</sup> *Id.* at 375.

<sup>66</sup> Nancy Serano Smartt, Note, *What Breard and its Progeny Mean for Avena and Other Mexican Nationals*, 19 TEMP. INT’L & COMP. L.J. 163, 168–69 (2005) (citing BLACK’S LAW DICTIONARY 1221 (7th ed. 1999)).

<sup>67</sup> See *Wainwright v. Sykes*, 433 U.S. 72, 81–85 (1977).

<sup>68</sup> See *id.*

<sup>69</sup> *Breard*, 523 U.S. at 375.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (quoting Consular Convention, *supra* note 6, art. 36(2)).

<sup>73</sup> See *id.* at 375–76.

Second, the Court noted that treaties, as the “supreme law of the land,” hold no higher status than the United States Constitution.<sup>74</sup> Therefore, because procedural default rules apply to the Constitution, procedural default rules also apply to international treaties.<sup>75</sup> In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>76</sup> which provides that a habeas petitioner alleging that his detention is “in violation of ‘treaties of the United States’” will generally not be afforded an evidentiary hearing if he “has failed to develop the factual basis of [the] claim in State court proceedings.”<sup>77</sup> The Court concluded, “Breard’s ability to obtain relief based on violations of the Consular Convention is subject to the AEDPA, just as any claim arising under the United States Constitution would be.”<sup>78</sup>

The Supreme Court denied Breard’s petition for an original writ of habeas corpus, Paraguay’s motion for leave to file a bill of complaint, the petitions for certiorari, and the stay applications filed by Breard and Paraguay.<sup>79</sup> On the same day, Virginia executed Breard as scheduled.<sup>80</sup> The Governor of Virginia issued a press release addressing the ICJ’s order:

It has been stipulated by both the prosecution and Mr. Breard that he was not notified of his ability to contact his consulate as required under the [Consular Convention]. The Republic of Paraguay has brought a proceeding in the International Court of Justice, claiming that that foreign tribunal has jurisdiction to stay his execution, void his conviction, and order a new trial. The International Court of Justice has issued an “indication of provisional measures” to have Mr. Breard’s execution delayed while it considers the merits of Paraguay’s claims. It is my understanding that the International Court’s proceeding could take years to reach conclusion.

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<sup>74</sup> *Id.* at 376.

<sup>75</sup> *See id.*

<sup>76</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C. § 2254(a), (e)(2) (2000)).

<sup>77</sup> *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. § 2254(a), (e)(2)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 378–79.

<sup>80</sup> Mani Sheik, Comment, *From Breard to Medellín: Supreme Court Inaction or ICJ Activism in the Field of International Law?*, 94 CAL. L. REV. 531, 539–40 (2006).

Both Mr. Breard and the Republic of Paraguay filed cases concerning this matter before the U.S. Supreme Court. At the request of the Court, the U.S. Department of Justice has argued forcefully that the rulings of the International Court of Justice are not enforceable by the courts of the United States, that the International Court of Justice has no[] authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state, and that the Supreme Court should not intervene in this matter. At the same time, the Secretary of State has requested that I stay Mr. Breard's execution. The Secretary specifically raises concern "about the possible negative consequences for the many U.S. citizens who live and travel abroad."

The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision.

As Governor of Virginia my first duty is to ensure that those who reside within our borders—both American citizens and foreign nationals—may conduct their lives free from the fear of crime. Our criminal justice system is designed to provide the greatest degree of safety for law abiding citizens and foreign visitors alike while ensuring substantial procedural safeguards to those accused of crime. Indeed, in this case Mr. Breard received all of the procedural safeguards that any American citizen would receive.

I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry[] out the jury's sentence despite the rulings [of] the International Court.

The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.

Mr. Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues being resolved against him, and the U.S. Supreme Court having denied the petitions of Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.<sup>81</sup>

On November 3, 1998, the United States issued a formal apology to Paraguay that stated that the failure to notify Breard of his consular rights "was unquestionably a violation of an obligation owed to the Government of Paraguay. . . . [T]he United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard."<sup>82</sup>

The United States Supreme Court revisited its decision in *Breard* when it granted certiorari in the consolidated cases of *Sanchez-Llamas v. Oregon*<sup>83</sup> and *Bustillo v. Johnson*.<sup>84</sup> There, the Court reaffirmed its holding in *Breard* and concluded "as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims."<sup>85</sup>

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<sup>81</sup> Press Release, Commonwealth of Va., Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998), available at <http://www.state.gov/documents/organization/65747.pdf> (last visited Sept. 22, 2008).

<sup>82</sup> Embassy of the U.S., Statement of the U.S. Concerning the Failure of Consular Notification in the Case of Angel Breard (Nov. 3, 1998), available at <http://www.state.gov/documents/organization/65829.pdf> (last visited Sept. 22, 2008).

<sup>83</sup> 546 U.S. 1001 (2005).

<sup>84</sup> 546 U.S. 1002 (2005).

<sup>85</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006).

2. *Germany v. United States*<sup>86</sup>

Half-brothers Walter and Karl LaGrand, both German nationals, were apprehended after a botched bank robbery in rural Arizona in 1982.<sup>87</sup> After both were arrested, Karl confessed in two different statements.<sup>88</sup> He stated that he had stabbed the bank manager and a bank employee, but that Walter had not been involved in stabbing anyone.<sup>89</sup> Following a jury trial, both were convicted of capital murder and sentenced to death.<sup>90</sup> The Arizona Supreme Court affirmed the convictions and sentences, and the United States Supreme Court denied certiorari.<sup>91</sup>

The LaGrands had retained their German citizenship even though they had been living in the United States since they were small children; in fact, they had at times identified themselves as citizens of the United States.<sup>92</sup> The arresting authorities in Arizona did not notify the LaGrands of their right to contact the German consulate,<sup>93</sup> and German officials did not learn of the LaGrands until the brothers independently contacted the consulate two years after their arrest, having learned of their right to do so from other German inmates.<sup>94</sup> Germany assisted the brothers in filing habeas petitions in which they raised Consular Convention violations for the first time.<sup>95</sup>

Like Breard, the LaGrands were barred from raising consular issues due to the procedural default doctrine.<sup>96</sup> The Ninth Circuit reviewed the brothers' habeas petitions jointly<sup>97</sup> and noted that "[i]t is undisputed that

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<sup>86</sup> LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), available at <http://www.icj-cij.org/docket/files/104/7736.pdf> (last visited Sept. 22, 2008).

<sup>87</sup> *State v. (Walter) LaGrand*, 734 P.2d 563, 565–66 (Ariz. 1987); *LaGrand*, 2001 I.C.J. at 474–75.

<sup>88</sup> *LaGrand*, 734 P.2d at 567.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 565.

<sup>91</sup> *Id.* at 563, *cert. denied*, 484 U.S. 872 (1987); *State v. (Karl) LaGrand*, 733 P.2d 1066 (Ariz. 1987), *cert. denied*, 484 U.S. 872 (1987).

<sup>92</sup> Counter-Memorial Submitted by the United States of America, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. Pleadings 466, paras. 15–16 (Mar. 27, 2000), available at <http://www.icj-cij.org/docket/files/104/8554.pdf> (last visited Sept. 22, 2008).

<sup>93</sup> Memorial of the Federal Republic of Germany, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. Pleadings 466, para. 2.01 (Sept. 16, 1999), available at <http://www.icj-cij.org/docket/files/104/8552.pdf> (last visited Sept. 22, 2008) [hereinafter German Memorial].

<sup>94</sup> *Id.* para. 2.06.

<sup>95</sup> *Id.* paras. 2.06–2.07; *LaGrand v. Lewis*, 883 F. Supp. 451, 454 (D. Ariz. 1995).

<sup>96</sup> *LaGrand*, 883 F. Supp. at 454–55.

<sup>97</sup> See *LaGrand v. Stewart*, 133 F.3d 1253, 1259 (9th Cir. 1998).

the State of Arizona did not notify the LaGrands of their rights under the [Consular Convention]. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted.”<sup>98</sup>

Karl LaGrand was executed on February 24, 1999.<sup>99</sup> On March 2, the day before Walter was scheduled to be executed, Germany brought suit against the United States in the ICJ for the alleged Consular Convention violation and requested provisional measures against Walter LaGrand’s execution.<sup>100</sup> The ICJ immediately responded by ordering the United States to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings.”<sup>101</sup> Both Germany and Walter LaGrand filed applications in the United States Supreme Court to stay Walter’s execution.<sup>102</sup> Meanwhile, Walter LaGrand chose the Arizona gas chamber as the method of execution, hoping to have his sentence commuted on the grounds of cruel and unusual punishment, something his brother had unsuccessfully attempted just one week before.<sup>103</sup> The Supreme Court rejected Walter’s attempt as well, holding that “[b]y declaring his method of execution, . . . [an inmate] waive[s] any objection he might have to it.”<sup>104</sup>

The Supreme Court declined to exercise its original jurisdiction over Germany’s case, citing “jurisdictional barriers” and “the tardiness of [Germany’s] pleas.”<sup>105</sup> The Court noted that Germany’s application “was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992.”<sup>106</sup>

The next day, after meeting with Germany’s United States ambassador and with a bank employee who had been stabbed in the attempted robbery, Arizona governor Jane Hall announced that, “[I]n the interest of justice and with the victims in mind, I have decided to allow this execution to go

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<sup>98</sup> *Id.* at 1261.

<sup>99</sup> German Memorial, *supra* note 93, para. 2.13.

<sup>100</sup> *Id.* para. 2.14, 2.09.

<sup>101</sup> Provisional Measures Order, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 9, para. 29 (Mar. 3, 1999), available at <http://www.icj-cij.org/docket/files/104/7726.pdf> (last visited Sept. 22, 2008).

<sup>102</sup> German Memorial, *supra* note 93, para. 2.15; see Fed. Republic of Germany v. United States, 526 U.S. 111 (1999); LaGrand v. Arizona, 526 U.S. 1001 (1999).

<sup>103</sup> See Stewart v. LaGrand, 526 U.S. 115, 117–19 (1999).

<sup>104</sup> *Id.* at 119.

<sup>105</sup> Fed. Republic of Germany, 526 U.S. at 112.

<sup>106</sup> *Id.*

forward as scheduled.”<sup>107</sup> Unlike his brother Karl, who ultimately chose to be executed by lethal injection, Walter was executed in Arizona’s gas chamber that evening.<sup>108</sup>

Germany modified its complaint and pursued its case in the ICJ despite the fact that the LaGrands had been executed, alleging that the United States violated international law by failing to implement the ICJ’s order granting provisional measures.<sup>109</sup> On June 27, 2001, the ICJ found in favor of Germany, holding that (1) Article 36 of the Consular Convention creates individually-enforceable rights; (2) the procedural default doctrine cannot be applied to bar judicial review of consular violations; (3) prejudice need not be demonstrated; (4) the United States must provide “review and reconsideration” of every case in which Article 36 was violated; and (5) the provisional orders of the ICJ are binding (and thus, that the United States further violated its obligations by refusing to give effect to the provisional order to stay Walter’s execution as binding).<sup>110</sup> This was the first time in ICJ history that it had ruled that its provisional measures were binding.<sup>111</sup>

The ICJ established the “review and reconsideration” remedy for Article 36 violations and ordered the United States to ensure “effective exercise” of Consular Convention rights by ensuring that:

“in any future cases of detention or of criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the [Consular Convention],”

and that

“[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36.”

. . . [I]f the United States, notwithstanding its commitment . . . should fail in its obligation of consular

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<sup>107</sup> German Memorial, *supra* note 93, para. 2.16.

<sup>108</sup> *Id.* paras. 2.13, 2.16.

<sup>109</sup> *Id.* para. 4.04.

<sup>110</sup> LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 515–16 (June 27).

<sup>111</sup> Press Release, Int’l Court of Justice, LaGrand Case (June 27, 2001), available at <http://www.icj-cij.org/presscom/index.php?pr=355&pt=1&p1=6&p2=1> (last visited Sept. 22, 2008).

notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.<sup>112</sup>

The ICJ expressly stated that it was irrelevant whether the LaGrands would have sought consular assistance, whether Germany would have rendered consular assistance, or whether consular assistance would have rendered a different verdict.<sup>113</sup> Thus, according to the ICJ, to establish a violation of the Consular Convention, it is enough that a national of a sending state was “in effect prevented” from exercising consular rights “had [he or she] so chosen.”<sup>114</sup>

The ICJ then turned to the application of the procedural default rule in the LaGrands’ case and noted that a “problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence” by claiming a violation of Article 36 of the Consular Convention.<sup>115</sup> According to the ICJ, the United States violated the Consular Convention when it applied its procedural default rule to prevent the LaGrands’ challenge to the denial of their right to consular access.<sup>116</sup> The United States was thus left with the dilemma of whether and how to abide by the ICJ’s order without contravening established rules of domestic criminal procedure.<sup>117</sup>

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<sup>112</sup> *LaGrand*, 2001 I.C.J at 513–14.

<sup>113</sup> *Id.* at 492.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 497.

<sup>116</sup> *Id.* at 497–98.

<sup>117</sup> See Jennifer Lynne Weinman, Note, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT’L L. REV. 857, 864 (2002).

3. *Mexico v. United States*<sup>118</sup>

Mexico, on behalf of its nationals on death row, brought suit against the United States in the ICJ on January 9, 2003.<sup>119</sup> Mexico, alleging a “pattern and practice”<sup>120</sup> of Consular Convention violations by the United States, claimed that each one of fifty-four Mexican nationals on death row in the United States had been “arrested, detained, tried, convicted, and sentenced to death”<sup>121</sup> while denied their right to consular assistance and that these violations had prevented Mexico from effectively exercising its consular functions.<sup>122</sup> Specifically, Mexico alleged that the United States had violated Article 36 of the Consular Convention by “failing to notify the fifty-four Mexican nationals of their [consular] rights without delay”<sup>123</sup> and by “employing certain municipal law doctrines to prevent the Mexican nationals from challenging their convictions and death sentences on the basis of the United States’[] violations of Article 36(1).”<sup>124</sup> Mexico argued that it had “suffered injuries in its own rights and in the form of injuries to its nationals.”<sup>125</sup>

To remedy the alleged violations, Mexico requested that the sentences and convictions of its nationals be annulled.<sup>126</sup> In addition, Mexico sought an order from the ICJ that the United States take all measures necessary to ensure that none of the Mexican nationals be executed until the ICJ issued its decision in the case.<sup>127</sup>

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<sup>118</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf> (last visited Sept. 22, 2008).

<sup>119</sup> See Mexico’s Application Instituting Proceedings, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. Pleadings 12, para. 1 (Jan. 9, 2003), available at <http://www.icj-cij.org/docket/files/128/1913.pdf> (last visited Sept. 22, 2008) [hereinafter *Avena Application*].

<sup>120</sup> *Id.* para. 4.

<sup>121</sup> *Id.* para. 1.

<sup>122</sup> *Id.* para. 2.

<sup>123</sup> Memorial of Mexico, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, IV.A (June 20, 2003), available at <http://www.icj-cij.org/docket/files/128/8272.pdf> (last visited Sept. 22, 2008) [hereinafter *Mexican Memorial*].

<sup>124</sup> *Id.* para. 169.

<sup>125</sup> *Avena Application*, *supra* note 119, para. 2.

<sup>126</sup> See *id.* para. 6; *Mexican Memorial*, *supra* note 123, para. 20.

<sup>127</sup> See *Mexican Memorial*, *supra* note 123, para. 284; Provisional Measures Order, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, para. 8 (Feb. 5, 2003), available at <http://www.icj-cij.org/docket/files/128/8180.pdf> (last visited Sept. 22, 2008).

In its application, Mexico noted that the role of its consulates in the United States is distinct from the role of their counterparts in other countries.<sup>128</sup> The distinction stems, in part, from the large Mexican population in the United States<sup>129</sup> and the socioeconomic status of “a young unskilled population with poverty levels above the [United States] national average.”<sup>130</sup> In capital cases, Mexico has committed to providing its nationals with the highest degree of consular assistance.<sup>131</sup> Consular officers in Mexico are instructed to monitor and support the defense counsel's efforts, to confer regularly with the defendant and his family, and to attend court proceedings.<sup>132</sup> Consular officers may also assist by providing funds for expert and investigative assistance, and help the defense to gather evidence in preparation for the guilt and penalty phases of capital trials. In other cases, consular officers support defendants’ attempts to obtain a more qualified lawyer.<sup>133</sup>

In 2000, Mexico formed the Mexican Capital Legal Assistance Program “to enhance the quality of legal representation available to Mexican capital defendants, to improve the ability of Mexican consular officers to assist them, and to increase awareness of and compliance with Article 36 of the [Consular] Convention.”<sup>134</sup> Since its inception, attorneys in the program have provided assistance in over one hundred capital cases.<sup>135</sup>

Mexico argued that the repeated Article 36 violations by United States officials often meant that Mexico’s ability to provide consular assistance to

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<sup>128</sup> See *Avena Application*, *supra* note 119, paras. 21–22.

<sup>129</sup> Carlos González Gutiérrez, *Decentralized Diplomacy: The Role of Consular Offices in Mexico's Relations with its Diaspora*, in BRIDGING THE BORDER: TRANSFORMING MEXICO—U.S. RELATIONS 49, 57 (Rodolfo O. de la Garza & Jesús Velasco eds., 1997). The U.S. census estimates that approximately six million Mexican nationals reside in the United States. *Id.*

<sup>130</sup> *Id.* at 58.

<sup>131</sup> *Avena Application*, *supra* note 119, paras. 23–27; see also Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT’L & COMP. L. 359, 367 (2003) (noting that early consular intervention in capital cases can often mean the difference between life and death).

<sup>132</sup> See *Avena Application*, *supra* note 119, para. 24.

<sup>133</sup> See *id.*

<sup>134</sup> *Id.* para. 25.

<sup>135</sup> *Id.* para. 26.

its nationals came too late.<sup>136</sup> At the time that Mexico filed its case in the ICJ, fifty-four Mexican nationals were on death row in the United States.<sup>137</sup> Mexico alleged that authorities in the United States failed to inform at least forty-nine of them that they had the right to contact the Mexican consulate.<sup>138</sup> To remedy these repeated violations, Mexico asked the ICJ to declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the [fifty-four] Mexican nationals on death row . . . violated its international legal obligations to Mexico . . . as provided by . . . the [Consular] Convention;

. . . .

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by . . . the [Consular] Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the [fifty-four] Mexican nationals on death row or any other Mexican national in its territory . . . ;

(5) that the right to consular notification under the [Consular] Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must . . . re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

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<sup>136</sup> *Id.* para. 27.

<sup>137</sup> *See id.* para. 68.

<sup>138</sup> *Id.*

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the [Consular] Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the [Consular] Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations . . . must provide Mexico a full guarantee of the non-repetition of the illegal acts.<sup>139</sup>

For the first time in its history, the ICJ was asked to stop the executions of all the nationals of a sending state, rather than of specific defendants in a single case.<sup>140</sup> In its memorial, Mexico noted that this was the first time that the ICJ would have an opportunity to “prescribe the full range of relief to which a State aggrieved by Article 36 violations is entitled,” rather than a post-execution examination of the rights afforded by the Consular Convention.<sup>141</sup> Mexico’s broad position was that no Mexican national should be executed in the United States until the ICJ rendered its decision;<sup>142</sup> essentially, Mexico asked the ICJ to order the United States to throw out the existing death penalty convictions and retry the nationals in the United States criminal justice system, despite the fact that the merits of each case had been heard in state and, in most cases, federal courts.<sup>143</sup>

In response to Mexico’s pleadings, the United States noted that its own criminal justice system provided the rights and protections that the

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<sup>139</sup> Avena Application, *supra* note 119, para. 281.

<sup>140</sup> Smartt, *supra* note 66, at 173.

<sup>141</sup> Mexican Memorial, *supra* note 123, para. 2.

<sup>142</sup> Smartt, *supra* note 66, at 172–73.

<sup>143</sup> Avena Application, *supra* note 119, paras. 36–42.

Mexican nationals allegedly had been deprived.<sup>144</sup> The United States further asserted that it had made a good faith effort to comply with the provisions of the Consular Convention through an “aggressive and unparalleled outreach program,”<sup>145</sup> characterizing the effort as follows:

Defendants are informed of and given their due process rights, and judges enforce those rights. Those not fluent in English are provided with translators, or are addressed in their [native language]. Custodial interrogation is terminated (or not commenced at all) once a detainee invokes his absolute right to silence or requests a lawyer . . . . A lawyer assigned to represent the detainee must be an effective one, and is provided at no charge to an indigent defendant. Defendants are entitled, at state expense, to the assistance necessary to offer mitigating evidence before sentencing. If the system fails in any respect to meet these obligations, and that failure is timely raised, the system can and will correct the error.<sup>146</sup>

The United States argued that, even absent *stare decisis*,<sup>147</sup> the ICJ’s *LaGrand* judgment should provide the framework for the interpretation of Mexico’s arguments<sup>148</sup>:

*LaGrand* interpreted Article 36(2), and articulated a remedy of review and reconsideration of the conviction and sentence in light of the violation. Since the decision in *LaGrand*, the United States has conformed its conduct, for all foreign nationals, to the holding in that case. The United States provides for case-by-case review and reconsideration of the conviction and sentence in capital cases in light of any breaches of Article 36(1)(b). The

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<sup>144</sup> See Counter-Memorial of the United States of America, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. Pleadings 12, para. 1.4 (Nov. 3, 2003), available at <http://www.icj-cij.org/docket/files/128/10837.pdf> (last visited Sept. 22, 2008) [hereinafter U.S. Counter-Memorial].

<sup>145</sup> *Id.* para. 9.2.

<sup>146</sup> *Id.* para. 1.4.

<sup>147</sup> See *id.* para. 5.7 (citing Statute of the International Court of Justice, art. 59, 59 Stat. 1055, 1062 (1945), which declares that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”).

<sup>148</sup> See *id.* paras. 5.1–5.9.

United States does so within the framework of its laws, including through the clemency process, and it will continue to do so.<sup>149</sup>

According to the United States, if the ICJ were to find Consular Convention violations in *Avena*, the convictions and sentences of the affected Mexican nationals could be “reviewed and reconsidered” via the clemency process.<sup>150</sup> Mexico countered that the clemency process of the United States was not adequate “review and reconsideration,”<sup>151</sup> but the United States argued that the clemency process has long been considered “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”<sup>152</sup>

In a March 31, 2004 decision, the ICJ determined that the United States had violated the Consular Convention

[1] by not informing, without delay upon their detention . . . [fifty-one] Mexican nationals . . . of their rights under Article 36 . . . of the [Consular Convention];

. . . .

[2] by not notifying the appropriate Mexican consular post without delay of the detention of . . . [forty-nine] Mexican nationals . . . and thereby depriving [Mexico] of the right . . . to render [consular] assistance;

. . . .

[3] [by depriving Mexico] of the right . . . to communicate with and have access to [forty-nine] nationals and to visit them in detention;

. . . .

[4] [by depriving Mexico] of the right . . . to arrange for legal representation of [thirty-four] nationals[; and]

. . . .

[5] by not permitting the review and reconsideration, in the light of the rights set forth in the [Consular]

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<sup>149</sup> *Id.* para. 9.4.

<sup>150</sup> *Id.* para. 2.6.

<sup>151</sup> *Id.* para. 6.67.

<sup>152</sup> *Id.* para. 6.68 (quoting *Herrera v. Collins*, 506 U.S. 390, 412 (1993)).

Convention, of the conviction and sentences of [three nationals].<sup>153</sup>

Rather than grant Mexico's request for annulments of the convictions and sentences of its nationals, the ICJ ordered the United States to provide, "by means of its own choosing," review and reconsideration of the convictions and sentences of fifty-one Mexican nationals "so as to allow full weight to be given to the violation of the rights sets forth in the Convention."<sup>154</sup> The ICJ explicitly stated that the courts of the United States could not rely on the procedural default doctrine to bar review.<sup>155</sup>

The *Avena* decision can be distinguished from *LaGrand* in at least two respects.<sup>156</sup> First, the *Avena* Court made clear that law enforcement officials should notify detainees of their rights under the Consular Convention as soon as there are grounds to believe that the person is a foreign national<sup>157</sup>:

[W]ere each individual to be told at [the time of detention] that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement . . . would be greatly enhanced. The provision of [Consular Convention rights] could parallel the reading of [*Miranda*] rights.<sup>158</sup>

Second, the ICJ in *Avena* refined the "review and reconsideration" standard announced in *LaGrand* by holding that the United States clemency process could supplement "review and reconsideration," but could not stand alone as a method of review<sup>159</sup>:

[T]he clemency process, as currently practised within the United States criminal justice system . . . is . . . not sufficient in itself to serve as an appropriate means of

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<sup>153</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 71–72 (Mar. 31).

<sup>154</sup> *Id.* at 73.

<sup>155</sup> *See id.* at 56, 59–60, 63, 65.

<sup>156</sup> *See Aceves, supra* note 26.

<sup>157</sup> *Id.*

<sup>158</sup> *Avena*, 2004 I.C.J. at 44.

<sup>159</sup> *See Aceves, supra* note 26.

“review and reconsideration” as envisaged by the Court in the *LaGrand* case.<sup>160</sup>

The ICJ further clarified the standard by holding that “review and reconsideration” requires an analysis of whether the Consular Convention violation caused “actual prejudice” to the defendant<sup>161</sup>:

[T]he remedy to make good [Consular Convention] violations should consist in an obligation . . . to permit review and reconsideration . . . with a view to ascertaining whether in each case the violation . . . caused actual prejudice to the defendant in the process of administration of criminal justice.<sup>162</sup>

## II. DISCUSSION AND ANALYSIS

### A. *Medellín’s Case*

José Ernesto Medellín, a Mexican national, lived in the United States for most of his life.<sup>163</sup> In 1993, he confessed to participating in the gang rape and murder of two teenage girls in Houston, Texas.<sup>164</sup> The crimes took place immediately after Medellín and other members of the “Black and Whites” gang had initiated a new member by taking turns beating him.<sup>165</sup> Medellín participated in the rape of both girls and confessed to holding the shoelaces used to strangle the sixteen-year-old victim.<sup>166</sup>

Medellín was convicted of murder during the course of a sexual assault, a capital offense, and was sentenced to death in a Texas court.<sup>167</sup> The Texas Court of Criminal Appeals, the state’s highest court for criminal cases, affirmed the conviction and sentence.<sup>168</sup> Medellín filed for a writ of habeas in Texas state court, arguing for the first time that Texas violated

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<sup>160</sup> *Avena*, 2004 I.C.J. at 66.

<sup>161</sup> See Aceves, *supra* note 26.

<sup>162</sup> *Avena*, 2004 I.C.J. at 59.

<sup>163</sup> See Respondent’s Brief at 2, *Medellín v. Dretke (Medellín I)*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 497765 [hereinafter Respondent’s Brief, *Medellín I*]; see also *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1354 (2008).

<sup>164</sup> See Respondent’s Brief, *Medellín I*, *supra* note 163, at 1–2.

<sup>165</sup> See *id.* at 1.

<sup>166</sup> See *id.*; *Medellín II*, 128 S. Ct. at 1354; John Makeig, *Death May Be Sought Against 5; Prosecutors Weigh Case Against Suspects in 2 Girls’ Killings*, HOUS. CHRON., July 8, 1993, at A1.

<sup>167</sup> *Medellín I*, 544 U.S. at 662.

<sup>168</sup> *Id.*

his rights under the Consular Convention when it failed to notify him of his right to seek consular assistance.<sup>169</sup> The trial court denied the writ, and the Texas Court of Criminal Appeals affirmed.<sup>170</sup>

In November 2001, Medellín raised the Consular Convention claim in a federal habeas petition.<sup>171</sup> The district court denied the petition, and Medellín applied to the Fifth Circuit for a certificate of appealability (“COA”).<sup>172</sup> While Medellín’s petition for a COA was pending in the Fifth Circuit, the ICJ decided *Avena*.<sup>173</sup> Medellín was named in the ICJ decision as one of the nationals entitled to “review and reconsideration” of his sentence.<sup>174</sup> The Fifth Circuit ultimately denied Medellín’s application, relying on the procedural default rule and prior holdings that the Consular Convention did not create individually-enforceable rights.<sup>175</sup> The court acknowledged the *Avena* judgment, but gave it no dispositive effect.<sup>176</sup>

The Supreme Court granted certiorari to consider Medellín’s claim that the *Avena* decision was binding on United States courts.<sup>177</sup> Two months later, President George W. Bush issued a memorandum ordering state courts to give full effect to the *Avena* decision,<sup>178</sup> a surprising move that one reporter characterized as “Bush vs. Texas.”<sup>179</sup> The text of the President’s memorandum is as follows:

The United States is a party to the [Consular Convention] and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ)

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<sup>169</sup> *Id.*; *Medellín II*, 128 S. Ct. at 1354.

<sup>170</sup> *Medellín I*, 544 U.S. at 662; *Medellín II*, 128 S. Ct. at 1354–55.

<sup>171</sup> *Medellín I*, 544 U.S. at 662; *Medellín II*, 128 S. Ct. at 1355.

<sup>172</sup> *See* *Medellín v. Dretke*, 371 F.3d 270, 270 (5th Cir. 2004); *Medellín II*, 128 S. Ct. at 1355.

<sup>173</sup> *See* *Medellín I*, 544 U.S. at 662–63; *Medellín II*, 128 S. Ct. at 1355.

<sup>174</sup> *See* *Avena Application*, *supra* note 119, paras. 196–200.

<sup>175</sup> *See* *Medellín*, 371 F.3d at 279.

<sup>176</sup> *See id.* at 279–80.

<sup>177</sup> *See* *Medellín I*, 544 U.S. at 661–62; *Medellín II*, 128 S. Ct. at 1355.

<sup>178</sup> The White House, President George W. Bush, Memorandum for the Attorney General (February 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (last visited Sept. 22, 2008).

<sup>179</sup> *See* Maro Robbins, *It’s Bush vs. Texas in Convict Clash*, SAN ANTONIO EXPRESS-NEWS, Mar. 13, 2005, at 1A, available at [http://www.mysanantonio.com/news/nation/stories/MYSA031305.1A.bush\\_texas.131a0a3ec.html](http://www.mysanantonio.com/news/nation/stories/MYSA031305.1A.bush_texas.131a0a3ec.html) (last visited Sept. 22, 2008).

jurisdiction to decide disputes concerning the “interpretation and application” of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national [sic] obligations under the decision of the International Court of Justice in [*Avena*] . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the [fifty-one] Mexican nationals addressed in that decision.<sup>180</sup>

Ten days later, the United States notified the United Nations that it was withdrawing from the Optional Protocol and therefore would no longer recognize the ICJ’s compulsory jurisdiction in Consular Convention cases.<sup>181</sup>

Relying on the President’s memorandum and the *Avena* judgment, Medellín filed a second habeas petition in the Texas Court of Criminal Appeals.<sup>182</sup> The Supreme Court, in a short per curiam opinion, dismissed the writ of certiorari as improvidently granted, noting that the state court proceeding “may provide Medellín with the very reconsideration of his [Consular] Convention claim that he now seeks.”<sup>183</sup> Thus, the Court addressed none of the constitutional and international law issues presented by Medellín’s case. However, the Court identified two of those issues: first, “whether a federal court is bound by the International Court of Justice’s (ICJ) ruling that United States courts must reconsider petitioner José Medellín’s claim for relief under the [Consular Convention] without regard to procedural default doctrines,”<sup>184</sup> and second, “whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ’s judgment.”<sup>185</sup>

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<sup>180</sup> The White House, *supra* note 178.

<sup>181</sup> See Letter from Condoleezza Rice, Sec’y of State of the U.S., to Kofi Annan, Sec’y General of the United Nations (Mar. 7, 2005), reprinted in Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS, Mar. 2005, <http://www.asil.org/insights050309a.cfm> (last visited Sept. 22, 2008).

<sup>182</sup> See *Medellín I*, 544 U.S. at 663–64; *Medellín II*, 128 S. Ct. at 1356.

<sup>183</sup> See *Medellín I*, 544 U.S. at 662; *Medellín II*, 128 S. Ct. at 1356.

<sup>184</sup> *Id.* at 661–62 (citations omitted).

<sup>185</sup> *Id.*

In addition, the Court identified five procedural issues that “could independently preclude federal habeas relief for Medellín.”<sup>186</sup> Most significantly, the Court noted that in order to obtain the COA necessary to pursue his claim, Medellín must make “a substantial showing of the denial of a *constitutional* right.”<sup>187</sup> Medellín must show that a violation of the Consular Convention satisfies the “constitutional” standard.<sup>188</sup> Additionally, in order to seek habeas relief, Medellín had to have shown that he exhausted all of his claims in state court.<sup>189</sup> Relief would only be available if Medellín could show that he exhausted “all available state-court remedies.”<sup>190</sup>

Justice Ginsburg wrote a separate concurrence that Justice Scalia joined.<sup>191</sup> While they joined the majority to dismiss the writ, they would have preferred to stay the proceedings until the Texas state courts considered Medellín’s habeas application.<sup>192</sup> Justice Ginsburg noted that Medellín’s case was “freighted with formidable threshold issues” such that the Court could not issue “definitive answers” on the questions presented in the writ of certiorari.<sup>193</sup>

Among the “formidable threshold issues” that the Court did not answer were whether the *Avena* judgment was enforceable, whether the Consular Convention created individually enforceable rights, and whether the President’s memorandum had any impact on the answers to those questions.<sup>194</sup> Justice O’Connor raised two of these questions in her dissent.<sup>195</sup> In O’Connor’s view, the Court should not have dismissed the writ and refused to answer “questions of national importance . . . bound to recur.”<sup>196</sup> Along with Justice O’Connor, Justices Stevens, Souter, and Breyer argued that a remand to the Fifth Circuit would be preferable to dismissal of the writ.<sup>197</sup> Justice O’Connor noted that Medellín’s ability to

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<sup>186</sup> *Id.* at 664.

<sup>187</sup> *Id.* at 666 (quoting 28 U.S.C. § 2253 (c)(2) (2000)).

<sup>188</sup> *Id.*; see also *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

<sup>189</sup> *Medellín I*, 544 U.S. at 666; see also 28 U.S.C. § 2254 (b)(1)(A), (b)(3).

<sup>190</sup> *Medellín I*, 544 U.S. at 666.

<sup>191</sup> See *id.* at 667 (Ginsburg, J., concurring).

<sup>192</sup> See *id.* at 669–70.

<sup>193</sup> *Id.* at 672.

<sup>194</sup> See *id.* at 672–73 (O’Connor, J., dissenting).

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 673.

<sup>197</sup> See *id.* at 690–92 (Souter, J., dissenting); *id.* at 692–93 (Breyer, J., dissenting).

seek relief in Texas was speculative at best.<sup>198</sup> She also raised the possibility that the Supreme Court could sidestep the issue of whether the *Avena* judgment is binding on United States courts by independently ruling that the Consular Convention grants individual rights.<sup>199</sup>

On November 16, 2006, the Texas Court of Criminal Appeals again considered Medellín's case to decide whether Medellín "[met] the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of [Texas state law]."<sup>200</sup> The court held (1) that the ICJ's *Avena* decision was not binding federal law;<sup>201</sup> (2) that the President's memorandum did not preempt state procedural rules; and (3) that neither the *Avena* decision nor the President's memorandum were previously unavailable factual or legal bases that would allow for review and reconsideration of Medellín's sentence.<sup>202</sup> In a lengthy opinion, the court addressed, *inter alia*, the effect of the Supremacy Clause of the United States Constitution on both the ICJ's *Avena* decision and the President's memorandum,<sup>203</sup> specifically addressing "whether the President has exceeded his power by directing us to give effect to the *Avena* decision under the principles of comity."<sup>204</sup> One question that the Texas court did not answer, however, was whether Article 36 creates individually-enforceable rights.<sup>205</sup>

In examining the President's memorandum, the Texas court revisited Justice Jackson's famous delineation of presidential power outlined in his concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer*.<sup>206</sup> Justice Jackson described presidential power in three categories: "at its maximum" when the President acts pursuant to Congress's authorization, in "a zone of twilight" when the President acts without a congressional grant (or denial) of authority, and "at its lowest ebb" when the President takes action that is contrary to the will of Congress.<sup>207</sup>

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<sup>198</sup> See *id.* at 673 (O'Connor, J., dissenting).

<sup>199</sup> See *id.*

<sup>200</sup> *Ex parte Medellín*, 223 S.W.3d 315, 323 (Tex. Crim. App. 2006).

<sup>201</sup> *Id.* at 330.

<sup>202</sup> *Id.* at 352.

<sup>203</sup> *Id.* at 330–49.

<sup>204</sup> *Id.* at 335.

<sup>205</sup> See *id.* at 330. The court noted that "a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court." *Id.*

<sup>206</sup> See *id.* at 344–45 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

<sup>207</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37.

Both Medellín and the United States (which joined the case as *amicus curiae*) argued that the President's power was "at its maximum" when he issued his directive and that the memorandum was the equivalent of an executive order that would preempt state law.<sup>208</sup> Medellín contended that the President's memorandum merely confirmed that the United States would abide by the ICJ's *Avena* judgment just as it had impliedly promised to do when it ratified the Consular Convention and its Optional Protocol.<sup>209</sup> This argument was countered by the state of Texas, which posited that the memorandum did not compel state courts to ignore procedural rules, but merely showed "the intent and determination of the United States to enforce the consular provisions of the Vienna Convention."<sup>210</sup>

After losing his Texas Court of Criminal Appeals case, Medellín appealed to the Supreme Court. The Court again granted certiorari.<sup>211</sup>

#### B. Analysis

##### 1. Medellín v. Dretke: *Unanswered Questions and their Resolution in Medellín v. Texas*

###### a. *Is the Avena Judgment Enforceable In Domestic Courts?*

The first question that the Supreme Court dodged and that the Texas state courts addressed is whether the ICJ's *Avena* judgment is binding on American courts. Ultimately, the Court, in *Medellín v. Texas*, decided *Avena* was not "automatically binding domestic law."<sup>212</sup>

This is the correct holding. Decisions of the ICJ, standing alone, are not and should not be binding on American courts.<sup>213</sup> ICJ decisions have no binding force except between the consenting parties, and only apply in the context of that particular dispute.<sup>214</sup> No executive exists to enforce ICJ judgments,<sup>215</sup> and compliance has been "only marginally satisfactory."<sup>216</sup>

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<sup>208</sup> See *Ex parte Medellín*, 223 S.W.3d at 332–33, 335.

<sup>209</sup> See *id.* at 344.

<sup>210</sup> *Id.* at 333.

<sup>211</sup> *Medellín v. Texas*, 127 S. Ct. 2129 (2007).

<sup>212</sup> *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1357 (2008).

<sup>213</sup> See Statute of the International Court of Justice, art. 59, 59 Stat. 1055, 1062 (1945).

<sup>214</sup> See *id.*

<sup>215</sup> See generally *id.* In the event of non-compliance, the only legal recourse that the aggrieved party may have is to the United Nations Security Council, which can "make recommendations" or issue "binding decisions." See U.N. Charter art. 38; see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 996 (5th ed. 2003). Both the United Nations charter and the ICJ Statute state that the only enforcement mechanism for ICJ decisions is

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Prior to *LaGrand* and *Avena*, no court in the world had ever held that domestic courts are obliged to comply with ICJ decisions.<sup>217</sup>

In the 2005 case, Medellín argued that United States courts must abide by the *Avena* judgment even though doing so would require overruling the Supreme Court's holding in *Breard* that Consular Convention claims are subject to procedural default:

The courts are an organ of the United States and hence are bound by its treaty commitments under both international law and the United States Constitution. . . . By operation of the treaty obligations undertaken by the political branches, the courts of the United States must now "comply with the [*Avena*] decision," . . . by treating the *Avena* [j]udgment as conclusive of Mr. Medellín's rights under the Convention.

. . . It is therefore incumbent upon [the United States Supreme] Court to bring the state and federal courts of the United States into line with the nation's treaty commitments.<sup>218</sup>

In the 2008 case, Medellín again argued that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the 'Law of the Land' by which all state and federal courts in this country are 'bound.'"<sup>219</sup>

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the Security Council, and the Security Council has discretion over whether it makes recommendations to give effect to the judgment. *Id.* art. 94; Statute of the International Court of Justice, art. 41, 59 Stat. 1061. However, Professor Malcolm Shaw notes that ICJ judgments have political impact and should not be evaluated solely on "the legal plane." *See SHAW, supra*, at 997.

<sup>216</sup> SHAW, *supra* note 215, at 996. *But see* Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335, 368 (Thomas M. Franck & Gregory H. Fox eds., 1996) (noting "an admirable record of compliance" with ICJ decisions).

<sup>217</sup> *See* Respondent's Brief, *Medellin I*, *supra* note 163, at 6.

<sup>218</sup> Brief for Petitioner at 36–37, *Medellin v. Dretke (Medellin I)*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 176452 [hereinafter Brief for Petitioner, *Medellin I*]. Medellín additionally argued that the *Avena* judgment was "definitively determined" that the procedural default rule did not apply. *Id.* at 44.

<sup>219</sup> Reply Brief for Petitioner at 1, *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 2886606 [hereinafter Reply Brief for Petitioner, *Medellin II*] (quoting U.S. CONST. art. VI).

Medellín's argument that the ICJ's *Avena* decision impliedly overturned *Breard* is contrary to the United States Constitution.<sup>220</sup> Justice O'Connor once noted that "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'"<sup>221</sup> It follows that vesting binding adjudicatory authority in ICJ decisions is a constitutionally impermissible delegation of judicial power.<sup>222</sup> This is not to suggest that the Supreme Court, on its own accord, could not revisit and overrule *Breard*, but an ICJ decision does not compel it to do so. Only the Supreme Court has the power to overrule its own decisions.<sup>223</sup> In fact, the Supreme Court did revisit its holding in *Breard* when it considered the consolidated cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Virginia*.<sup>224</sup> Both cases were brought by foreign nationals claiming, like Medellín, that the Consular Convention had been violated when police failed to notify them of their rights to consular communication.<sup>225</sup> Petitioner Bustillo argued, *inter alia*, that the ICJ's *Avena* and *LaGrand* cases, both decided after the Supreme Court considered *Breard*'s case, operated to preclude states from applying procedural default rules to bar Consular Convention claims.<sup>226</sup> The Court rejected this argument and noted that, although it would still afford

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<sup>220</sup> See U.S. CONST. art. III.

<sup>221</sup> Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS, *supra* note 216, at 13, 19 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

<sup>222</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) ("The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1591 (1833) ("The Constitution has wisely established, that there shall be one Supreme Court, with a view to uniformity of decision in all cases whatsoever, belonging to the judicial department, whether they arise at the common law or in equity, or within the admiralty and prize jurisdiction; whether they respect the doctrines of mere municipal law, or constitutional law, or the law of nations.").

<sup>223</sup> See *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents."); *cf. Plaut*, 514 U.S. at 227 (holding that Congress unconstitutionally interfered with the power of the federal courts when it reopened a final judgment).

<sup>224</sup> 548 U.S. 331 (2006).

<sup>225</sup> *Id.* at 342–43.

<sup>226</sup> See *id.* at 352–53.

“respectful consideration” to ICJ decisions, neither *Avena* nor *LaGrand* required the Court to reconsider its holding in *Breard*<sup>227</sup>: “Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on [United States] courts. The ICJ’s decisions have ‘no binding force except between the parties and in respect of that particular case.’”<sup>228</sup>

The Court, in *Sanchez-Llamas*, emphasized that decisions of the ICJ are not binding on the ICJ itself, so any suggestion that those same decisions should be binding on domestic courts is illogical.<sup>229</sup> In addition, the Court noted that nothing in the Convention itself compels domestic courts to accept the decisions of the ICJ as having binding force,<sup>230</sup> quoting the language in Article 36 that makes clear that rights under the Convention “shall be exercised in conformity with the laws and regulations of the receiving State.”<sup>231</sup>

Nor does the text of the Optional Protocol include any provision that purports to indicate that ICJ decisions are enforceable in domestic courts.<sup>232</sup> Medellín argued that the ICJ’s jurisdiction to interpret and apply the Consular Convention includes the authority to compel United States courts to enforce ICJ decisions.<sup>233</sup> However, the ratification history of the Consular Convention indicates that the signatory states believed that any problems arising under the Optional Protocol would be solved through diplomatic, not judicial, channels.<sup>234</sup>

The Court, in *Medellín v. Texas*, noted that the U.N. Charter’s Article 94, not the Optional Protocol, provided the “obligation on the part of signatory nations to comply with ICJ judgments.”<sup>235</sup> Article 94’s “diplomatic—that is, nonjudicial—remedy” indicated that ICJ decisions

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<sup>227</sup> *Id.* at 353 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

<sup>228</sup> *Id.* at 354 (quoting Statute of the International Court of Justice, art. 59, 59 Stat. 1055, 1062 (1945)).

<sup>229</sup> *See* 354–55.

<sup>230</sup> *See id.* at 355.

<sup>231</sup> *Id.* at 356 (citing Consular Convention, *supra* note 6, art. 36).

<sup>232</sup> *See generally* Optional Protocol, *supra* note 28.

<sup>233</sup> *See* Brief of Petitioner, *Medellín I*, *supra* note 218, at 47–48.

<sup>234</sup> *See* Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the U.S. as *Amici Curiae* in Support of Respondent at 12 n.3, *Medellín v. Dretke (Medellín I)*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 497763.

<sup>235</sup> *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1358 (2008).

were never meant to be enforced in U.S. courts.<sup>236</sup> Further, the Court mentioned that the diplomatic remedy is not “absolute” because Security Council action is required to enforce judgments, and the United States holds a veto on the council.<sup>237</sup> The Court pointed out that adopting Medellín’s argument would “undermin[e] the ability of the [U.S.] political branches to determine whether and how to comply with an ICJ judgment.”<sup>238</sup>

Accepting Medellín’s claim that the *Avena* judgment was binding would create an undesirable rule that the ICJ has the ability to overrule United States Supreme Court decisions, thus transforming the Supreme Court into just another intermediate level appellate court. The Court, in *Medellin v. Texas*, realized this very problem, stating that the likely result would be that “neither Texas nor this Court may look behind a[n] [ICJ] judgment and quarrel with its reasoning or result.”<sup>239</sup> Thus, it would be possible for any foreign national who could convince his country to represent his claim before the ICJ to gain an additional appeal.<sup>240</sup> In Breard’s case before the ICJ, Judge Oda noted that Breard had been

treated fairly in all legal proceedings within the American judicial system governed by the rule of law.

The [ICJ] cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters.<sup>241</sup>

The Supreme Court, in *Sanchez-Llamas*, answered the question even more simply. Chief Justice Roberts, in the majority opinion, wrote that procedural default rules are a cornerstone of an adversary system and that

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<sup>236</sup> *Id.* The Court stated that Article 94 was not “a directive to domestic courts” because there was no “shall” or “must” language in the article, and there was indication “that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.” *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1360.

<sup>239</sup> *Id.* at 1364.

<sup>240</sup> The Court noted that this argument could be expanded such that there would be “nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ.” *Id.*

<sup>241</sup> Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 260 (Apr. 9) (Declaration of J. Oda).

the consequence for failing to raise a claim at the appropriate time rests solely with the party who failed to raise it.<sup>242</sup> Thus, despite Medellín's argument that the procedural default rule would have operated in his case and fail to give the rights afforded under the Consular Convention any "legal significance," he provided no support for his claim.<sup>243</sup>

If Medellín's reading of the Consular Convention was accepted as correct, domestic courts could only conclude that the broad "full effect" language of Article 36(2) supersedes procedural laws.<sup>244</sup> As the *Sanchez-Llamas* Court pointed out, this interpretation would excuse failure to comply with statutes of limitations, would permit the filing of successive habeas petitions, and would generally void much of the procedural law of the United States.<sup>245</sup> Of great importance, Chief Justice Roberts, in his *Medellin v. Texas* majority opinion, cited affirmatively to the *Sanchez-Llamas* analysis and concluded that "there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules."<sup>246</sup>

*b. Does the Consular Convention Create Individually Enforceable Rights?*

Medellín also maintained that *Avena* supersedes United States law because (1) the consular rights applied in *Avena* are unquestionably self-executing and thus individually enforceable, and (2) the United States' ratification of the Optional Protocol requires its domestic courts to enforce *Avena*.<sup>247</sup> Medellín's argument was that because the Convention is self-executing, it creates individual rights enforceable in American courts.<sup>248</sup>

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<sup>242</sup> See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006).

<sup>243</sup> See *id.* at 356.

<sup>244</sup> See *id.* at 357.

<sup>245</sup> See *id.*

<sup>246</sup> *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1363–64 (2008).

<sup>247</sup> Brief for Petitioner, *Medellin I*, *supra* note 218, at 13–18; Reply Brief for Petitioner, *Medellin II*, *supra* note 219, at 5–6.

<sup>248</sup> Brief for Petitioner, *Medellin I*, *supra* note 218, at 30 ("Because the rights conferred by the [Consular] Convention are self-executing, and because the United States agreed to submit . . . disputes [to the ICJ] concerning the interpretation and application of the . . . Convention, Mr. Medellín's rights under the *Avena* Judgment are enforceable by the courts of the United States . . ."). In the 2008 case, Medellín again asserted that the *Avena* judgment provided him individual rights in U.S. courts. Reply Brief for Petitioner, *Medellin II*, *supra* note 219, at 7–8 ("It is hard to imagine a right more 'individual' to Mr. Medellín than the right not to be executed without the review and reconsideration of his  
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The Court, in *Medellín v. Texas*, rejected this argument by holding that it is the Article 94 of the U.N. Charter, and not the Optional Protocol, that creates an underlying non-self executing obligation.<sup>249</sup>

However, it is worth noting that a treaty's self-executing nature and its granting of individual rights are distinct issues.<sup>250</sup> Generally, treaties do not create individual rights,<sup>251</sup> even those treaties that directly benefit individuals.<sup>252</sup> United States courts have consistently recognized and applied this principle.<sup>253</sup> It is only when a treaty unambiguously stated that its purpose was to create individually-enforceable rights that United States courts have given effect to individual rights.<sup>254</sup> The Consular Convention explicitly states that its purpose is to benefit states, not individuals: "[T]he purpose of [the] privileges and immunities [herein] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."<sup>255</sup>

Additionally, Article 36 itself reiterates the notion that its purpose is to facilitate consular function, not to benefit individuals: the provision is to be construed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State."<sup>256</sup> The Court did not address the

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conviction and sentence that are required 'within the overall judicial proceedings relating to the individual defendant concerned' by a legally binding judgment [*Avena*] addressing his own case.'").

<sup>249</sup> See *supra* notes 235–38 and accompanying text.

<sup>250</sup> See RESTATEMENT (THIRD), *supra* note 34, § 111, cmt. h.

<sup>251</sup> See *id.* § 907, cmt. a; see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that two multilateral treaties at issue there "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action . . .").

<sup>252</sup> See *United States v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) ("[E]ven where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.") (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. e (1965)).

<sup>253</sup> See, e.g., *Amerada Hess Shipping Corp.*, 488 U.S. at 442; *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986); *Gengler*, 510 F.2d at 67.

<sup>254</sup> See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 346 (1925); *Asakura v. City of Seattle*, 265 U.S. 332, 340–44 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 486 (1879); *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270–71 (1817); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812).

<sup>255</sup> Consular Convention, *supra* note 6, pmbl.

<sup>256</sup> *Id.* art. 36.

Article 36 argument. Chief Justice Roberts' opinion did rightfully point out "that only nation-states may be parties before the ICJ [and] . . . that ICJ judgments are binding only between those parties."<sup>257</sup> Therefore, it can be fairly argued that any collateral benefit to individuals that arises from rights of signatory states does not translate into a judicially-enforceable right under the Convention.<sup>258</sup> Mexico (not Medellín) was a party to *Avena*. Thus, even though he is named as one of the Mexican nationals in *Avena*, the ICJ decision does not create an individually-enforceable right for Medellín.

While not addressed in *Medellin v. Texas*, even assuming that the Consular Convention does create individual rights, it does not create a remedy for violations of those rights. In *Avena*, the ICJ stated that the Consular Convention does not create an individual remedy, leaving "the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention."<sup>259</sup>

*c. Did the President Exceed His Power When Ordering State Courts to Give Effect to the Avena Judgment?*

As mentioned above, shortly before the Supreme Court heard oral arguments in Medellín's case, President Bush issued a memo ordering state courts to give effect to the *Avena* judgment in accordance with principles of comity.<sup>260</sup> Comity is defined as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving [especially] mutual recognition of legislative, executive, and judicial acts."<sup>261</sup> Comity is not automatically extended; it is a "voluntary observance of the right of foreign nations to regulate their own affairs."<sup>262</sup>

The President's decision to apply principles of comity seems contradictory to his acknowledgement of an obligation under *Avena*. As one commentator observed:

Perhaps he meant simply that state courts, in revisiting their decision in these cases, should do more than go

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<sup>257</sup> *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1361 (2008) (citing Statute of the International Court of Justice, art. 34, 59 Stat. 1055, 1059 (1945)).

<sup>258</sup> See *United States v. Li*, 206 F.3d 56, 60–61 (1st Cir. 2000).

<sup>259</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 60 (Mar. 31).

<sup>260</sup> See *The White House*, *supra* note 178.

<sup>261</sup> BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

<sup>262</sup> Respondent's Brief, *Medellin I*, *supra* note 163, at 47.

through the motions and should instead give real respect to the ICJ judgment. Perhaps he meant that state courts are not legally required to give any ICJ judgment immediate effect in [United States] domestic law in the absence of a determination by the President. If the latter, and if it is intended as a general statement extending beyond the facts of the present case, there would be a separation-of-powers question whether the President's foreign affairs authority under the Constitution extends to determining the direct legal effect of ICJ judgments on domestic judicial proceedings in the United States.<sup>263</sup>

It is implicit from the President's memorandum that state courts should set aside procedural default rules and should not deny relief on the grounds that the Consular Convention does not create individual rights, although neither point is entirely clear.<sup>264</sup> Thus, in light of the presidential determination, Medellín was faced with several possibilities.<sup>265</sup> The Texas courts could have reconsidered his claim on comity grounds and decided that Medellín still did not have individually-enforceable rights under the Convention, or perhaps they could have reviewed his claim and decided that he did have judicially-enforceable treaty rights.<sup>266</sup> Or, even in light of the President's memo, they could have applied the Texas procedural default rule upon review and decided that Medellín had procedurally defaulted his Consular Convention claim.<sup>267</sup> The latter is, of course, exactly what the Texas Court of Criminal Appeals did in Medellín's case.<sup>268</sup>

The Supreme Court conclusively resolved this matter in *Medellín v. Texas*. Medellín and the United States (again joining the case as *amicus*

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<sup>263</sup> Frederic L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS, Mar. 2005, <http://www.asil.org/insights050309.cfm> (last visited Sept. 22, 2008).

<sup>264</sup> *See id.*

<sup>265</sup> *See* Frederic L. Kirgis, *The Supreme Court Backs Away from a Consular Convention Case*, ASIL INSIGHTS, May 31 2005, <http://www.asil.org/insights050531.cfm> (last visited Sept. 22, 2008).

<sup>266</sup> *See id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See* *Medellín v. Dretke (Medellín I)*, 544 U.S. 660, 663 (2005).

*curiae*) presented the same arguments offered in the Texas appeals case.<sup>269</sup> The Court held that the memorandum fell under the third category of the *Youngstown* framework.<sup>270</sup> The majority reasoned that the President's powers to enforce international obligations, while extensive, did not include "unilaterally converting a non-self-executing treaty into a self-executing one."<sup>271</sup> The Court explained that non-self-executing treaties, like the ones in this case, required action by Congress.<sup>272</sup> Without legislation the President could not claim authority under the first *Youngstown* category.<sup>273</sup> Likewise, the Court rejected the notion that Congress acquiesced by remaining silent when the President resolved other ICJ obligations because none of the previous instances "remotely involved transforming an international obligation into domestic law and thereby displacing state law."<sup>274</sup>

The United States also argued that the President's memorandum was "valid exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations" independent of any existing treaty obligations.<sup>275</sup> The Court rejected this argument because

the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.<sup>276</sup>

Finally, the Court dismissed Medellín's argument that the memorandum was merely the President faithfully executing the law as required by Article II of the Constitution.<sup>277</sup> It noted that *Avena* was not

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<sup>269</sup> *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1368 (2008); *see also supra* notes 208 & 209 and accompanying text.

<sup>270</sup> *Id.* at 1369.

<sup>271</sup> *Id.* at 1368.

<sup>272</sup> *Id.* at 1369.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1370.

<sup>275</sup> *Id.* at 1371.

<sup>276</sup> *Id.* at 1372; *see also supra* note 209 and accompanying text.

<sup>277</sup> *Medellín II*, 128 S. Ct. at 1372.

domestic law, and, moreover, Article II grants the President the power to “execute the laws, not make them.”<sup>278</sup>

## 2. *Medellín’s Procedural Hurdles*

While not addressed in *Medellín v. Texas*, the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>279</sup> enacted by Congress in 1996, requires that a defendant make a “substantial showing of the denial of a constitutional right” in order to obtain a certificate of appealability.<sup>280</sup> Thus, the AEDPA acknowledges procedural default and directs federal courts to dismiss claims that are based on a denial of statutory or other non-constitutional rights.

The AEDPA should have barred *Medellín’s* request for habeas relief. Under the AEDPA, a habeas petitioner must obtain a COA before a federal court can rule on the merits of his case.<sup>281</sup> Until a defendant obtains a COA, federal courts have no jurisdiction to hear a claim.<sup>282</sup> The Fifth Circuit denied *Medellín’s* petition for a COA, holding that he failed to make a substantial showing that he was denied a *constitutional right*.<sup>283</sup> Before passage of the AEDPA, the standard to obtain a COA was violation of a *federal right*,<sup>284</sup> which may have included a treaty violation; however, treaty-based rights are not constitutional rights.<sup>285</sup> Even before *Sanchez-Llamas*, the Supreme Court took “due note” of the change of language,<sup>286</sup> and the Fourth Circuit addressed the notion that rights under the Consular Convention are “certainly” not constitutional rights:

In order to obtain a [COA], a petitioner whose habeas petition was denied by a district court must make “a substantial showing of the denial of a constitutional right.” [Petitioner]’s argument that his rights under the [Consular Convention] were violated does not satisfy [this]

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<sup>278</sup> *Id.*

<sup>279</sup> 28 U.S.C. § 2253(c)(2) (2000).

<sup>280</sup> *Id.*

<sup>281</sup> *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (“[U]ntil a COA has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.”).

<sup>282</sup> *Id.*

<sup>283</sup> *Medellín v. Dretke*, 371 F.3d 270, 275, 281 (5th Cir. 2004).

<sup>284</sup> See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

<sup>285</sup> See *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

<sup>286</sup> *Slack*, 529 U.S. at 483.

requirement because even if the [Consular Convention] 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. . . . 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.<sup>287</sup>

### III. SIGNIFICANCE

The Supreme Court, in speculating that Medellín might have found the relief he sought in Texas state court, backed away from an opportunity to answer the question of what effect decisions of international tribunals have on the domestic law of the United States.<sup>288</sup> By dismissing the writ, the Supreme Court placed that important question, among others, into the hands of the Texas courts.<sup>289</sup> Because Texas did not provide Medellín with the relief he sought, the Supreme Court had to again grant certiorari in order to answer the difficult questions it evaded in *Medellín v. Dretke*.<sup>290</sup> However, the Court laid the framework for Medellín's unsuccessful appeal in *Medellín v. Texas* by shutting many doors in *Sanchez-Llamas* that were previously open.<sup>291</sup>

Medellín's case emphasizes the important difference between treaty obligations and compliance with ICJ decisions interpreting those obligations. Clearly, the United States violated the Consular Convention when it failed to notify foreign detainees of their right to contact the appropriate consular officers. Thus, the issue in Medellín's cases became not whether there was a denial of a treaty-based right; the issue was how much weight to give to the *Avena* decision that purported to fashion a remedy for that violation, even when that decision conflicted with established domestic procedure.<sup>292</sup>

### CONCLUSION

Giving binding effect to *Avena* would have been undesirable for many reasons. First, treating *Avena* as binding on the American courts would have essentially created another level of appellate review for foreign

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<sup>287</sup> *Murphy*, 116 F.3d at 99–100.

<sup>288</sup> See *Medellín v. Dretke (Medellín I)*, 544 U.S. 660, 664 (2005).

<sup>289</sup> See *id.*

<sup>290</sup> See *id.* at n.1.

<sup>291</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 358–60 (2006).

<sup>292</sup> See *Medellín I*, 544 U.S. at 684–85 (O'Connor, J., dissenting).

nationals convicted of crimes in the United States, making the ICJ, rather than the United States Supreme Court, the final arbiter of their claims. In *Medellín v. Texas*, the Supreme Court reaffirmed its authority to “say what the law is”<sup>293</sup> and to uphold federal statutes and binding rules of criminal procedure. Second, recognizing *Avena* as binding would have bestowed individual rights under the Consular Convention in contradiction of the Convention’s stated purpose. Finally, the President’s order to the state courts to comply with the ICJ’s judgment in accordance with principles of comity, along with the subsequent review and reconsideration of the cases of foreign nationals in those state courts, may have fully discharged the obligations of the United States under the Consular Convention. However, given the non-self executing nature of the treaty, the President cannot act without authorization by Congress.

Refusing to give *Avena* binding force should not be viewed as an attempt by the United States to shirk its treaty obligations. Giving a decision of the ICJ automatic binding force is foreclosed by the domestic procedural law of the United States. *Medellín*’s request for relief was barred by both federal statutes and constitutional precedent. Nothing in *Avena* alters that federal law.

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<sup>293</sup> *Sanchez-Llamas*, 548 U.S. at 353–54 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

