

Medellín v. Texas and the Ultimate Law School Exam

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Introduction

Commentators often fall in love with the object of their analysis and thereby lose perspective. After being immersed for so long in the minutia of a given topic, and investing so much in a particular narrative or thesis, it becomes difficult not to overstate the importance of the subject matter. In recognizing this bias with respect to *Medellín v. Texas*,¹ I hope to avoid it. Having said that, I don't believe it's an exaggeration to call this the most intellectually interesting case of the term. It is also probably the one with the broadest implications for American jurisprudence, coming at the increasingly topical intersection of international and constitutional law.

Medellín presented the Court with a law school exam of a case, combining questions of treaty interpretation and application, federalism, separation of powers, and criminal procedure. It forced the justices to grapple with tensions between international and domestic law (and what that means for the Constitution's Supremacy Clause), federal and state government, and the president and three separate institutions: Congress, the Supreme Court, and—in what then-Texas Solicitor General Ted Cruz (who argued the case) has called a "Möbius twist"—state courts. In short, this remarkable case raised issues touching on every axis of governmental structure, checks and balances, and the design of political institutions.

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¹ 552 U.S. _____, 128 S. Ct. 1346 (2008). All citations styled as "*Medellín*" that do not include the other party to the case (i.e., lower court, state, and previous Supreme Court rulings) refer to this opinion.

The case arose out of a lawsuit that Mexico filed against the United States in the International Court of Justice (often called the “World Court”) regarding the interpretation of the Vienna Convention on Consular Affairs² and its Optional Protocol³. The ICJ issued an extraordinary order, directing the United States to reopen and review the convictions and death sentences of 51 Mexican nationals who had not been apprised of their consular rights.⁴ It was a rare instance of a foreign tribunal attempting to assert the authority to bind American judges, and so the first issue for the Supreme Court to resolve was whether it could do so.

The case took a further strange twist in 2005, when President George W. Bush wrote a two-paragraph memorandum to then-Attorney General Alberto Gonzalez (formerly of the Texas Supreme Court) directing the Texas courts to put the ICJ order into effect. There was no precedent for a U.S. president to do something like that, either in the name of international comity or in fulfillment of a treaty obligation. The second issue was thus whether the president can direct state courts to follow an ICJ judgment regarding the consular rights of a convicted felon.

The Court found for the state of Texas, holding that the ICJ cannot make Vienna Convention rights—the alleged violation of which was not raised until post-conviction state habeas review four years after the original trial—legally cognizable without congressional legislation (cannot make them “self-executing”); but regardless, the Court further held, President Bush stepped beyond his lawful authority in trying to enforce the ICJ judgment against state courts.

Not surprisingly, the multi-layered legal controversy produced the oddest of bedfellows: On one side, Texas was supported by states not typically known to hold the Lone Star State’s view of law or policy—and one amicus brief brought together Erwin Chemerinsky and John Yoo, scholars not often on the same side of a legal dispute. On the other, President Bush found himself supported by

² Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820.

³ Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, [1970] 21 U.S.T. 325, 326, T.I.A.S. No. 6820 (granting the ICJ exclusive jurisdiction over disputes regarding the Vienna Convention).

⁴ Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12 (Judgment of Mar. 31).

death penalty abolitionists and progressive transnationalists (and 81 countries joined briefs supporting the U.S. position).

This article presents the lead-up to the case, analyzes the opinion and its aftermath, and evaluates *Medellín's* implications for international law and executive authority. I begin in Part I with the factual and procedural background to the case, the legal developments that led to this intersection of international and constitutional law, and the course of litigation before the Supreme Court. In Part II, I parse the *Medellín* opinion, concentrating of course on Chief Justice John Roberts's opinion for the Court, but also noting salient points from Justice John Paul Stevens's concurrence and Justice Stephen Breyer's dissent. Part III details subsequent legal action and *Medellín's* execution. In Part IV, I look at the future of international law and executive power in U.S. courts and propose how a president could act in similar circumstances if an issue like this ever arises again.

I. Background

A. Legal Developments

The United States ratified the Vienna Convention and its Optional Protocol in 1969. Article 36 of the Convention "facilitate[s] the exercise of consular functions" and provides that if a foreign person detained by a party country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [arrested person] of his right[]" to consular assistance.⁵ This right is meant to "contribute to the development of friendly relations among nations."⁶ Under the Optional Protocol, disputes over the application of the Vienna Convention "shall lie within the compulsory jurisdiction of the [ICJ]" and can be brought "by any party to the dispute" who is a party to the Protocol.⁷

The ICJ is "the principal judicial organ of the United Nations"⁸ and is governed by a part of the UN Charter known as the ICJ Statute.⁹ Each UN member "undertakes to comply with the decision

⁵ Art. 36(1), 21 U.S.T. at 100–01.

⁶ Preamble, 21 U.S.T. at 79.

⁷ Art. I, 21 U.S.T. at 326.

⁸ UN Charter, art. 92, 59 Stat. 1051, T.S. No. 993 (1945).

⁹ *Id.*, art. 59, 59 Stat. 1062.

of the [ICJ] in any case to which it is a party."¹⁰ ICJ jurisdiction, however, depends on the parties' consent, either generally to any question of international law or treaty or specifically over a particular category of cases under a particular treaty.¹¹ The United States consented to the ICJ's general jurisdiction until 1985, at which point its continuing adherence to the Optional Protocol constituted consent to the specific jurisdiction over Vienna Convention claims. About a year after the *Avena* decision (referenced above and discussed below), the United States withdrew from the Optional Protocol altogether.¹²

As it happens, the instant case is not the first time that the Supreme Court has grappled with the meaning of the Vienna Convention and its relationship to state criminal law. In 1998, the Court in *Breard v. Greene* considered a petition to stay the execution of a rapist-murderer to allow time for the consideration of his claim that he had not been informed of his right to contact his consulate.¹³ The Court ruled that the defendant could not raise his Vienna Convention claim for the first time at this late stage (not having argued it at trial, appeal, or state habeas proceedings) and added that even if he were not procedurally defaulted, it was "extremely doubtful" that the alleged violation had any effect on his trial that would result in the overturning of his conviction.¹⁴ In an interesting wrinkle—and in response to the intervention of the government of Paraguay, its ambassador, and its consul general—the Court also found that the Vienna Convention did not give a foreign nation a private right of action in U.S. courts.¹⁵

Then, between *Avena* and this latest iteration of the Medellín saga, the Court had a further opportunity to interpret the Vienna Convention's Article 36, in a case unrelated to the individuals named in the

¹⁰ *Id.*, art. 94(1), 59 Stat. 1051.

¹¹ *Id.*, art. 36, 59 Stat. 1060.

¹² Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, UN Secretary-General, March 7, 2005; Charles Lane, U.S. Quits Pact Used in Capital Cases, *Washington Post*, March 10, 2005, at A01.

¹³ 523 U.S. 371 (1998) (per curiam). While per curiam ("by the court") opinions are typically unanimous and uncontroversial, this one generated separate dissents from Justices Stevens, Ginsburg, and Breyer, as well as a bizarre "statement" (not concurrence nor dissent) from Justice Souter.

¹⁴ *Id.* at 377.

¹⁵ *Id.*

ICJ suit. The consolidated 2006 case of *Sanchez-Llamas v. Oregon* involved two murderers who argued that their respective convictions should be overturned because their consular rights had been violated.¹⁶ The Oregon Supreme Court had affirmed, on direct appeal, the denial of the Mexican defendant's motion to suppress his own incriminating statements, holding that Article 36 did not create judicially cognizable rights.¹⁷ The Virginia Supreme Court, meanwhile, had affirmed the denial of the Honduran defendant's state habeas petition in part because he had not previously made the consular rights argument (and so had waived it).¹⁸ The U.S. Supreme Court, in an opinion by Chief Justice Roberts (then completing his first term), agreed with both states' judiciaries, holding that: 1) the Vienna Convention did not override state default rules—the standard principle of criminal (and civil) procedure that issues not raised before the trial court could not later be raised on appeal—and 2) even if the Convention created privately enforceable rights that were violated here, the exclusionary rule (which was designed to remedy federal constitutional violations) was not an appropriate remedy.¹⁹ The Court left to another day the question of whether the Vienna Convention did indeed create rights that could—after the ICJ adjudicated them—be individually enforced in state or federal court. That day came with the *Medellín* case.

B. Facts of the Case

This case, which would gain worldwide infamy, move both the Supreme and World Courts to action, and rebuke the “leader of the free world,” began with a grisly gang rape and double murder. They were brutal crimes, but ones not normally meriting national—let alone international—attention. It was only the later (and latest) legal machinations that make this much more than a personal tragedy for the families of the victims.

In June 1993, then-18-year-old José Ernesto Medellín, who was born in Mexico but came to the United States when he was three, growing up in Houston, participated in a particularly depraved gang initiation. As 14-year-old Jennifer Ertman and 16-year-old Elizabeth

¹⁶ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

¹⁷ *State v. Sanchez-Llamas*, 108 P.3d 273 (Or. 2005).

¹⁸ *Shackleford v. Commonwealth*, 547 S.E.2d 899 (Va. 2001).

¹⁹ *Sanchez-Llamas*, 548 U.S. at 360.

Peña walked home, they encountered Medellín and his fellow gang members, who began teasing them. The girls tried to run away but were soon caught. Ertman tried to help her friend, whom Medellín had thrown to the ground. The gang proceeded to rape both girls for over an hour. Then, to prevent their victims from being able to get them in trouble, the gang killed the girls and left their bodies in a wooded area. Medellín himself strangled one of the girls with her own shoelace. The gang then divided up the girls' money and jewelry; Medellín kept Ertman's ring while his brother took a Disney watch. Later that evening, at the home of the brother of one of the gang members, Medellín boasted of the "fun" they had had.

Authorities found the girls' decomposing remains four days later. The police arrested Medellín the day after that. He confessed almost immediately—the timing would become an important detail—signing a detailed statement after being given his *Miranda* warnings. Medellín was convicted of capital murder and sentenced to death by lethal injection, which conviction and sentence were duly affirmed on appeal in May 1997.²⁰

Medellín next filed for habeas corpus in state court (seeking post-conviction relief for procedural irregularities at trial and on direct appeal), arguing inter alia that his arresting officers never informed him of his right under the Vienna Convention to notify the Mexican consulate. The state district court ruled the claim procedurally waived because he had not previously raised it, but also reached the merits to find that Medellín had not presented any evidence that the violation of his consular rights somehow affected the outcomes of his trial and appeals.²¹ (The ICJ later found that the Vienna Convention is satisfied when the detaining state provides the detainee's consulate with notice of detention within three working days of arrest.²² Here, Medellín confessed within three hours of arrest, well before the deadline by which Texas had to vindicate his consular rights.²³) Nearly four years after Medellín did his deeds, the Texas Court of Criminal Appeals affirmed the habeas denial.²⁴

²⁰ Medellín v. State, No. 71,997 (Tex. Crim. App., May 16, 1997).

²¹ Ex parte Medellín, No. 675430-A (339th Dist. Ct., Jan. 22, 2001).

²² Avena, 2004 I.C.J. 12, 52 ¶ 97 (Judgment of Mar. 31). See also Sanchez-Llamas, 548 U.S. at 362 (Ginsburg, J., concurring in the judgment).

²³ Medellín v. Texas, 128 S. Ct. at 1355 n.1.

²⁴ Ex parte Medellín, No. WR-50, 191–02 (Tex. Crim. App. Oct. 3, 2001).

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Medellín then filed for habeas in federal district court. That petition was also denied, again because 1) the Vienna Convention claim was procedurally defaulted and 2) Medellín had failed to show that he had been prejudiced by any such violation.²⁵

While Medellín sought to appeal this ruling in the Fifth Circuit—rejections of collateral attacks on state convictions are not entitled to appeal as of right—the ICJ issued *Avena*. The court held that the United States had indeed violated the Vienna Convention rights of 51 Mexicans, including Medellín. The United States was thus obligated “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences”²⁶ without regard to state procedural default rules.²⁷

Nevertheless, the Fifth Circuit denied a certificate of appealability, following its own precedent and concluding that the Convention did not confer individually enforceable rights.²⁸ It further held that it was bound not by the ICJ but by the Supreme Court’s ruling in the *Breard* decision that Vienna Convention claims are indeed subject to procedural default rules.²⁹

The Supreme Court granted certiorari to resolve the seeming conflict between the ICJ and America’s treaty obligations on the one hand and Court precedent and Texas criminal procedure on the other. After briefing but before oral argument, President Bush reversed his administration’s previous position—which, far from endorsing *Avena*, involved filing a brief supporting Texas—and issued a remarkable memorandum to Attorney General Gonzales. The memorandum, dated February 28, 2005, and titled “Compliance with the Decision of the International Court of Justice in *Avena*,” read, in its entirety:

²⁵ Medellín v. Cockrell, Civ. Action No. H-01-4078 (S.D. Tex., June 26, 2003).

²⁶ *Avena*, 2004 I.C.J. at 72.

²⁷ *Id.* at 56–57.

²⁸ Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004). For purposes of full disclosure, I should note that I was clerking for a Fifth Circuit judge while this case was pending. My judge was not on the panel that decided the case, but I had the opportunity to read the slip opinion and confer with my judge before the mandate issued. (While the procedure varies by circuit, at the federal appellate level judges can “hold” the mandate of opinions in cases decided by their colleagues to study the issues further and potentially call for a vote as to whether to have the case re-argued en banc.)

²⁹ *Id.* (citing *Breard*, 523 U.S. at 375).

The United States is a party to the Vienna Convention on Consular Relations (the “Convention”) and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) 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 international 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 51 Mexican nationals addressed in that decision.³⁰

That is, the president purported to use his executive power over foreign affairs to enforce U.S. obligations under international law, all in the interest of “comity.”

Relying on both this presidential memorandum and *Avena*, Medellín filed a *second* petition for state habeas, arguing that Texas’s violation of the Vienna Convention deprived him of assistance during sentencing, in developing mitigating evidence. Not wanting to tread on state court jurisdiction (and because Medellín’s federal claims might turn out to be barred), the Supreme Court dismissed the cert petition as improvidently granted (a move known as a “DIG,” an acronym combining the action’s operative words).³¹

Texas courts again denied Medellín’s petition, in part because he had received consular assistance in preparing his first habeas filing and failed to raise the mitigation argument, but more importantly because neither *Avena* nor the presidential memorandum was “binding federal law” that could overcome state limitations on successive habeas petitions.³²

Medellín again filed for certiorari, and the Supreme Court again granted it.

³⁰ Memorandum from President George W. Bush to the Attorney General of the United States (Feb. 28, 2005) (available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>).

³¹ *Medellín v. Dretke*, 544 U.S. 660, 664 (2005) (per curiam). For an analysis of *Medellín*’s previous trip to the Court, see A. Mark Weisburd, *International Judicial Decisions, Domestic Courts, and the Foreign Affairs Power, 2004–2005 Cato Sup. Ct. Rev.* 287 (2005).

³² *Ex parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App., Nov. 15, 2006).

C. *The Case before the Supreme Court*

Medellín presented four basic arguments to the Court: 1) that the United States is bound to comply with the *Avena* judgment by virtue of being a party to the UN Charter, the Vienna Convention, and the Optional Protocol—and states cannot enact policies contrary to U.S. treaties;³³ 2) the Constitution’s Supremacy Clause makes duly ratified treaties a part of federal law, which states are bound to enforce (and which President Bush was enforcing);³⁴ 3) President Bush’s memorandum was a valid and binding exercise of the federal executive’s authority over foreign affairs;³⁵ and 4) Texas’s procedural bar (the issue of Medellín’s having waived his consular rights claim by not having raised it earlier) is preempted by U.S. treaty obligations, as incorporated into federal law by the Supremacy Clause.³⁶ Simply put, Texas was bound by the judgment of a court whose jurisdiction it fell under as a result of U.S. treaty commitments.

Texas had several options for opposing that argument, with potential emphases on sovereignty (American and Texan), federalism (the federal government’s stepping on state prerogatives), and separation of powers (the president’s encroaching on Congress, the federal judiciary, and state courts). While each of these issues would be aired in the briefs and at oral argument, it is no coincidence that Texas focused on the last, presenting this complex matter as essentially a grade-school civics lesson on checks and balances. That is, Texas’s main arguments were that President Bush, through his memorandum: 1) purported to create law and thus intruded on congressional authority;³⁷ 2) usurped the courts’ (federal and state) role in saying what the law is, particularly in light of *Sanchez-Llamas*;³⁸ and 3) interfered with state control over criminal law while conscripting states to implement federal obligations.³⁹ Texas raised five other points that underscore its theme that President Bush vastly exceeded his powers, including that the federal government’s position admits

³³ Petitioner’s Brief, 2007 WL 1886212, at *19–26.

³⁴ *Id.* at *26–33.

³⁵ *Id.* at *34–42.

³⁶ *Id.* at *43–44.

³⁷ Respondent’s Brief, 2007 WL 2428387, at *13–34.

³⁸ *Id.* at *34–38.

³⁹ *Id.* at *38–42.

of no limiting principles to presidential authority; the executive branch can comply with *Avena* in other ways;⁴⁰ *Avena*, even if binding, is not enforceable by a private party in a domestic court; and Medellín already received the judicial review the ICJ ordered.⁴¹

Had the state defended the case otherwise, the narrative on the other side would have been about “those cowboys,” defying the world and even its own former governor—not to mention how “crazy” Texans are about the death penalty. That is how the case still appears to many in the foreign media.⁴² It would have been much more difficult to win. Instead, Texas’s lawyers articulated Congress’s authority to ratify treaties and make them have domestic effect, and the power of the Supreme Court to make decisions about the Constitution. To paraphrase what Ted Cruz says when he discusses the case in public: How many times in your legal career do you get to cite *Marbury v. Madison* as a principal authority?

The argument before the Court proceeded along expected lines. Justice Antonin Scalia and Chief Justice Roberts questioned Medellín’s counsel about the enforceability of the treaties at issue. “The thing that concerns me . . . is that it seems to leave no role for this Court in interpreting treaties as a matter of federal law,” the Chief explained, posing a hypothetical where the ICJ ordered a five-year prison term for the officers who violated Medellín’s consular right.⁴³ Justice Anthony Kennedy expressed “interest[.]” in the answer to this hypothetical but inferred that, in any event, the president’s determination “is not conclusive.”⁴⁴ Moreover, Kennedy expressed his belief that “Medellín did receive all the hearing he’s entitled to under [*Avena*] anyway.”⁴⁵

On the other hand, Justice Breyer offered that the Court could decline to enforce an ICJ ruling that “violate[d] something basic in

⁴⁰ See Part IV.B, *infra*.

⁴¹ *Id.* at *43–50.

⁴² See Part III, *infra*.

⁴³ Argument Transcript, 2007 WL 2945736, at *4.

⁴⁴ *Id.* at *6, *10.

⁴⁵ *Id.* at *20.

our Constitution” but otherwise appeared willing to enforce the World Court’s ruling.⁴⁶ And Justice Ruth Bader Ginsburg suggested that the agreement to submit the *Avena* dispute to the ICJ’s exclusive jurisdiction required state courts to give the ruling the equivalent of “full faith and credit.”⁴⁷

Justice Stevens agreed with Justice Breyer’s answer to Chief Justice Roberts’s hypothetical but then posited a situation whereby the ICJ ordered that Medellín’s sentence be commuted and reduced.⁴⁸ Medellín’s counsel seemed flustered by that change-up and the ensuing pile-on by Justices Samuel Alito and Scalia and the Chief Justice. Justice David Souter clarified that, in any event, Medellín’s position was not that federal law (or the ICJ ruling) trumped state jurisdiction, but that it preempted it.⁴⁹

The questioning of Solicitor General Paul Clement focused on presidential authority, because the government’s position was that the Court would have no obligation to enforce *Avena* but for President Bush’s memorandum.⁵⁰ Justice Scalia pointed out the seeming weakness in the government’s split-the-baby position: The ICJ judgment was not self-enforcing, but the president, acting without Congress (which typically passes the legislation enforcing such non-self-enforcing treaties), can enforce it himself.⁵¹ Chief Justice Roberts and Justice Alito then questioned the solicitor general on the limits to the president’s power to enforce treaties that didn’t enforce themselves. Clement explained that here the president was enforcing the Optional Protocol and not the Vienna Convention itself, which he conceded the Court had already determined in *Sanchez-Llamas* not to mean what the ICJ said it did.⁵²

Roberts and Scalia then raised the issue of how Medellín gained any personal rights from *Avena* when he was not a party to a case, but only named in the suit.⁵³ Before Clement could respond, Justice

⁴⁶ *Id.* at *9.

⁴⁷ *Id.* at *12.

⁴⁸ *Id.* at *13.

⁴⁹ *Id.* at *17.

⁵⁰ U.S. Brief at 27–29; Argument Tr., 2007 WL 2945736, at *23.

⁵¹ Argument Tr. at *25.

⁵² *Id.* at *26–29.

⁵³ *Id.* at *29–30.

Ginsburg interrupted with a long colloquy centering on the United States' having submitted to ICJ jurisdiction.⁵⁴ Justice Kennedy steered a middle ground, saying that "we should give [the president's] determination great weight, but that's something different from saying that he can displace the authority of this Court on that issue of law."⁵⁵ Clement concluded by first referring to a John Marshall speech on an extradition case that seemed to suggest that the president can act to enforce a treaty when Congress doesn't, then by invoking international comity.⁵⁶

Ted Cruz began with the uncomfortable truism that "the United States's argument is predicated on the idea that the President's two-paragraph memorandum is in and of itself binding federal law."⁵⁷ Justice Souter pointed out that if *Avena* is directly binding, then the executive power question is obviated—which Cruz readily conceded, but added that the United States explicitly disclaimed the treaties in question as the source of presidential authority and expressly agreed with the holding of *Sanchez-Llamas*.⁵⁸ Justice Breyer, later joined by Justice Ginsburg, led a long discussion challenging Cruz on why Texas was not bound by *Avena* by operation of the Supremacy Clause in light of the United States' having submitted itself to the ICJ's jurisdiction.⁵⁹ Cruz, supported by Justice Scalia, explained that this was "jurisdiction" for political (or international obligation) purposes, not for enforcement of a judgment in domestic court.⁶⁰

Justice Stevens jumped in to ask Cruz why *Avena* is not an ordinary enforceable judgment, and Cruz—in his longest uninterrupted period at the podium—listed six reasons, concluding again with the idea that "the entire purpose of this [ICJ] adjudication is not to resolve something finally in a court of law, but it is rather a diplomatic measure."⁶¹ Justice Kennedy suggested that the heart of the

⁵⁴ *Id.* at *30–32.

⁵⁵ *Id.* at *33.

⁵⁶ *Id.* at *38 (referring to 10 Annals of Cong. at 611, reprinted in 18 U.S. (5 Wheat.) 1 App. at 24 (1800) (statement of Rep. John Marshall on the extradition of Thomas Nash)).

⁵⁷ *Id.* at *39.

⁵⁸ *Id.* at *40.

⁵⁹ *Id.* at *40–44.

⁶⁰ *Id.* at *44–45.

⁶¹ *Id.* at *49–50.

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case is that “for 200 years we have had some treaties that are very important, but they’re not self-executing . . . there is no obligation on the part of the State to comply with” a law that is “not self-executing.”⁶² Cruz agreed with that characterization and went on to clarify that “the Vienna Convention was self-executing in the sense that it didn’t require legislation to go into effect, but it was not self-executing in the sense that it provided judicially cognizable rights.”⁶³

The remainder of the argument reinforced the back-and-forth between the Breyer/Ginsburg/Souter line regarding submission to binding ICJ jurisdiction and the Scalia/Kennedy line regarding non-self-execution. At one point, Justice Kennedy asked whether Texas would have to lose if the Court determined—as it had assumed, without deciding, in *Breard* and *Sanchez-Llamas*—that the Vienna Convention created individually enforceable rights. Cruz replied in the negative because Medellín had defaulted his claim to those rights, which result *Sanchez-Llamas* held was fully constitutional.⁶⁴ And when Justice Ginsburg prodded Cruz to explain what the president could have done to enforce the Vienna Convention, Cruz suggested a new statute providing for a federal right of review in consular rights cases; even Texas’s procedural bar allows an exception for a new law.⁶⁵ This would get Congress involved and avoid problems like those raised by unilateral executive authority in *Hamdan* (which the Court struck down even though there the president was “at the height of his war powers authority”).⁶⁶

It appeared by the end of the argument that the decision in the case would be exceedingly close, but Justice Kennedy’s skepticism toward the position that the ICJ ruling was directly binding suggested that Medellín had lost on that point. And if Texas won there, it was hard to conceive of a scenario whereby five justices (or even one) would be willing to establish the precedent that a two-paragraph presidential memorandum could overrule state criminal court decisions that had already found both that the claim was procedurally defaulted and that any error was harmless.

⁶² *Id.* at *50.

⁶³ *Id.* at *51.

⁶⁴ *Id.* at *58–59.

⁶⁵ *Id.* at *63–65.

⁶⁶ *Id.* at *65–66 (referring to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

II. The *Medellín* Decision

Remarkably, it was a 6–3 decision. The Court, in a magisterial opinion by Chief Justice Roberts, made two main points: 1) The so-called World Court has no authority to bind the United States’ (let alone an individual state’s) justice system, and 2) the president does not have the power to tell state courts what to do. In short, it is the Constitution and the Supreme Court that define American law, not international tribunals or chief executives. Chief Justice Roberts’s majority opinion is a tour de force of separation of powers, federalism, and international law. Justice Stevens’s concurrence—preventing this from being another highly charged 5–4 split—agreed with the majority’s judgment but recommended that Texas nevertheless comply with the (otherwise non-binding) ICJ decision. Justice Breyer’s dissent, meanwhile, found both the Vienna Convention’s consular rights and the ICJ ruling judicially enforceable without further legislative (or other) action but, interestingly, declined to speak definitively on the executive power issue.

The Chief Justice’s legal analysis begins with the question of whether *Avena* is directly binding on U.S. courts.⁶⁷ The ICJ ruling would have to be binding on both federal and state courts for this to be the end of the habeas inquiry because: a) It would be bizarre for an international treaty to bind national courts but not those of a sub-national jurisdiction such as a state, and, conversely; b) under the U.S. Constitution, federal courts cannot simply order state courts to do something without some preempting force of law. Here such a preemptory authority would be the Supremacy Clause, which in relevant part says that “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby” notwithstanding any state law or constitution.⁶⁸ That is, if the duly authorized treaties require that an ICJ ruling be treated as co-equal with the Constitution and federal law—setting aside for now the question of what would happen if the ICJ ordered an unconstitutional action—there is nothing the Supreme Court (let alone a state court) could do but honor *Avena*.

⁶⁷ *Medellín*, 128 S. Ct. at 1356.

⁶⁸ U.S. Const. art. VI.

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Clearly the Supreme Court was not going to stand for such a limitation on its powers. (Recall that, whether led by “liberals”—as in, say, *Boumediene v. Bush* or *Kennedy v. Louisiana*—or “conservatives”—here—the Court this term, and indeed throughout modern history, rarely acts to constrain its own jurisdiction when given the opportunity to do so.)⁶⁹ And so Roberts explains that even as *Avena* indisputably creates an *international* law obligation on the United States, that obligation does not automatically become binding and privately enforceable *domestic* law. From its earliest days, the Court has recognized “the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.”⁷⁰ In other words, some treaties bind the U.S. government generally—the nation violates the commitments it has made to its treaty partners if it does not fulfill the treaty terms—but do not have any legal effect in the courts, let alone creating a right of action for an individual litigant.

Chief Justice Marshall himself found a treaty to be directly binding only when it “operates of itself without the aid of any legislative provision.”⁷¹ Half a century later, the Court explained the converse, that when treaties “can only be enforced pursuant to legislation to carry them into effect” they are not “self-executing”—applying that term for the first time in the context of treaty interpretation.⁷² *Medellín* synthesizes this line of precedent by adopting the First Circuit’s formulation that treaties do not constitute domestic law “unless Congress has either enacted implementing legislation or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on those terms.”⁷³ In what will likely stand as the most consequential

⁶⁹ For a discussion of judicial supremacy in criminal law, see Edward J. Loya Jr., *Judicial Supremacy and Federalism: A Closer Look at Danforth and Moore*, 2007–2008 *Cato Sup. Ct. Rev.* 161 (2008).

⁷⁰ *Medellín*, 128 S. Ct. at 1356.

⁷¹ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (title dispute hanging on whether Spain ceded titles to land upon signing a certain treaty), overruled on other grounds, *United States v. Percheman*, 7 Pet. 51 (1833).

⁷² *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (import duty applications and obligations of a treaty between the United States and the Dominican Republic).

⁷³ *Medellín*, 128 S. Ct. at 1356 (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

footnote in treaty interpretation—as with *Carolene Products* footnote 4, some of the most revealing Supreme Court nuggets are dropped in footnotes—Chief Justice Roberts makes it clear that the term “self-executing” refers to a treaty provision that has “automatic domestic effect as federal law upon ratification,” without regard to implementing legislation.⁷⁴

Roberts next cites the *Head Money Cases*, a set of 19th-century cases argued together that established the principle that a treaty, while the “law of the land,” is “primarily a compact between independent nations”; it does not hold a privileged position over—and indeed is “subject to”—other acts of Congress that may affect its “enforcement, modification, or repeal.”⁷⁵ He observes that only “[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.”⁷⁶ And even when treaties are self-executing, “the background presumption is that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”⁷⁷ Finding that neither the Optional Protocol nor the UN Charter (or any other ICJ-relevant treaty) “creates binding federal law in the absence of implementing legislation,” the Court concludes that *Avena* was not “automatically binding domestic law.”⁷⁸ In another passing footnote, the Court notes that the ICJ itself

⁷⁴ *Id.*, 128 S. Ct. at 1356 n.2. Roberts goes on to say that “[a] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.” *Id.* at 1369.

⁷⁵ 112 U.S. 580, 598–99 (1884). See also *The Federalist* No. 33, p. 207 (J. Cooke ed. 1961) (A. Hamilton) (comparing laws that individuals are “bound to observe” as “the supreme law of the land” with “a mere treaty, dependent on the good faith of the parties”) (as quoted in *Medellín*, 128 S. Ct. at 1357).

⁷⁶ *Medellín*, 128 S. Ct. at 1357 (quoting *Whitney*, 124 U.S. at 194).

⁷⁷ *Id.* at 1357 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment a, p. 395 (1986)) (going on to cite opinions from six Courts of Appeals holding that “treaties do not create privately enforceable rights in the absence of express language to the contrary”). That the Court was able to cite the Restatement for this proposition is telling, because the Restatement is generally favorable to the application of international law in U.S. courts.

⁷⁸ *Id.* at 1357. Interestingly, because the issue presented was whether *Avena* has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and UN Charter, the Court declined to decide whether the Vienna Convention itself is self-executing, simply assuming as it did in *Breard* and *Sanchez-Llamas* that for purposes

does not seem to see *Avena* as directly enforceable because it ordered the United States to review and reconsider the convictions and sentences “by means of its own choosing”—a strange formulation for a binding legal instrument.⁷⁹

Chief Justice Roberts then turns to the executive power issue. Recall that while the U.S. position to this point accords with the Court, here the government joined Medellín’s argument that, regardless of the *Avena* decision’s direct applicability, the presidential memorandum made it binding domestic law. The majority opinion initially sets out as a first principle that presidential authority “as with the exercise of any governmental power ‘must stem either from an act of Congress or from the Constitution itself.’”⁸⁰ It invokes Justice Robert Jackson’s classic formulation that: 1) presidential authority reaches its zenith when Congress authorizes the particular action (because it includes his own vested powers “plus all that Congress can delegate”); 2) when Congress has not spoken on a given matter, the president must rely on his own independent powers (some of which may overlap with Congress’s in a “zone of twilight”); and 3) the president’s power is “at its lowest ebb” when he acts in contravention to the “expressed or implied will of Congress.”⁸¹

Next, the Court dispatches the multifarious arguments about presidential authority with the stark statement that while the president “has an array of political and diplomatic means available to enforce international obligations[,] unilaterally converting a non-self-executing treaty into a self-executing one is not among them.”⁸² Instead, that responsibility is reserved to Congress.⁸³ The president “makes” treaties and the Senate ratifies them; if a treaty is not self-executing—lacks domestic legal effect without further domestic lawmaking—its ratification signals that Congress has reserved the decision to craft enabling legislation (rather than somehow granting the president the

of the instant litigation the Convention grants an individually enforceable right to consular notification.

⁷⁹ *Id.* at 1361 n.9 (citing *Avena*, 2004 I.C.J. at 72).

⁸⁰ *Id.* at 1368 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) and citing *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)).

⁸¹ *Id.* (quoting and citing *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring)).

⁸² *Id.*

⁸³ *Id.* (citing *Foster*, 27 U.S. at 315; *Whitney*, 124 U.S. at 194; *Igartúa-De La Rosa*, 417 F.3d at 150).

unilateral power to do so independently). That is, “the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations, but also implicitly prohibits him from doing so.”⁸⁴ Here President Bush was in Justice Jackson’s third category, the Chief Justice concludes, and could not execute *Avena* without involving Congress.⁸⁵

All the above does not mean that the Court has precluded the president, in the absence of implementing legislation, from acting to comply with international legal obligations arising from non-self-executing treaties. It simply means that “the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect,” because a treaty’s “non-self-executing character” is a check on presidential power.⁸⁶ And the president has other means at his disposal to ensure U.S. compliance with its international obligations.⁸⁷

Finally, the Court quickly disposes of the claim that the memorandum was a valid exercise of the president’s authority to resolve disputes with foreign countries. In making this argument, the United States relied on a line of precedent whereby the Court had upheld the exercise of the president’s foreign affairs power “to settle foreign claims pursuant to an executive agreement.”⁸⁸ The Court distinguishes this power as involving instances of making “executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.”⁸⁹ Unlike such actions, there is no precedent for a president’s issuing a directive to state courts that purports to “reopen final criminal judgments and set

⁸⁴ *Id.* at 1369.

⁸⁵ *Id.* at 1368, 1370 n.14 (referencing the president’s previous resolution of numerous ICJ controversies, including two Vienna Convention cases, that did not involve “transforming an international obligation into domestic law and thereby displacing state law”).

⁸⁶ *Id.* at 1371.

⁸⁷ *Id.* For some suggestions on what the president could have done in this case—and options available for similar situations in future—see Part IV.B, *infra*.

⁸⁸ *Id.* at 1372 (citing *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 679–80 (1981); *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

⁸⁹ *Id.* at 1371 (citations omitted).

aside neutrally applicable state laws.”⁹⁰ Nor is the memorandum somehow empowered by the “Take Care” clause, which “allows the President to execute the laws, not make them.”⁹¹

Justice Stevens concurs in the judgment but does not join the majority opinion, saying that “[t]here is a great deal of wisdom in Justice Breyer’s dissent” and that “this case presents a closer question than the Court’s opinion allows.”⁹² He agrees with Breyer that the Supremacy Clause and the Court’s treaty interpretation precedent “do not support a presumption against self-execution” and that the Vienna Convention is self-executing and judicially enforceable.⁹³ In the end, however, he determines that “the relevant treaties do not authorize this Court to enforce [*Avena*]” because the operative phrase “undertakes to comply” is “a promise to take additional steps to enforce ICJ judgments” rather than the automatically binding language of a self-executing treaty.⁹⁴

Importantly, Justice Stevens notes that under the governing treaties, an ICJ decision “has no binding force except between the parties and in respect of that particular case.”⁹⁵ By the terms of the Optional Protocol (and the ICJ Statute generally), only countries can be party to ICJ cases, whose judgments are only binding on those country-parties and cannot be used by individuals to sue in domestic courts. That amounts, ultimately, to saying the same thing the majority did: An ICJ judgment is binding as a matter of international law, but has no domestic legal effect. Still, Stevens adds that even though the presidential memorandum is not binding law for the reasons the majority cites, the United States is not released from “its promise to take action necessary to comply with [*Avena*].”⁹⁶ Thus, while the Court has no legal basis for ordering Texas courts to enforce the ICJ judgment, Stevens strongly urges Texas to save the United States from (further) treaty violations: “Texas would do well to recognize

⁹⁰ *Id.* at 1372.

⁹¹ *Id.* (referencing U.S. Const. art. II, § 3). The Court uses but one paragraph—four sentences—to dispose of this last argument, lauding the United States for not joining Medellín in making it.

⁹² *Id.* (Stevens, J. concurring).

⁹³ *Id.*

⁹⁴ *Id.* at 1372–73.

⁹⁵ *Id.* at 1374 (citing the ICJ Statute, *supra* at note 10).

⁹⁶ *Id.*

that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.⁹⁷

Justice Breyer dissents (joined by Justices Souter and Ginsburg⁹⁸), applying the simple logic that the judgment of a court whose jurisdiction the United States has accepted via duly ratified treaty necessarily binds U.S. courts “no less than ‘an act of the [federal] legislature.’”⁹⁹ Looking at the Court’s history of treaty-related cases’ interpreting the Supremacy Clause, Breyer concludes that no implementing legislation is required. Breyer uses a 1796 case as a vehicle for illustrating the point that the Founders intended the Supremacy Clause to mean that ratified treaties were self-executing.¹⁰⁰ He traces the development of the law from Chief Justice Marshall’s opinion in *Foster v. Neilson* through at least some recognition by 1840 that “it would be a bold proposition” to assert “that an act of Congress must be first passed” to make a treaty the supreme law of the land.¹⁰¹ Breyer then refers to an appendix listing, as examples, 29 cases where the Court held or assumed that particular treaty provisions were self-executing. Of course, this whole discussion shows only that it is not unusual for treaties to be self-executing and that the Supremacy Clause ensures that treaties sometimes have different domestic legal effect

⁹⁷ *Id.* at 1375.

⁹⁸ It was not a shock that Justice Ginsburg dissented here, but it would also not have been too surprising to see her come out the other way in light of her concurrence in *Sanchez-Llamas*. While agreeing with Justice Breyer’s dissenting opinion that the Vienna Convention grants privately enforceable rights, Justice Ginsburg found that the exclusionary rule was not appropriate on the facts of that case because the defendant, “who indicated that he understood” the *Miranda* warnings he was given in both English and Spanish, and “with his life experience in the United States,” “would have little need to invoke the Vienna Convention.” *Sanchez-Llamas*, 548 U.S. at 361 (Ginsburg, J., concurring in the judgment). Apparently this reasoning does not apply to death penalty cases.

⁹⁹ *Medellín*, 128 S. Ct. at 1376 (Breyer, J., dissenting) (quoting *Foster*, 27 U.S. at 314) (edited text in original).

¹⁰⁰ *Id.* at 1377–78 (discussing *Ware v. Hylton*, 3 Dall. 199, 272–77 (1796), with a focus on Justice Iredell’s opinion that, unlike in the pre-Constitutional era—or the state of the law in Britain—the Supremacy Clause obviated the need for legislative action on ratified treaties).

¹⁰¹ *Id.* at 1379 (citing *Foster*, 27 U.S. at 310 and quoting *Lessee of Pollard’s Heirs v. Kibbe*, 14 Pet. 353, 388 (1840) (Baldwin, J., concurring)).

in the United States than in other countries—which Breyer admits as he turns to the interpretive tools available to the Court.¹⁰²

Justice Breyer argues that the determination of whether a particular treaty provision is self-executing should go beyond the typical “clear statement” presumptions undergirding textual analysis. Referring to cases where the Court found implicit self-execution, Breyer states that “the absence or presence of language in a treaty about a provision’s self-execution proves nothing at all.”¹⁰³ “At worst it erects legalistic hurdles that can threaten the application of provisions in many existing [treaties] and make it more difficult to negotiate new ones.”¹⁰⁴

Next, Justice Breyer suggests certain context-specific criteria for the Court to use, such as the treaty’s subject matter. If the treaty declares peace or promises not to engage in war, then clearly it is addressed to the political branches (and is not justiciable).¹⁰⁵ If, on the other hand, it “concern[s] the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery,” it is more likely to have direct legal effect in U.S. courts.¹⁰⁶ Similarly, if a treaty confers “specific, detailed individual legal rights” or presents “definite standards that judges can readily enforce,” its provisions are more likely to be available for private domestic litigation.¹⁰⁷ Glossing over other potential factors, Breyer clearly favors a balancing test here rather than a bright line rule (or “magic formula,” as he calls it).

Applying the above principles to the instant case, Justice Breyer concludes his analysis of the international law issue with seven reasons that militate for holding *Avena* to be a self-executing judgment: 1) The language of the relevant treaties supports direct enforceability because they contemplate mandatory ICJ adjudication;¹⁰⁸ 2) the Vienna Convention itself, without the Optional Protocol, is self-executing;¹⁰⁹ 3) “logic suggests that a treaty provision

¹⁰² *Id.* at 1381.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1381–82.

¹⁰⁵ *Id.* at 1382 (citing *Ware*, 3 Dall. At 259–62 (opinion of Iredell, J.)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citations omitted).

¹⁰⁸ *Id.* at 1383.

¹⁰⁹ *Id.* at 1385–86 (referencing, inter alia, the State Department’s report after ratification that the Convention is “considered entirely self-executive and does not require any implementing or complementing legislation” S. Exec. Rep. No. 91-9, p. 5 (1969)).

providing for ‘final’ and ‘binding’ judgments that ‘sett[le]’ treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing’;¹¹⁰ 4) the majority’s approach has “seriously negative practical difficulties” in terms of the (at least 70) treaties providing for ICJ dispute resolution;¹¹¹ 5) the particular requirements of the judgment at issue here—evaluation of the prejudice Medellín faced from a violation of his rights—is particularly suited to judicial (rather than legislative) action;¹¹² 6) finding U.S. treaty obligations self-executing neither upsets constitutional structures nor creates a new private right of action;¹¹³ and 7) neither the executive nor legislative branch has “expressed concern about direct judicial enforcement of the ICJ decision.”¹¹⁴ Having thus decided that *Avena* is self-executing and judicially enforceable, Breyer briefly explains that the proper means of enforcing it is to remand the case back to the Texas courts to provide further hearings on whether Medellín was prejudiced by having been denied his consular rights.¹¹⁵

Justice Breyer curiously avoids taking a position on the presidential authority question, instead engaging in some brief ruminations on the foreign affairs power. He mentions in passing that President Bush’s authority here lies in Justice Jackson’s “middle range” because Congress has “neither specifically authorized nor specifically forbidden” the action at issue.¹¹⁶ Then he raises various hypothetical situations whereby, potentially, the president could legitimately set aside state law. “On the other hand, the Constitution must impose significant restrictions upon the President’s ability, by invoking Article II treaty-implementation authority, to circumvent ordinary legislative processes and to pre-empt state law.”¹¹⁷ Ultimately, because the Court has “reserved judgment” as to “the ‘scope

¹¹⁰ *Id.* at 1386. That is, because *Avena* interpreted the self-executing Vienna Convention, and the United States agreed that ICJ adjudication of the Convention would be binding, the judgment is itself self-executing.

¹¹¹ *Id.* at 1387.

¹¹² *Id.* at 1388.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1389.

¹¹⁵ *Id.* at 1390.

¹¹⁶ *Id.* (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

¹¹⁷ *Id.*

of the President's power to preempt state law pursuant to authority delegated by . . . a ratified treaty," Breyer would "leave the matter in the constitutional shade from which it has emerged."¹¹⁸

Justice Breyer concludes that the Court unnecessarily complicates both the president's foreign affairs power and U.S. foreign relations generally, as well as putting American citizens at risk abroad and upsetting constitutional structures.¹¹⁹ Citing among other things "the views of the Founders," he laments that the Court is now complicit in breaking U.S. treaty obligations that the president tried to enforce and in regards to which Congress has been silent.¹²⁰

III. Aftermath and Execution

While *Medellín v. Texas* provided rich material for debating legal theory and speculating about the course of future litigation involving international treaties, this case did not end when Chief Justice Roberts read the Court's opinion in open court. Instead, the fate of José Medellín, and of the issues he raised, took one more journey through the Texas, World, and Supreme courts. These developments showcased the interaction between abstruse jurisprudence and contemporary political debates. In particular, and unfortunately for the rule of law, they revealed that much of the support for Medellín—who never retracted his confession, and whom nobody believes to be innocent—was a) support for "global governance" by unelected and unaccountable international institutions, and b) back-door death penalty abolitionism.

Medellín was ultimately executed, as would have happened had nothing more been filed after the opinion came down. But to say that nothing happened in the interim would be to leave this ultimate law school exam fact pattern unfinished. Here is a brief summary of events from March 25, 2008, the date of the opinion's release, to Medellín's execution in early August.

On May 5, soon after the Supreme Court lifted its *de facto* death penalty moratorium by deciding that the most common method of

¹¹⁸ *Id.* at 1391 (quoting *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 329 (1994)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1392.

lethal injection was not unconstitutional,¹²¹ a Texas state judge ordered a new execution date set for Medellín: August 5. A month later, on June 5, Mexico returned to the ICJ, claiming that all parts of U.S. government—national and state—had been involved in violating the Vienna Convention, so all must take steps to prevent the imminent executions of Medellín and four others (the only five on Texas’s death row whose appeals had concluded). Mexico relied on a provision in the ICJ Statute that allows the court to elaborate on a ruling if any part of the ruling is in dispute. The United States responded that there is no dispute—that Texas had indeed violated the Mexicans’ consular rights—so the World Court had no authority to issue new orders. Mexico contended that there was a continuing dispute because not all governmental actors (such as Congress and the states) had implemented *Avena*.

On June 17, before the World Court could rule, Attorney General Michael Mukasey and Secretary of State Condoleezza Rice wrote to the governor of Texas, Rick Perry, to ask for help in carrying out the World Court’s previous ruling (*Avena*). Governor Perry, echoing the Supreme Court, replied that Texas was not bound by *Avena* and it was up to the federal government to comply with international obligations. Other efforts by the administration had led other states with Mexicans on their death rows (such as Oklahoma) to newly review their cases.

On July 14, leading Democrats in the U.S. House of Representatives introduced a bill to create rights for Medellín and others covered by the World Court’s rulings, to wit “a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention [and Optional Protocol].”¹²² Later that week, the current and past presidents of the American Society of International Law wrote to Congress, urging action to “ensure that the United States lives up to its binding international legal obligations.”¹²³

On July 16, the ICJ voted 7–5 that the U.S. government had not done enough to ensure the consular rights of Mexican nationals

¹²¹ *Baze v. Rees*, 553 U.S. ____ , 128 S. Ct. 1520 (2008).

¹²² *Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong. (2d Sess. 2008).

¹²³ Letter from Lucy Reed, President, ASIL, et al., to Senator Harry Reid, et al. (July 17, 2008) (available at <http://www.asil.org/pdfs/presidentsletter.pdf>).

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convicted of capital murder, and ordered it to stop five imminent executions in Texas, including Medellín's.¹²⁴ The court agreed with Mexico that there remained a dispute over *Avena's* scope—and did so by relying on the French version of the ICJ Statute, rather than the English one.¹²⁵ Leaving it up to the United States to choose the way to carry out the order, the ICJ ordered the United States to “take all measures necessary” to ensure that Texas did not execute Medellín and four others.¹²⁶ This ruling was essentially a directive to keep the five individuals alive pending the full resolution of Mexico's arguments regarding the U.S. government's treaty obligations. The ICJ ruling also included 11–1 votes ordering the United States to inform the World Court of its complying measures and maintaining jurisdiction over the case. The American judge, Thomas Buergenthal, dissented on all points, but was joined by judges from Japan, New Zealand, Russia, and Slovakia on the issue of whether to stay the executions.

On July 22, a federal court rejected a new (second federal) habeas petition by Medellín because, under the relevant statute, he had no legal right to pursue that new claim without first getting permission from the Fifth Circuit. The Fifth Circuit would later deny Medellín's motion for leave to file a successive habeas petition because, contrary to Medellín's contention, the Supreme Court's March 25 decision did not create a “new rule of constitutional law” such that he could make out a previously unavailable claim.¹²⁷ On July 24, the Inter-American Commission on Human Rights, a part of the Organization of American States, issued a preliminary report finding that Medellín's rights were violated by denial of access to Mexican diplomats while his case went forward to Texas courts.

¹²⁴ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2008 I.C.J. 3, Request for Interpretation of the Judgment of 31 March 2004 (Order of July 16, 2008).

¹²⁵ *Id.* at 3. The French version gives the ICJ the power to issue interpretations where there is a “contestation,” while the English version does so when there is a “dispute.” The court concluded that a “contestation”—which it found currently exists—is broader than a “dispute.” Whether an international (or any) court can arbitrarily decide that different translations of what is obviously meant to be the same text can have different legal weights is a topic beyond the scope of even this polymathic article.

¹²⁶ *Id.* at 6.

¹²⁷ *Medellín v. Quarterman*, No. 08-20495, slip op. at 4 (5th Cir. Aug. 4, 2008) (unpublished) (citing 28 U.S.C. § 2244(b)(2)(A)).

On July 28, after the federal habeas plea was dismissed, Medellín's lawyers filed another (third state) habeas petition in the Texas Court of Criminal Appeals. Not having gotten a response by (Friday) August 1, the same lawyers lodged a mass of filings with the U.S. Supreme Court. The papers included: a motion to recall and stay the mandate in *Medellín v. Texas* (to give the political branches time to afford *Avena* domestic legal effect); a new petition for habeas; and a new cert petition (in the event the Texas court denies relief); along with an application to stay Medellín's execution pending the resolution of these other claims. As is appropriate with this type of filing, the stay request was addressed to Justice Scalia as circuit justice for the Fifth Circuit. Scalia had authority to act alone but, not surprisingly, referred it to the whole Court.

In asking the Court to pull back its March decision, Medellín's counsel said they were not seeking to reopen previously resolved issues, but merely wanted the mandate held "until Congress has had a reasonable opportunity to enact legislation consistent with this Court's decision."¹²⁸ "Federal and state actors at the highest levels of government have been engaging in unprecedented efforts to bring the Nation into compliance by providing a judicial forum to grant [Medellín] the review and reconsideration to which he is entitled," they noted.¹²⁹ Medellín's attorneys also alerted the Court to the pending House bill and that Secretary Rice and Attorney General Mukasey requested Texas to "assist the United States in carrying out its international obligations"; that a Texas state senator has "committed to introducing legislation at the earliest opportunity when the Texas Legislature reconvenes," and that "leaders of the diplomatic and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad."¹³⁰ If the execution goes forward, "Texas effectively will usurp the institutional prerogative of the federal political branches—advocated by Texas in *Medellín v. Texas* and confirmed by this

¹²⁸ Motion to Recall and Stay the Court's Mandate in *Medellín v. Texas* at 5 (No. 08A98) (dated July 31, 2008, filed August 1, 2008).

¹²⁹ Application for Stay of Execution Pending Disposition of Motion to Recall and Stay the Mandate and Petition for Writ of Certiorari or Writ of Habeas Corpus at 1 (No. 08A99) (signed July 31, 2008, filed August 1, 2008).

¹³⁰ *Id.* at 1–2.

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Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation.”¹³¹

George Washington University law professor Ed Swaine was quoted as saying that an execution now would “diminish the ICJ’s credibility and lessen the incentive for countries to bring cases to the ICJ in the first place.”¹³²

In the meantime, the Texas Court of Criminal Appeals had refused to issue a stay of the execution and dismissed Medellín’s latest habeas filing.¹³³ One judge dissented,¹³⁴ while another concurred but urged the governor to grant a reprieve so Congress could act.¹³⁵ Judge Cathy Cochran, concurring with the majority and filing the most detailed opinion, noted that while Texas authorities “clearly failed in their duty to inform this foreign national of his rights under the Vienna Convention, this foreign national equally failed in his duty to inform those authorities that he was a Mexican citizen.”¹³⁶ Moreover, “there is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellín.”¹³⁷ Perhaps most interesting, and cutting to the heart of what was really going on in this final week, Cochran concluded her opinion with this:

Some societies may judge our death penalty barbaric. Most Texans, however, consider death a just penalty in certain rare circumstances. Many Europeans may disagree. So be it. But until and unless the citizens of this state or the courts of this nation decide that capital punishment should no longer be allowed under any circumstances at all, the jury’s

¹³¹ Mot. to Recall, *supra* note 128, at 4.

¹³² Quoted in Dan Slater, “Texas Defies Bush, International Law; ICJ’s Credibility in Jeopardy,” Wall Street Journal Law Blog, August 1, 2008 (available at <http://blogs.wsj.com/law/2008/08/01/texas-defies-bush-international-law-icjs-credibility-in-jeopardy/>). Swaine’s statement is true, but anything that reminds people that public international law is, at base, nothing more or less than political agreements written by lawyers is probably a good thing. See generally Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005).

¹³³ Ex Parte Medellín, Tex. Crim. App. No. WR-50191-03, 2008 WL 2952485 (July 31, 2008).

¹³⁴ *Id.* at *9 (Meyers, J., dissenting).

¹³⁵ *Id.* at *4 (Price, J., concurring).

¹³⁶ *Id.* at *4 (Cochran, J., concurring).

¹³⁷ *Id.* at *8.

verdict in this particular case should be honored and upheld because applicant received a fundamentally fair trial under American law.¹³⁸

This was a plainly written differentiation of law and politics. This court could no more stop the execution in consideration of a policy debate about capital punishment than could the ICJ bind the Texas court.

After what was no doubt a sleepless weekend, on Monday morning, August 4, lawyers for the state of Texas urged the U.S. Supreme Court to allow the execution to proceed, arguing that Medellín has several times received all the review of his case that American or international law requires. In both of the state's filings, Texas said that it "acknowledges the international sensitivities" presented by *Avena*.¹³⁹ Texas also noted that Justice Stevens had commented in his concurrence to *Medellín* that it would be only a "minimal" cost to Texas to obey the ICJ.¹⁴⁰ Because of these considerations, the state said, "in future proceedings" involving Mexican nationals covered by *Avena* who have not had review of their cases as required by that decision, the state would not only "refrain from objecting" but "will join the defense in asking the reviewing court to address" such an inmate's claim of legal prejudice caused by a Vienna Convention violation.¹⁴¹ It remains to be seen how this policy pronouncement will apply to the four other individuals named in the July 16 ICJ decision (one of whom may have an execution date set on 30 days' notice), let alone others on death row or awaiting sentencing.

The state's top legal officers contended that the Court should not postpone the execution merely because one member of Congress had introduced proposed legislation:

Nothing in the Constitution, statute, or case law," the officials argued, "authorizes relief based on legislation that has been introduced but not enacted—especially not where Congress has taken no action in the over four years since *Avena*, and

¹³⁸ *Id.* at 8.

¹³⁹ *Medellín v. Texas*, 08-5573 (08A99), Brief in Opposition at 17 (August 4, 2008); 08-5574, Reply to Petition for Original Writ of Habeas Corpus at 17 (August 4, 2008).

¹⁴⁰ *Medellín*, 128 S. Ct. at 1374–75 (Stevens, J., concurring).

¹⁴¹ *Medellín v. Texas*, 08-5573 (08A99), Brief in Opposition at 17 (August 4, 2008); 08-5574, Reply to Petition for Original Writ of Habeas Corpus at 17 (August 4, 2008).

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where there is no remote, let alone reasonable, expectation that both Houses of Congress will approve the legislation. Nor does any rule of law exist to determine how much more delay is needed to further confirm that no action is indeed forthcoming.¹⁴²

To hold otherwise, they argued,

would be to license a single member of the House of Representatives to enjoin the administration of criminal justice by a sovereign State. The Court has already held that the President of the United States, alone, cannot give domestic legal effect to *Avena* and override Texas law. A fortiori, one member of the House of Representatives cannot do so.¹⁴³

Later that day, the Texas Board of Pardons and Paroles voted 7–0 against a reprieve, a recommendation that went to Governor Perry for a final decision on Medellín’s fate. The board also rejected the lawyers’ request to commute Medellín’s punishment to a life sentence.

By this point, the narrative in the (non-Texas) media was overwhelmingly negative toward the way the legal endgame was playing out. “Texas Defies World Court, Bush on Execution” ran one Associated Press story that was picked up by the *Boston Globe*, ABC News, and other media.¹⁴⁴ Jeffrey Davidow, formerly America’s senior career diplomat and one of three people ever to hold the rank of Career Ambassador, penned an op-ed in the *L.A. Times* arguing that executing Medellín would make it more difficult to protect U.S. citizens abroad.¹⁴⁵ This is a far cry from the headlines greeting the Supreme Court’s decision in March, which were generally of the “Court to Bush: Don’t Mess With Texas” variety.¹⁴⁶ Yet the real story

¹⁴² *Id.* at 3.

¹⁴³ *Id.*

¹⁴⁴ Michael Graczyk, Texas Defies World Court, Bush on Execution, Associated Press, August 3, 2008 (available at various media sites, including <http://abcnews.go.com/TheLaw/wireStory?id=5506179>, http://www.boston.com/news/nation/articles/2008/08/03/texas_defies_world_court_bush_on_execution/, and http://ap.google.com/article/ALeqM5gpkdpV0pGSS_ozv30DC1F1QkVd5wD92B1T100).

¹⁴⁵ Jeffrey Davidow, Protecting Them Protects Us, *L.A. Times*, August 4, 2008 at 15.

¹⁴⁶ See, e.g., Tony Mauro, Supreme Court Rules: Don’t Mess With Texas, *The BLT: The Blog of the Legal Times*, March 25, 2008 1:36 p.m. (available at <http://legaltimes.typepad.com/blt/2008/03/supreme-court-r.html>).

had nothing to do with Texas (or the United States, for that matter) defying the World Court, international law, or even (elite) European opinion. Buried at the end of the AP article, a spokesman for the Texas attorney general had this to say: “The law is clear: Texas is bound not by the World Court, but by the U.S. Supreme Court, which reviewed this matter and determined that this convicted murderer’s execution shall proceed.”¹⁴⁷ Again, this is a basic legal issue; once the Supreme Court ruled, and in the absence of congressional action executing (as it were) the *Avena* decision, there is nothing for Texas to do but follow its own rules of criminal procedure.

In any event, Medellín’s counsel made their last arguments on his behalf late on August 4, the eve of the scheduled execution day, in a reply to the Texas filings from earlier that day. They argued that if their client is put to death, “the world will have every reason to question the value of . . . the United States’s treaty commitments.”¹⁴⁸ The brief focused on constitutional design, painting Texas as being opposed to all branches of the federal government and throwing a wrench into the works of the American system of government. Specifically: The Supreme Court agreed that the United States has an “international obligation” (though not domestically enforceable) to provide a review of Medellín’s consular rights; President Bush has attempted to comply; and Congress “has now begun to take steps to comply.”¹⁴⁹ Yet “Texas is about to execute Mr. Medellín anyway . . . placing the United States irrevocably in breach.”¹⁵⁰ Because Texas’s governor has authority to delay the execution only another 30 days (after the parole board denied relief) and Texas’s highest criminal court has decided not to block the execution, “the decision to breach the treaty has effectively been made by the District Attorney of Harris County, Texas, who, with the approval of a state trial-court judge [set the earliest execution date allowed by state law].”¹⁵¹ Thus Medellín requested that the Supreme Court stay the

¹⁴⁷ Jerry Strickland, as quoted in Graczyk, *supra* at note 144.

¹⁴⁸ Medellín v. Texas, 08-5573, 08-5574, 08A98, 08A99, Reply to Brief in Opposition to Petition for Certiorari and to Response to Petition for Habeas Corpus, Motion to Recall and Stay Mandate, and Application for Stay of Execution, at 13 (August 4, 2008).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 14.

execution “for a period of one year to allow Congress an opportunity to enact implementing legislation” to carry out U.S. obligations.¹⁵²

Just before 10:00 p.m. (EST), the Supreme Court, by a 5–4 vote, refused to delay the execution. Each of the four dissenting justices, Stevens, Souter, Ginsburg, and Breyer, filed separate written dissents.

The majority, in a per curiam opinion, said that the chance that Congress or the Texas legislature would remedy the treaty violation was “too remote” to justify delaying the execution.¹⁵³ The majority relied in part on the fact that the Justice Department opted not to take any part in this latest round of the *Medellín* case, even though it was actively involved when the Court last ruled on it on March 25. Its silence was “no surprise” because the United States “has not wavered in its position that [Medellín] was not prejudiced by his lack of consular access.”¹⁵⁴ Indeed, the United States had always maintained that the Texas courts were bound by the presidential memorandum, and not by ICJ decisions—and had withdrawn from the Optional Protocol.

While reaffirming that it was up to Congress to make the Vienna Convention binding domestic law, the Court noted that “Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling.”¹⁵⁵ The Court also found it “highly unlikely as a matter of domestic or international law” that Medellín’s confession was obtained illegally; and it found “insubstantial” the other arguments for why the consular rights violation invalidated the conviction and sentence.¹⁵⁶ Medellín’s *Miranda* warnings, the Court said, gave him far more

¹⁵² *Id.* Medellín’s counsel also attached a letter that the Democratic leaders of the House Judiciary Committee wrote to Governor Perry on August 1, urging a stay of execution to give Congress—which was out of session and would remain on its annual summer recess through the Labor Day weekend—“the time needed to consider this situation and make an appropriate judgment as to the important policy matter in question.” Letter from Reps. John Conyers, Jr., Jerrold Nadler, and Robert “Bobby” Scott to Gov. Rick Perry (August 1, 2008) (available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/medellin-supp-appdx.pdf>).

¹⁵³ *Medellín v. Texas*, 06-984 (08A98), 08-5573 (08A99), 08-5574 (08A99), 2008 WL 3821478, slip op. at 1 (U.S. August 5, 2008).

¹⁵⁴ *Id.*, slip op. at 2.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

protection than a Mexican consul could have—let alone what a similarly situated individual could expect in most if not all other countries—and we were beyond the point of re-litigating claims of, e.g., inadequacy of counsel.

Notably, Justice Stevens, who had provided that sixth vote supporting the Court’s March ruling, here wanted to delay execution so as to invite the solicitor general to submit the government’s views (in light of the looming violation of U.S. treaty obligations). “Balancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convinces me that the application for a stay should be granted.”¹⁵⁷

Justice Souter said he would postpone Medellín’s execution until the Court’s new term begins in October to solicit the government’s views and allow Congress to act—but also invoked the rule that “it is reasonable to adhere to a dissenting position [here his position in *Medellín*] throughout the Term of the Court in which it was announced.”¹⁵⁸ Justice Ginsburg agreed.

Justice Breyer, author of the March dissent, filed the longest August opinion—three and a half pages. He again cited a multitude of factors, this time militating in favor of a stay: 1) the ICJ again asked the United States to enforce Medellín’s treaty rights; 2) legislation has been introduced in Congress to provide a remedy; 3) Congress might not have understood the need to act before the Court’s earlier decision; 4) permitting the execution violates international law “and breaks our treaty promises”; 5) President Bush has stressed the importance of carrying out treaty obligations here, which, in light of the president’s “responsibility for foreign affairs,” makes his views pertinent; and 6) the diverging views on the Court itself.¹⁵⁹ Breyer said the majority was wrong to suggest that the key issue was the validity of Medellín’s confession. According to Breyer, the real issue is whether the United States “will carry out its international legal obligation.”¹⁶⁰ Breyer joined his dissenting colleagues in calling for the views of the solicitor general, and noted his disappointment that

¹⁵⁷ *Id.* slip op. dissent at 1 (Stevens, J., dissenting).

¹⁵⁸ *Id.* at 2 (Souter, J., dissenting) (citing *North Carolina v. Pearce*, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part)).

¹⁵⁹ *Id.* at 3–4 (Breyer, J., dissenting).

¹⁶⁰ *Id.* at 4.

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“no Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the solicitor general’s views once received.”¹⁶¹

Because the death warrant was to remain in effect until 1:00 a.m. (EST), Texas went ahead with the execution (which had originally been scheduled for 7:00 p.m. (EST) but was delayed at least three hours by the Court’s final review). Within an hour of the Court’s decision, Texas had completed its execution process. The *Houston Chronicle* reported: “Medellín was pronounced dead at [10:57 p.m. (EST)], nine minutes after receiving the fatal cocktail.”¹⁶²

Mexico’s Senate had urged President Felipe Calderón to press U.S. officials to delay execution. Calderón did not respond to the Senate request. After Medellín’s death, Mexico’s Foreign Relations Ministry sent a note of protest to the State Department, officials saying they “were concerned for the precedent that [the execution] may create for the rights of Mexican nationals who may be detained in [the United States].”¹⁶³ At least six other Mexican nationals have been executed in Texas since 1982, when the state resumed capital punishment. Based on Texas courts’ previous findings, however, it is very likely that even if *Medellín* had gone the other way, Medellín would still eventually have been executed—assuming the Supreme Court hadn’t somehow ruled the death penalty unconstitutional in the interim.

As for the other gang members involved in the crime, Derrick O’Brien was executed two years ago. Peter Cantu, described as the ringleader, is awaiting his execution date. Efrain Perez and Raul Villareal had their death sentences commuted to life in prison when the Supreme Court barred executions for those who were 17 at the time of their crimes. Vernancio Medellín was 14 at the time of crime, and is serving a 40-year prison term.

¹⁶¹ *Id.* at 5. Breyer was protesting too much; while it is considered common courtesy on the Court to provide a fifth vote for a stay of execution pending the consideration of a legitimate cert petition, it would be a far stretch to speak of a traditional courtesy vote to allow for the consideration of the government’s views (especially when, as the majority explained, the government’s views are easily discernible and would clearly go against Medellín’s position).

¹⁶² Allan Turner & Rosanna Ruiz, *Medellín Put to Death After One Last Appeal*, *Houston Chronicle*, August 6, 2008 at, A1.

¹⁶³ As quoted in *Mexican Government Protests Texas Execution*, CNN.com, (<http://www.cnn.com/2008/CRIME/08/06/mexican.executed/>) (August 7, 2008).

IV. Implications

While it is unlikely that this law school exam-type fact pattern will ever present itself again—if only because a president is unlikely to both reverse his position on the binding nature of a treaty *and* try to enforce said treaty with a scant memorandum—*Medellín v. Texas* is thick with important precedent in the areas of international law and executive power.¹⁶⁴ Perhaps most significantly, it provides a road map of how American courts will decide treaty-based and other international law disputes in the future and draws bright lines between what the president can and cannot do in this realm.

A. International Law

Medellín more or less reinforced the status quo on international law, in line with the Court's traditional deference to the political branches' powers to make and ratify treaties but asserting judicial supremacy in interpreting them. It would have been much bigger news if the Supreme Court had come out the other way, supporting the position that U.S. courts are powerless to resist World Court decisions. Helpfully for future cases, the majority opinion explained its interpretive methodology¹⁶⁵ and laid out four issues courts face when determining the extent to which a treaty—or the judgment of a treaty-created tribunal—is self-executing.

First, the Court will look to the text, in an exercise akin to statutory interpretation that also considers “as ‘aids to its interpretation’ the negotiating and drafting history of the treaty.”¹⁶⁶ To not begin with, and heavily weigh, the text of a legal document one is interpreting is sheer folly, and a recipe for judicial mischief. *Second*, the Court is reluctant to subvert the “careful set of procedures that must be followed before federal law can be created under the Constitution—

¹⁶⁴ That is not to say that similarly situated criminal defendants (especially those facing capital murder charges) won't, at the last minute, plead Vienna Convention violations, just that those cases will now be unlikely to get very far in federal court (though we can expect some states to provide further hearings, as Oklahoma has for its Mexican death row inmates in the wake of *Avena* and the ICJ's July ruling). See, e.g., Larry Welborn, Judge Rejects Mexico's Bid to Halt Death Penalty Trial, Orange County Register, August 18, 2008 (available at <http://www.ocregister.com/articles/motion-martinez-casas-2129411-penalty-legal>).

¹⁶⁵ See Part II, *supra*.

¹⁶⁶ *Medellín*, 128 S. Ct. at 1357 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).

vesting that power in the political branches, subject to checks and balances.”¹⁶⁷ It thus decidedly rejected the dissent’s proposed multi-factor balancing test as providing no guidance—until a court has ruled—as to the consequences of U.S. treaty involvements. *Third*, the “postratification understanding” of signatory nations can help establish the parties’ purposes in making what at base is an international contract.¹⁶⁸ This is one of the rare instances where it is fully appropriate to query how foreign polities look at the law; in the case of the Vienna Convention, not one member nation (out of 171) treats ICJ judgments as binding law. *Fourth*, this entire exercise is wholly different in kind from the enforcement of foreign judgments or arbitration agreements.¹⁶⁹ In any event, Congress enacted legislation to implement most of the treaties underlying such private enforcement mechanisms.¹⁷⁰

Another key legal issue that *Medellín* teased out is that under the Optional Protocol (but also under the enforcement addenda of other treaties, and the ICJ Statute generally), only nations can bring cases before the ICJ. While nations are certainly free to bring suits on behalf of individuals (as Mexico did in *Avena*), by the normal operation of law the resulting judgments are binding only on the parties to that suit—those same national governments. To have a larger effect, national parliaments have to pass implementing legislation (preferably before the judgment but, as the proposed *Avena* Case Implementation Act shows, not necessarily so). It is unlikely, as both the *Medellín* majority and dissent noted, that many countries will make a habit of passing laws applicable either to individual ICJ judgments or to *all* treaties that rely on the ICJ for dispute resolution. But those countries that wish to can certainly legislate that ICJ judgments carry the same domestic weight as those of the domestic supreme court—or to negotiate terms in future treaties that move in that direction.

Still, most countries would—or should—be wary of giving up too many opportunities to review the actions of an international

¹⁶⁷ *Id.* at 1362.

¹⁶⁸ *Id.* at 1363 (quoting *Zicherman*, 516 U.S. at 226).

¹⁶⁹ *Id.* at 1365.

¹⁷⁰ For example, the famous New York Convention (formally known as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, 330 UNTS 38) is executed at 9 U.S.C. § 201.

tribunal that is by definition less accountable and less democratically legitimate than national courts. In the American context, if Congress passed a law saying that all ICJ judgments automatically become the law of the land—setting aside that such a law would be unconstitutional on its face because Article III names the Supreme Court as the nation’s highest judicial body—what would happen if the ICJ ordered an unconstitutional action, or wanted to overrule a state criminal court (as it effectively did in *Medellín*)? This is a slippery slope if ever there were one.

No, under our constitutional system, it is the judiciary’s duty to determine whether a treaty is self-executing, and then to define the scope and nature that execution has for purposes of domestic law. If Congress disagrees with the Court’s determination that a given treaty is non-self-executing, its duty is to pass implementing or codifying legislation. The *Medellín* Court thus makes clear that the distinction between self-executing and non-self-executing treaties is very real and not at all arbitrary, and that this distinction in certain circumstances may well mean the literal difference between life and death.¹⁷¹ Justice Breyer’s observation that many (if not most) treaties are self-executing is irrelevant because the one at issue in this case was not.

While many commentators have warned that the *Medellín* decision will affect the treatment of Americans abroad¹⁷²—including students, Peace Corps volunteers, servicemen, businessmen, and tourists—I for one have a hard time believing that courts in Europe, Mexico, or elsewhere change their behavior as a result of any one Supreme Court decision (beyond any general antagonism directed against

¹⁷¹ For a sample of the rich scholarly debate about self-execution and the Supremacy Clause, see, e.g., Tim Wu, *Treaties’ Domains*, 93 Va. L. Rev. 571 (2007); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999); Martin S. Flaherty, *Response: History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 Colum. L. Rev. 2095 (1999); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 Stan. L. Rev. 529 (1999); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695 (1995).

¹⁷² See, e.g., Davidow, *supra* at note 145; David G. Savage, *Advice of Consul*, ABA Journal, June 2008 (available at http://www.abajournal.com/magazine/advice_of_consul).

the United States or President Bush). As it stands, the U.S. system provides criminal defendants with the highest level of protection—*Miranda* rights (let alone *Miranda* warnings) and the exclusionary rule, for example, are quite literally foreign to the rest of the world, not to mention the absence of habeas corpus outside the Anglo-sphere. (In many of the countries criticizing Texas, the Supreme Court, and the United States generally, Medellín would not have been able even to file anything after his first direct appeal was denied.) Moreover, as Chief Justice Roberts noted, not a single nation treats ICJ judgments regarding Vienna Convention rights as self-executing.¹⁷³ Thus, the fear of international payback for the Court's intransigence is both overblown and hypocritical, appearing to rest on little more than disagreements over capital punishment and the force of international law, and base anti-Americanism.

In the end, and notwithstanding the Court's increasing sensitivity to international law and awareness of the worldwide legal developments, *Medellín* was a significant victory for national sovereignty and democratic legitimacy. The ICJ may be sophisticated and wise, but its rule can never constitute self-government as constitutionally structured—and as embodied in Texas's granting Medellín the full panoply of due process under the state's code of criminal procedure (which nobody can seriously contend failed constitutional muster).

B. Executive Authority

Here again the case would have been bigger news if the Court had ruled against Texas and allowed the president to dictate to state courts any time he desired to put pen to paper—or at least where international affairs were concerned.¹⁷⁴ Instead, when enforcing treaty obligations that purport to have some sort of legal (not just political or diplomatic) component that the president seeks to enforce against the states—if this is in a sphere where such enforcement

¹⁷³ *Medellín*, 128 S. Ct. at 1363 (“[As in *Sanchez-Llamas*], the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts.”); see also *supra* at note 168 and accompanying text.

¹⁷⁴ Before *Medellín* was decided, one observer sketched out such a scenario in the gun control area. See David Kopel, *Medellín and the Second Amendment, The Volokh Conspiracy*, <http://volokh.com/posts/1192051881.shtml> (October 10, 2007 at 5:31 p.m.).

would not violate federalism principles—the president needs to have constitutional authority or congressional approval.

Of course, that raises a question similar to the one mentioned immediately above: Can the president make, and the Senate ratify, a treaty that grants powers to either Congress or the president that they do not have under the Constitution? For example, if the United States duly joined a treaty abolishing the death penalty, could Congress pass and the president sign a bill eliminating capital punishment from state criminal codes? As above with a theoretical treaty stripping the Supreme Court of its ability to be the final arbiter of U.S. law, the answer should be no—with the caveat that a treaty may sometimes expand the president’s options within a sphere over which he already has executive authority (foreign affairs being the most obvious one).¹⁷⁵

Joining high theory to *Medellín*, it is striking that *Medellín*’s counsel argued for rather expansive executive authority over foreign affairs.¹⁷⁶ That was almost wholly opportunistic—particularly because the groups who supported this argument are not generally fans of robust executive authority, even as scholars who read Article II as giving plenary foreign affairs power to the president came out on the other side.¹⁷⁷ This case concerned the president’s *domestic* affairs power, of course, albeit relating to a foreign affairs matter. Nevertheless, *Medellín*’s position was adopted by Justice Breyer, who uncharacteristically wants to defer to the president instead of micro-managing executive branch actions with international components:

Given the Court’s comparative lack of expertise in foreign affairs; given the importance of the Nation’s foreign relations;

¹⁷⁵ Unfortunately, the flawed case of *Missouri v. Holland*, 252 U.S. 416 (1920), makes this a surprisingly difficult question to answer. For a fascinating and detailed discussion of these issues, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

¹⁷⁶ Petitioner’s Brief, 2007 WL 1886212, at *34–42.

¹⁷⁷ And these scholars were joined by colleagues who would likely share *Medellín*’s position on the international law issue. See, e.g., the Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas (scholar amici are Erwin Chemerinsky, John Eastman, Thomas Lee, Michael Ramsey, Michael Van Alstine, Arthur Mark Weisburd, John Yoo, and Ernest Young).

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given the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters; and given the likely future importance of this Court's efforts to do so, I would very much hesitate before concluding that the Constitution implicitly sets forth broad prohibitions (or permissions) in this area.¹⁷⁸

Chief Justice Roberts, in his majority opinion, replies to this reasoning by saying that Justice Breyer's hypothetical scenarios are beside the point, in that the issues here

are the far more limited ones of whether [the president] may unilaterally create federal law by giving effect to the judgment of the international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case.¹⁷⁹

While the president has sole authority to resolve certain international issues—even in *Medellín*, where President Bush was fully within his powers as chief executive to determine that the United States would comply with *Avena*—he cannot unilaterally enact domestic law or otherwise command other federal branches (let alone states).¹⁸⁰

So what could the president have done to comply with *Avena* that would not have run afoul of separation-of-powers principles or federalism? Aside from moral suasion—the phone calls by Secretary Rice and Attorney General Mukasey—several options were (and remain) available. Texas's brief before the Court sketches three. The president could have: 1) worked with Congress to enact a statute providing a new federal habeas remedy; 2) concluded a treaty with Mexico (and possibly other countries) containing a self-executing provision requiring federal judicial review of ICJ-adjudicated Vienna Convention violations; or 3) issued an executive order providing for a "review and reconsideration panel" for the 51 individuals referenced in *Avena*, perhaps composed of retired federal judges.¹⁸¹

¹⁷⁸ *Medellín*, 128 S. Ct. at 1391 (Breyer, J., dissenting).

¹⁷⁹ *Id.* at 1367 n.13.

¹⁸⁰ *Id.* at 1370 n.14 and 1371; *Medellín*, *supra*, note 83 and accompanying text.

¹⁸¹ Respondent's Brief, 2007 WL 2428387, at *46–47; see also *supra*, notes 65–66 and accompanying text.

There is room for much variation within these three options and, depending on how they played out in real life, they would not necessarily be immune from legal challenge. Still, any of the above, and possibly others, would be significantly better than the questionable course President Bush actually pursued—and the first two would at least have the backing of the full federal government.

In sum, it is now beyond dispute that the president cannot unilaterally create binding law—let alone by drafting a short memorandum that does not even rise to the level of an executive order.

Conclusion

Endlessly fascinating for the policy wonks who spot legal issues in every twist and turn, this case was ultimately about resisting the tide of transnational global governance. While economic globalization brings opportunity and freedom to different parts of the world, what could be called “political globalization” seeks to substitute the views of elite cosmopolitan technocrats for the consent of each nation’s governed.¹⁸² The Supreme Court has, for now, put a finger in the dyke, and perhaps *Medellín*—and this term generally¹⁸³—represents a halt in that political globalization. More likely, however, because the intricate facts of this case are sui generis, the next time something like this happens the political branches will neither be caught off-guard nor act in what can be characterized as an ad hoc manner.

Still, both the ICJ decision and the presidential memorandum were unprecedented in what they intended to do: overrule a state’s lawful criminal procedures. While elite opinion around the world expressed shock that one renegade political subdivision could thwart the will of both the World Court and the president, here in the United States

¹⁸² For more on this disturbing trend, see John Fonte, *Global Governance vs. the Liberal Democratic Nation-State: What is the Best Regime?*, Essay Commissioned by the Hudson Institute, May 14, 2008 (available at http://pcr.hudson.org/index.cfm?fuseaction=publication_details&id=5599).

¹⁸³ Unlike the other high-profile death penalty cases over the last decade, for example, the opinion holding capital punishment for child rape to be unconstitutional, did not contain a single international citation. Compare, e.g., *Kennedy v. Louisiana*, 554 U.S. ____ , 128 S. Ct. 2641 (2008) with *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002).

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we take our federalism seriously.¹⁸⁴ As a spokesman for Texas Governor Perry explained: “The world court has no standing in Texas.”¹⁸⁵

Medellín thus stands for the principle of democratic self-government. Neither a foreign tribunal nor the president can dictate to American courts, federal or state. It will be interesting to see in the future how the seemingly opposed forces of globalism and judicial supremacy interact—not least in the mind of the Court’s swing vote, Justice Kennedy.

¹⁸⁴ But see, e.g., *Gonzales v. Raich* 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁸⁵ Quoted in Reed Johnson, *Amid Protests Abroad, Texas Executes Mexican*, L.A. Times, August 6, 2008, at 10, and Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On*, Houston Chronicle, July 17, 2008, at A1.

