Towards Better Implementation of the United States' International Obligations

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I. Introduction

The United States is a party to hundreds of treaties that create a vast array of international obligations for the country. In addition, the United States often has agreed to submit disputes arising out of or in connection with many of these treaties to various international tribunals for resolution. Historically, treaties dealt with relations between States in the international community. Today, however, treaty-based obligations increasingly affect relations between the United States and its sub-federal units of government, in part because the subject matter of these treaties is expanding into areas traditionally regulated by the states. Non-state actors, such as individuals and businesses, frequently find that they also are directly affected by these international agreements.

Domestic implementation of these international obligations has created structural tensions for the United States, both between the branches of the federal government and between the states and the federal government. As globalization continues at its rapid...
pace, the proper allocation of power between the different branches and levels of
government with respect to implementation of international obligations is likely to arise
more and more often. This article addresses the question of how best to implement the
United States’ international obligations, and in particular, decisions of international
tribunals, particularly when the decision relates to litigation involving individual rights in
federal or state courts in the United States.

This issue arose most recently in connection with the Bush Administration’s
decision to implement the judgment of the International Court of Justice (ICJ) in the Case
Concerning Avena and Other Mexican Nationals, which found that the United States
had breached its obligation under the Vienna Convention on Consular Relations to
inform certain Mexican nationals of their consular notification rights. As discussed in
more detail below, Article 36 of the Vienna Convention affords foreign nationals the
right to be informed without delay of their right to have their consulate notified upon
their arrest or detention. The ICJ further found that the appropriate reparation would
consist of providing, by means of the United States’ own choosing, review and
reconsideration of the convictions and sentences of the Mexican nationals that were the
subject of the case.

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United States on Nov. 24, 1969) [hereinafter Vienna Convention or VCCR].
8 VCCR, supra note 6, art. 36(1)(b).
9 Avena, 2004 I.C.J. at 72. The U.S. Supreme Court has thus far assumed without deciding that the treaty at
issue in Avena creates an individual cause of action. See Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2674
(2006). At least four of the justices have expressly stated that they would find an individual cause of action
for a VCCR Article 36 claim on the merits. See id. at 2690, 2694-98 (Breyer, J. dissenting).
In the domestic implementation stage of the *Avena* decision, President Bush asserted the sole power to order state courts to provide review and reconsideration of the Mexican nationals’ judgments in state criminal proceedings. The President’s claim to such authority is troubling because it appears to violate structural principles of separation of powers and federalism.\(^{10}\) Thus, this article uses the *Avena* judgment and subsequent litigation to illustrate some of the problems presented by this issue and to analyze how implementation of international obligations can be better handled in the future.\(^{11}\)

The article begins by providing some background regarding the *Avena* judgment and post-*Avena* litigation and analyzes the strengths and weaknesses of arguments that have been made in that litigation regarding the proper method of implementation of the ICJ judgment by the United States. The article then places that litigation in the larger context of the debate regarding the proper role of each branch of the federal government with respect to the implementation of the United States’ international obligations. The article also examines the issue from a federalism perspective and the interplay between the states and the federal government with respect to implementation of the United States’ international obligations. Finally, the article provides some suggestions as to how implementation can be better handled in the future.

\(^{10}\) While the case raises many interesting issues, this article focuses on the issue of the proper roles of the three branches of the federal government and the states in implementation of U.S. international obligations, an issue which is currently before the U.S. Supreme Court in *Medellin v. Texas*, 127 S. Ct. 2129 (2007).

\(^{11}\) I refer throughout to the United States’ “international obligations” rather than its “treaty obligations” because there are really two separate, but closely related, international obligations at issue here. The first is the United States’ obligation to comply with its treaty commitments. In the case of the Vienna Convention, its duty is to provide consular notification to foreign nationals without delay when they are arrested or detained. The second obligation is the United States’ duty to comply with a decision of the ICJ finding that the United States breached its treaty-based consular notification obligations. This article addresses how to better implement both types of international obligations.
II. The Avena Litigation

A. Proceedings at the International Court of Justice

Since 1969, the United States has been a party to the Vienna Convention on Consular Relations. At the time of the Avena litigation at the ICJ, the United States was also a party to the Vienna Convention’s Optional Protocol pursuant to which parties agree to submit disputes arising out of the Vienna Convention to the ICJ. The purpose of the Vienna Convention is to protect the rights of foreign nationals in another country, primarily with respect to diplomatic and consular staff, but also with respect to ordinary citizens. Of particular relevance here, Article 36(1)(b) of the Vienna Convention states that, if requested by a foreign national, the authorities of the receiving State shall, without delay, inform the consular post of the sending State that a national of that state has been arrested or committed to prison or to custody pending trial or detained in any other manner. Article 36 further states that “said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.”

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12 VCCR, supra note 6. As a result, the Vienna Convention is part of the Supreme law of the land under the U.S. Constitution. U.S. CONST. art. VI.
13 Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 18, 1961, 21 U.S.T. 326, T.I.A.S. No. 6820. Following the Avena decision by the ICJ, the U.S. withdrew its acceptance of the Optional Protocol, but remains a party to the VCCR. See Letter of Attorney General Alberto Gonzales, (dated Apr. 5, 2005), attached as Addendum A-2 to the Brief of the United States as Amicus Curiae filed in Ex parte Jose Ernesto Medellin, Court of Criminal Appeals of Texas, No. AP-75,207 (Sept. 2, 2005) 2005 WL 3142648. That withdrawal affects only future disputes under the VCCR and does not extinguish any pre-existing legal obligations that the United States had assumed.
14 See, e.g., Sanchez-Llamas, 126 S. Ct. at 2691 (Breyer, J., dissenting).
15 VCCR, supra note 6, at art. 36(1)(b).
The United States has been sued at the ICJ three times in the past decade for violation of this obligation – by Paraguay in *Breard*,\(^1\) by Germany in *LaGrand*,\(^2\) and most recently by Mexico in *Avena*, involving 54 Mexican nationals who were on death row in the United States.\(^3\) In virtually all of the underlying cases, the United States did not deny that the authorities had failed to inform the foreign defendants of their right to have their consulates notified of their arrest and detention without delay; rather, the disputes largely revolved around the appropriate remedy.\(^4\) In all three ICJ cases, the defendants had not raised the government’s failure to notify them of their right to consular notification until after trial and conviction, at least in part because they had not been notified that they had such a right.\(^5\) The United States took the position that the foreign defendants could not raise this claim on appeal due to various state procedural default rules.\(^6\)

Not surprisingly, the ICJ found in *Avena* that the United States had once again violated its obligations under the Vienna Convention by failing to inform the Mexican nationals, without delay, of their right to have the Mexican consulate notified of their arrest and detention.\(^7\) As to the appropriate remedy, the ICJ stated that the United States has an obligation to provide, by means of its own choosing, review and reconsideration of

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\(^3\) *Avena*, 2004 I.C.J. 12.

\(^4\) In *Avena*, the United States did not deny its failure to give the consular notification in 47 of the 51 cases. *See id.* at 46. With respect to the remaining *Avena* defendants, the United States asserted that the defendants had claimed U.S. citizenship and, thus, the authorities did not believe they were dealing with foreign nationals. However, the U.S. largely failed to prove these allegations, and the U.S. claims were rejected by the ICJ. *See id.* at 40-46; *see also LaGrand*, 2001 I.C.J. at 20-21; *Breard*, 1998 I.C.J. at 253.

\(^5\) *See Avena*, 2004 I.C.J. at 52-53, 57 (describing the timing when consular notification was given, if ever). *See also LaGrand*, 2001 I.C.J. at 23 (right to notification not raised at trial or two subsequent proceedings; LaGrands finally learned of right from other sources); *Breard*, 1998 I.C.J. at 249 (“Paraguay learnt by its own means that Mr. Breard was imprisoned in the United States.”).

\(^6\) *See Avena*, 2004 I.C.J. at 55-57; *see also LaGrand*, 2001 I.C.J. at 68-69; *Breard*, 1998 I.C.J. at 249.

\(^7\) *See Avena*, 2004 I.C.J. at 53, 71.
the affected Mexican nationals’ cases with a view to ascertaining whether the violation of
the Vienna Convention caused actual prejudice to the defendant. The ICJ further stated
that state procedural default rules should not bar that reconsideration. Thus, the ICJ did
not order the United States to overturn the convictions of the Mexican nationals, but did
order the United States to consider whether lack of notice of consular access would have
made a difference.

Under the United Nations Charter: “Each Member of the United Nations
undertakes to comply with the decision of the International Court of Justice in any case to
which it is a party.” Decisions of the ICJ have binding force between the parties with
respect to the particular case. Thus, the United States has an international legal
obligation to abide by the judgment of the ICJ in Avena.

B. U.S. Executive’s Reaction to Avena

Following the Avena decision, President Bush decided that it would be in the best
interests of the United States to comply with the ICJ’s judgment. Accordingly, he
decided to implement the ICJ’s judgment by issuing a “Memorandum for the Attorney
General” dated February 28, 2005 in which he stated in pertinent part:

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 [ICJ in
Avena], by having State courts give effect to the decision in

24 Id. at 65-66.
25 Id. at 57.
26 Specifically, the ICJ found “that the appropriate reparation in this case consists in the obligation of the
United States to provide, by means of its own choosing, review and reconsideration of the convictions and
sentences of the Mexican nationals” that were the subject of the case. Id. at 72.
27 U.N. Charter art. 94. The United States is, of course, a founding member of the United Nations.
28 Statute of the International Court of Justice, art. 59, June 26, 1945, 50 Stat. 1031 [hereinafter ICJ
Statute].
accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.\(^{29}\)

In April 2005, U.S. Attorney General Alberto Gonzales sent this Presidential Memorandum to the relevant states’ attorneys general\(^{30}\) and filed it with state and federal courts where the Mexican nationals’ cases were pending, including the U.S. Supreme Court in \textit{Medellin},\(^{31}\) one of the cases involved in the \textit{Avena} litigation at the ICJ. The next section describes the \textit{Medellin} litigation in some detail to illustrate the difficult constitutional and policy questions presented by the implementation of an ICJ judgment involving an alleged violation of individual rights under U.S. law.

\section*{C. The \textit{Medellin} Litigation}

In 1997, Mexican national José Ernesto Medellin was convicted of participating in the rape and murder of two girls in Houston, Texas and was sentenced to death.\(^{32}\) His conviction and sentence were affirmed on direct appeal.\(^{33}\) In 2001, Medellin filed an application for a writ of habeas corpus claiming for the first time that his rights under the VCCR had been violated because he had never been informed of his right to have the Mexican consulate notified of his arrest and detention.\(^{34}\) The Texas district court denied his petition on several grounds. First, the court found that his claim was procedurally

\begin{footnotesize}
\begin{enumerate}
\item President’s Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in \textit{Avena} (Feb. 28, 2005), \textit{available at} http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html [hereinafter Presidential Memorandum].
\item \textit{Medellin} v. Dretke, 543 U.S. 1032 (2004).
\item See id.
\end{enumerate}
\end{footnotesize}
barred because he failed to object to the violation of his VCCR rights at trial.\textsuperscript{35} Second, the court found that as a private individual, Medellin did not have standing to bring a claim under the VCCR because it is a treaty between States and does not confer enforceable rights on individuals.\textsuperscript{36} The court further determined that Medellin failed to show any harm because he had received effective legal representation; thus, his constitutional rights had been safeguarded.\textsuperscript{37}

Medellin filed a federal petition for habeas corpus and his case eventually reached the U.S. Supreme Court, which granted certiorari in December 2004.\textsuperscript{38} The Supreme Court’s grant of certiorari followed shortly on the heels of the ICJ’s decision in \textit{Avena} and was granted to address two questions: (1) whether a federal court is bound by the ICJ’s ruling that U.S. courts must reconsider Medellin’s claim for relief under the VCCR without regard to procedural default doctrines; and (2) whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ’s judgment.\textsuperscript{39}


\textsuperscript{36} \textit{See id. at app. 61. Ignoring the Supremacy Clause, the Texas court stated that “treaties do not constitute ‘laws’ for the purposes of Tex. Code Crim. Proc. Art. 38.23;” which, inter alia, prohibits the admission of evidence obtained in violation of the laws of the United States. See id. at app. 52-53 & 61. Subsequent to this decision, the U.S. Supreme Court assumed without deciding that the VCCR does create an individually enforceable right to consular notification. See Sanchez-Llamas, 126 S. Ct. at 2674. Federal circuit courts that have addressed the issue on the merits have split as to the proper result. Compare Jogi v. Voges, 480 F.3d 822, 834 (7th Cir. 2007) to Conejo v. County of San Diego, 504 F.3d 853, 860 (9th Cir. 2007). For a discussion of different models U.S. courts use to determine the creation of individually enforceable rights by treaties, see David Sloss, \textit{When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas}, 45 COLUM. J. TRANSNAT’L L. 20 (2007). The Supreme Court may be able to duck the resolution of this issue once again in \textit{Medellin} because of the added procedural elements of the Presidential Memorandum seeking to implement the judgment of the ICJ in \textit{Avena}.}


\textsuperscript{38} Medellin v. Dretke, 543 U.S. 1032 (2004).

\textsuperscript{39} Medellin v. Dretke, 544 U.S. 660, 661 (2005).
After the Supreme Court granted certiorari, Medellin filed an application for writ of habeas corpus in the Texas Court of Criminal Appeals, relying in part on the Presidential Memorandum instructing courts to review and reconsider the individual cases involved in the *Avena* litigation. Because Medellin might obtain the relief he was requesting through that state court proceeding, the U.S. Supreme Court dismissed the writ of certiorari as improvidently granted in *Medellin’s* case in May 2005, in a 5-4 decision.

Shortly after that decision, the U.S. Supreme Court decided *Sanchez-Llamas*, another case involving a claim of lack of consular notification under the Vienna Convention. In *Sanchez-Llamas*, the Supreme Court reaffirmed that a decision of the ICJ, such as that in *Avena*, is not binding on U.S. courts, but is entitled to “respectful consideration.” This holding left open the question of the precise legal weight and authority of the ICJ’s judgment in *Avena* on the underlying criminal cases that were part of the *Avena* case. The next section addresses the views of the various interested parties with respect to that issue, with a particular focus on the views of the Executive Branch.

**D. The View of the Executive Branch with Respect to Its Role in Implementing International Legal Obligations**

Following the return of the case to Texas state court, the Court of Criminal Appeals for Texas invited the United States government to state its views on whether the Presidential Memorandum or the ICJ’s decision in *Avena* constitutes either a “factual or legal basis for a claim that was unavailable” at the time Medellin filed his initial

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40 *Ex parte José Ernesto Medellín*, 2006 WL 3302639 at *2.
42 *Sanchez-Llamas*, 126 S. Ct. at 2669. Sanchez-Llamas was not one of the 51 defendants involved in the *Avena* case.
43 The proper meaning of “respectful consideration” is discussed in more detail in part IV.A below.
application for state habeas corpus relief.\textsuperscript{44} Because of the sweeping claims of executive power set forth in the brief filed with the Texas court, this next section sets forth in some detail a summary of the arguments of the Executive Branch. In particular, it focuses on those arguments related to the proper role of the Executive vis-à-vis the other branches of the federal government and the states in implementing international legal obligations of the United States.

The crux of the United States’ argument is that the Texas court should permit review and reconsideration of Medellin’s claim based on the authority of the Presidential Memorandum, but not the authority of the ICJ’s judgment.\textsuperscript{45} In support of its position, the United States argued that Medellin’s case should be reviewed by the Texas court because the United States has an obligation under Article 94 of the United Nations Charter to “undertake[] to comply” with any decision of the ICJ in a case to which it is a party.\textsuperscript{46} According to the United States, the phrase “undertake[] to comply” does not mean that the ICJ decision will be given immediate effect in the domestic courts of the United States, but instead represents a commitment that the member state will take appropriate action to comply with the decision.\textsuperscript{47} Instances of non-compliance with an ICJ decision are to be dealt with by the UN Security Council.\textsuperscript{48} But no provision of the

\begin{thebibliography}{9}
\bibitem{footnote} Brief of the U.S., \textit{supra} note 44, at *12.
\bibitem{footnote} U.N. Charter art. 94(1).
\bibitem{footnote} Brief of the U.S., \textit{supra} note 44, at *12.
\bibitem{footnote} \textit{Id.} at *14, 16. \textit{See also} U.N Charter art. 94(2). Because the United States is a permanent member of the U.N. Security Council, it has the power to veto any decisions of that body. Thus, there is no real danger that the U.N. Security Council could take any enforcement action against the United States. The underlying expectation is that members of the United Nations will comply with ICJ judgments as, indeed, many nations have done in contentious cases. \textit{See} Curtis Bradley, Lori Fisler Damrosch & Martin Flaherty, \textit{Medellin v. Dretke: Federalism and International Law}, 43 COLUM. J. TRANSNAT’L L. 667, 696 (2005) (“Usually ICJ judgments are complied with, perhaps running up to as close as 80 percent or certainly at least two-thirds of the judgments.”).
\end{thebibliography}
UN Charter requires that ICJ decisions be treated as binding law in the domestic courts of UN Member States. According to the United States, this structure, coupled with the history of U.S. ratification of the UN Charter, demonstrates that enforcement of an ICJ decision is committed to the political branches of the United States government.

The United States further argued that it is the President who has authority to determine whether and how the United States will comply with the ICJ’s judgment by virtue of the United Nations Participation Act (UNPA) and the United States’ ratification of the United Nations (UN) Charter. In this case, the President, as the nation’s representative in foreign affairs, determined that the United States will comply with the ICJ’s decision in *Avena* by having state courts give effect to the *Avena* judgment in accordance with principles of comity.

The United States further argued that the President’s determination, like an executive agreement with a foreign nation, has independent legal force and effect, such that contrary state rules must give way. In this particular case, the U.S. government argued that the President’s decision to implement the United States’ treaty obligations

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49 Brief of the U.S., *supra* note 44, at *18. By contrast, Medellin argued that because the United States is a party to the UN Charter, it is obligated to comply with judgments of the ICJ in good faith. *See* Reply Brief of Jose Ernesto Medellin filed in *Ex parte* Jose Ernesto Medellin, No. AP-75,207 (Tex. Crim. App., Sept. 8, 2005), 2005 WL 3142645 at *1 [hereinafter Medellin Reply Brief]. According to Medellin, the Presidential Memorandum is the United States’ good faith effort to comply with its treaty obligations and give recognition to an international judgment pursuant to principles of comity. *See id.* at *20-21.


51 *Id.*

52 *Id.* at *13.

53 *Id.* As discussed in more detail in Part III.B below, the U.S. Supreme Court has repeatedly upheld the President’s authority to make executive agreements with other countries to settle claims even without express Congressional approval. *See, e.g.*, Dames & Moore v. Reagan, 453 U.S. 654, 679, 682-683 (1981); United States v. Belmont, 301 U.S. 324, 330-331 (1937). Furthermore, the U.S. Supreme Court has determined that these executive agreements are part of the Supreme law of the land and therefore preempt any conflicting state law. *See, e.g.*, *Garamendi*, 539 U.S. at 416-17; *Belmont*, 301 U.S. at 327, 331.
preempts the operation of section 5 of the Texas Criminal Code.\textsuperscript{54} With respect to the President’s power to preempt state law, the U.S. government argued that the President is “the sole organ of the federal government in the field of international relations”\textsuperscript{55} and that “the President ‘enjoys a degree of independent authority to act’ in ‘foreign affairs’” under Article II of the U.S. Constitution.\textsuperscript{56} The President claimed that he is charged under the UNPA with directing all functions connected with the participation of the United States at the UN, including the power to determine U.S. policy concerning compliance with ICJ decisions.\textsuperscript{57}

The U.S. government explained that “[b]ecause compliance with the ICJ’s decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President exercised his constitutional foreign affairs authority and his authority to direct the performance of United States functions in the United Nations to establish [a] binding federal rule without the need for implementing legislation.”\textsuperscript{58} The U.S. government further argued that the President’s powers have “special force as applied to the treatment of aliens in the United States, which is a matter of paramount federal concern and has long been regulated by treaty.”\textsuperscript{59} Furthermore, “it is the President who . . . protects Americans deprived of liberty

\textsuperscript{54} Brief of the U.S., supra note 44, at *15. The Texas Code of Criminal Procedure provides in relevant part that a Texas “court may not consider the merits of or grant relief based upon the subsequent [habeas] application unless the application contains sufficient specific facts establishing that (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.” Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a)(1) (Vernon 2005).


\textsuperscript{56} Brief of the U.S., supra note 44, at *20, citing American Ins. Assoc., 539 U.S. at 414.

\textsuperscript{57} Brief of the U.S., supra note 44, at *20, 28.

\textsuperscript{58} Id. at *22.

\textsuperscript{59} Id.
abroad.” In deciding whether and how to implement the ICJ’s decision in *Avena*, the President must make “delicate and complex calculations” taking into account the need for the United States to be able to enforce its laws against foreign nationals in the United States, the need for the United States to protect its nationals abroad, the international legal obligations of the United States, and the impact on U.S. foreign relations. In this case, the President determined that “the limited intrusion into state practice . . . is fully justified to enable review of the State’s own violation of treaty rights in the treatment of an alien defendant.”

In contrast to the President’s claim of independent legal authority for his determination to comply with the ICJ’s judgment, the United States government argued that standing alone, neither the Vienna Convention, nor the ICJ’s decision in *Avena* interpreting the Vienna Convention, is privately enforceable by foreign nationals in U.S. courts. Medellin had argued that because the rights conferred by the Vienna Convention are self-executing and because the United States agreed to submit disputes arising out of the VCCR to binding resolution by the ICJ, the *Avena* judgment provides the rule of decision in Medellin’s case without the need for any further executive or legislative action.

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60 *Id.* at *23.
61 *Id.*
62 *Id.* at *29.
63 *Id.* at *14.
65 *See* Medellin Reply Brief, supra note 49 at *1.
In response, the U.S. government argued that, while treaties such as the Vienna Convention are part of the supreme law of the land, they are primarily compacts between nations which depend for their enforcement on the honor of governments that are parties to them.\textsuperscript{66} Thus, when a treaty violation occurs, it normally becomes the subject of international negotiations, not judicial redress.\textsuperscript{67} The U.S. government further argued that both the language and structure of the VCCR demonstrate that its purpose is to facilitate consular functions and not to give rise to rights that may be privately enforced in criminal proceedings.\textsuperscript{68} Likewise, the U.S. government argued that the ICJ decision in \textit{Avena} is not privately enforceable because Article 94 of the UN Charter states that a UN Member “undertakes to comply” with ICJ decisions, giving Member States discretion to determine how to comply.\textsuperscript{69} If an ICJ decision were directly enforceable in Member States’ domestic courts, the discretion as to how to implement a judgment would be eliminated.\textsuperscript{70} Finally, the U.S. government pointed out that the ICJ itself did not purport to make its judgment in \textit{Avena} directly enforceable in U.S. courts, leaving it to the United States to determine how to conduct the necessary “review and reconsideration” of the affected cases.\textsuperscript{71}

\textbf{E. The Decision of the Texas Court of Criminal Appeals}

The Court of Criminal Appeals of Texas rejected the arguments of both the federal government and Medellin, ruling that neither the Presidential Memorandum nor

\begin{itemize}
\item \textsuperscript{66} \textit{Brief of the U.S., supra} note 44, at *35.
\item \textit{Id.}
\item \textit{Id.} at *37-38.
\item \textit{Id.} at *43-44.
\item \textit{Id.}
\item \textit{Id.} at *48. While the ICJ left it to the United States to provide review and reconsideration “by means of its own choosing,” it did not leave the United States unlimited choice in this regard. \textit{Avena}, 2004 I.C.J. 66, 72. The ICJ stated that the judicial process would be most suited to the task and that the executive clemency process as currently practiced in the United States would not be sufficient. \textit{Id.} at 66.
\end{itemize}
the ICJ’s decision in *Avena* constituted binding federal law that preempted state procedural default rules.\(^{72}\)

With respect to the Presidential Memorandum, the Texas Court of Criminal Appeals determined that President Bush had “exceeded his constitutional authority by intruding into the independent powers of the judiciary.”\(^{73}\) The Texas Court distinguished previous cases upholding broad powers for the president in foreign affairs, such as *Dames & Moore*\(^{74}\) and *Belmont*,\(^{75}\) by pointing out that the President did not enter into any kind of executive agreement or settlement with Mexico in this case. Instead, he unilaterally issued the Presidential Memorandum in an attempt to resolve the matter.\(^{76}\) The Texas Court further stated that in issuing the Memorandum, the president’s foreign affairs power is not at its maximum because he is not acting “pursuant to an express or implied authorization of Congress.”\(^{77}\) The Texas Court also rejected the U.N. Charter and the UNPA as bases for the President’s action, stating that neither the treaty nor the statute authorize the President’s action directing state courts to comply with the ICJ’s decision.\(^{78}\)

With respect to the ICJ’s decision in *Avena*, the Texas Court relied on the U.S. Supreme Court’s holding in *Sanchez-Llamas*\(^{79}\) to the effect that decisions of the ICJ are

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\(^{72}\) *Ex parte* Jose Ernesto Medellin, No. AP-75,207, 2006 WL 3302639 (Tex. Crim. App., Nov. 15, 2007). Of note, although all of the justices agreed on the result, few could agree on a rationale. In fact, there were six separate opinions filed by the judges in support of the holding.

\(^{73}\) *Id.* at *10.

\(^{74}\) 453 U.S. 654.

\(^{75}\) 301 U.S. 324.


\(^{78}\) *Medellin*, 2006 WL 3302639 at *21. The Texas Court is correct that the UNPA deals with the President’s ability to appoint persons to represent the United States in various United Nations’ bodies and says nothing about implementation of ICJ judgments or other international obligations.

\(^{79}\) 126 S. Ct. at 2685.
not binding on U.S. courts and are only entitled to respectful consideration. The Texas Court further held that the *Avena* judgment does not constitute a new factual or legal basis that was previously unavailable to Medellin within the meaning of section 5 of the Texas Code of Criminal Procedure. Accordingly, the Texas Court refused to give review and reconsideration to Medellin’s case and it dismissed Medellin’s application for a writ of habeas corpus.

On April 30, 2007, the U.S. Supreme Court granted Medellin’s second petition for writ of certiorari to decide two questions: (1) Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that states must comply with the United States’ treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in that judgment, and (2) Are state courts bound by the Constitution to honor an undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in cases that judgment addressed?

The Supreme Court heard oral argument in the matter on October 10, 2007 and a decision is expected during the 2007-08 term of the Court.

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80 *Medellin*, 2006 WL 3302639 at *18. The Texas Court is certainly in line with the thinking of its top law enforcement officers on this point. Following the issuance of the ICJ’s decision in *Avena*, Governor Rick Perry’s spokesman stated: “Obviously, the governor respects the world court’s right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas.” Polly Ross Hughes, *U.S. Told to Review Cases of Mexicans Sentenced to Death*, HOUSTON CHRON., Apr. 1, 2004, at A1 (quoting Robert Black, spokesman for Gov. Rick Perry). Likewise, the Texas Attorney General stated that: “The state of Texas believes no international court supersedes the laws of Texas or the laws of the United States.” Mike Tolsen & Rosanna Ruiz, *Mexicans on Death Row May Get New Hearings*, HOUSTON CHRON., Mar. 9, 2005, at A1 (quoting Greg Abbott, Texas Attorney General).

81 See id. at *22-24.

82 Id. at * 24.

III. Problems with the Executive’s Claim of Authority

This next section analyzes the merits of the President’s claim of broad, unilateral power to determine whether and to what extent the U.S. should comply with its treaty obligations generally and, more specifically, comply with a judgment of an international tribunal to which the U.S. has given the power to hear and resolve disputes arising under a treaty. While presidents clearly do and should have broad power over foreign affairs and the primary duty to implement treaties as part of the supreme law of the land, President Bush’s action in this case potentially violates both separation of powers and federalism principles. His claim for broad, unilateral and unchecked executive power is troubling, especially where individual rights are involved. Thus, the Texas Court of Criminal Appeals was correct in finding that President Bush’s action in issuing the Memorandum with instructions to the state courts exceeded his constitutional powers. On the other hand, the Texas Court was incorrect in giving so little regard to the United States’ international obligations and the views of the Executive.

A. Separation of Powers Concerns

The separation of powers doctrine concerns the division of power between the three branches of the federal government, Legislative, Executive and Judicial. The Founding Fathers divided power between the three different branches primarily to “diffus[e] power the better to secure liberty.” Separation of powers arguments therefore

84 The President’s foreign affairs powers largely derive from Article II of the Constitution. U.S. CONST. art. II, § 2, cl. 2 (“The President shall be Commander in Chief . . . He shall have the Power . . . to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls.”)
85 See Norman Redlich, John Attanasio & Joel K. Goldstein, UNDERSTANDING CONSTITUTIONAL LAW 6 (3d ed. 2005).
86 Youngstown, 343 U.S. at 635 (Jackson, J., concurring); see also Bowsher v. Synar, 478 U.S. 714, 722 (1986); United States v. Brown, 381 U.S. 437, 443 (1965) (discussing separation of powers as a bulwark against tyranny).
consider whether each branch of government is exercising power in a manner consistent with this structure of government outlined in the U.S. Constitution.

The Executive Branch’s assertions with respect to the scope of its power to unilaterally determine whether and how the United States will comply with its international obligations raises serious separation of powers concerns. It infringes on both the Legislative Branch’s express and implied constitutional powers with respect to foreign affairs, as well as the Judicial Branch’s duty to interpret and apply international law as part of the supreme law of the United States.

1. The Proper Role of Congress in the Implementation of International Obligations of the United States

The Executive Branch’s claim in the Medellin litigation that the President is the “sole organ of the federal government in the field of foreign relations” suggests there is little or no role for the Legislative Branch with respect to implementation of the United States’ international obligations, despite Congress’ express and implied constitutional powers over many matters involving foreign relations, including declarations of war, regulating foreign commerce, creating rules for the naturalization of foreign citizens, and giving advice and consent to diplomatic appointments and treaties. Clearly, the Constitution provides a significant role for Congress in foreign affairs. The fact that Congress and the President share powers with respect to foreign affairs has long been an accepted maxim of United States law. In particular, Congress’ traditional role in

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87 Brief of the U.S., supra note 44, at *20. The claim that the President is “the sole organ of the nation in its external relations” was originally made in the context of a discussion of the President representing the United States in the negotiation of treaties and other international matters with foreign nations, not in the context of deciding how and whether to implement the resulting legal obligations. See Curtiss-Wright, 299 U.S. at 320.
88 U.S. CONST. art. I, § 8, cl. 3, 4, 10, 11, art. II, § 2, cl. 2.
89 See e.g., Dames & Moore, 453 U.S. at 680; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1952) (Youngstown involved a challenge to President Truman’s decision to seize the steel mills to
controlling immigration belies the President’s argument that he and only he has power to
determine what happens to foreign nationals in the United States.90

Justice Jackson’s concurring opinion in *Youngstown* is often cited as the proper
method of evaluating claims of Executive power, particularly in cases involving foreign
affairs.91 In that case, Justice Jackson suggested that where the President acts pursuant to
express or implied authorization by Congress, he exercises both his own power and that
of Congress and his power is at its zenith; where the President acts without Congressional
authorization, the validity of his acts depend on Congressional indifference or
acquiescence; and where the President acts in contravention of the will of Congress, his
power is at the lowest.92

The various participants in the *Medellin* litigation have taken very different
positions as to the proper application of the *Youngstown* test. In its decision, the Texas
Court of Criminal Appeals argued that the President’s unilateral issuance of a
Memorandum directing state courts to comply with the *Avena* judgment was contrary to
implied Congressional will because the President had failed to conclude an executive
agreement with Mexico.93 Four states – Alabama, Montana, Nevada, and New Mexico –
filed an *amici curiae* brief in support of the State of Texas in *Medellin* suggesting a
slightly different application of the *Youngstown* test. They argued that under the

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91 See, e.g., *Dames & Moore*, 453 U.S. at 661-62, 668.
92 See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
Youngstown formulation of Presidential power, the President’s power in this case is at its lowest ebb because the President is acting contrary to Congressional will as expressed in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)\textsuperscript{94} which limits situations in which federal law will cause state criminal proceedings to be reopened.\textsuperscript{95} The United States responded to these arguments by asserting that when the President acts pursuant to a duly ratified treaty such as the VCCR and his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith.\textsuperscript{96} Because a treaty requires the advice and consent of two-thirds of the Senate, Presidential action pursuant to that treaty falls within the first category of Youngstown and is valid unless the federal government “as an undivided whole lacks power.”\textsuperscript{97}

The United States has the better argument on this point. In giving its advice and consent to the Vienna Convention and the Optional Protocol, the Senate has already given the President express authorization to carry out the terms of that treaty and to submit disputes arising under the treaty to the compulsory jurisdiction of the ICJ. Moreover, the United States has long taken the position that the VCCR is entirely self-executing, meaning it did not require any further legislative action to become effective in U.S. law.\textsuperscript{98} Congress has done nothing to indicate that its views have changed since

\textsuperscript{96} Brief for the United States as Amicus Curiae Supporting Petitioner, filed in Medellin v. Texas, No. 06-984, 2007 WL 1909462 at *10 (June 28, 2007).
\textsuperscript{97} \textit{Id.}, citing Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
\textsuperscript{98} When the State Department submitted the Vienna Convention to the Senate for its advice and consent, Deputy Legal Advisor J. Edward Lyerly indicated that: “The Convention is considered “entirely self-executive and does not require any implementing or complementing legislation.” S. Exec. Rep. No. 91-9, at 5 (1969) (Appendix). Professor Weisburd has argued that the Senate has not acquiesced in the President’s action here because it envisioned that ICJ judgments would only be executed by the U.N. Security Council. \textit{See} A. Mark Weisburd, \textit{International Judicial Decisions, Domestic Courts and the Foreign Affairs Power}, 2005 CATO SUP. CT. REV. 287. Professor Weisburd reads too much into the
ratification. Therefore, there was no need for the President to secure a second international agreement with Mexico when implementing the United States’ obligations pursuant to the Vienna Convention. The United States had a legally binding agreement with Mexico pursuant to the VCCR to provide consular notification to Mexican nationals when arrested or detained in the United States. When the United States breached that agreement, Mexico sued in the court having jurisdiction over the matter to obtain relief on behalf of its nationals and to secure better compliance with the agreement in the future. Requiring a new agreement with Mexico simply to ensure compliance with the Avena judgment would therefore be redundant.

The argument of the Amici States is also misplaced because AEDPA only applies to writs of habeas corpus filed in a federal court.\(^99\) The Medellin litigation arises out of a petition for certiorari filed with the U.S. Supreme Court to review a Texas state court decision, not a federal habeas petition.\(^100\) In addition, the Amici States’ argument also does not take into account the impact of the judgment of the ICJ in Avena. That judgment can be viewed as a more specific application of the law that came later in time than the enactment of AEDPA.\(^101\) Furthermore, there is no evidence that Congress

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\(^100\) Thus, Medellin is in a different procedural posture than the Breard case where this issue arose before. See Breard, 523 U.S. at 376.
\(^101\) In Whitney v. Robinson, 124 U.S. 190, 194 (1888), the U.S. Supreme Court developed what is known as the last-in-time rule: “By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the Supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.” Id. This doctrine was
intended to override the United State’s international legal obligations under the Vienna Convention when it enacted AEDPA. 102

Agreeing with the President that he is at the zenith of his power under Youngstown, however, does not completely answer the question of whether he can order the state courts to comply with the Avena judgment. When the foreign affairs powers of the different branches of federal government are combined, an action is only unconstitutional if the federal government “as an undivided whole lacks power.” 103 But determining that the federal government as a whole has the power to take an action does not tell us whether the Executive is the proper branch of government to perform that action.

Given the U.S. Supreme Court’s role in ensuring that state courts comply with federal law, including treaty law, under the Supremacy Clause, it is the U.S. Supreme Court that should ultimately order the state courts to comply with the international obligations of the United States, not the President. 104 As explained in the next section, the President’s views are entitled to great weight. In fact, they should carry even greater

devolved on the theory that Congress generally would not want to violate the United State’s international obligations by its legislative actions. Even though the ICJ judgment is not a treaty, it is issued pursuant to a duly ratified treaty and the courts should apply the same reasoning to reconcile any potential inconsistencies between AEDPA and the United States’ international obligations arising from the Vienna Convention.


103 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).

104 Courts must follow self-executing treaty law, as well as treaty obligations that have been implemented by way of federal statutes pursuant to the Supremacy Clause. However, even provisions of U.S. treaties that are not directly enforceable in U.S. courts should still inform the court’s interpretation of domestic law in order to avoid conflict between U.S. domestic law and U.S. international legal obligations. See Cindy G. Buys, Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation, 21 B.Y.U. J. PUB. L. 1, 51 (2007).
weight in this case because he is acting in accordance with Congressional will in carrying
out the United States’ obligations under the VCCR. Moreover, the Executive Branch is
the entity charged with executing virtually all diplomatic and consular functions,
including protecting Americans overseas. However, that does not give the President the
power to order a state court to re-open a judgment in a specific case. Accordingly, the
next section of the article addresses the proper balance between the executive and judicial
branches in this regard in more detail.

2. The Proper Role of the Federal Courts in the Implementation of
the International Obligations of the United States

The Executive Branch’s position infringes on the power and duty of the Judicial
Branch to say what the law is. Traditionally, cases involving individual rights are
uniquely within the judicial competence. The U.S. Supreme court has long viewed
itself as a protector of individual rights. As the Supreme Court stated in Sanchez-
Llamas, another case involving consular notification rights under the VCCR:

If treaties are to be given effect as federal law under our legal system,
determining their meaning as a matter of federal law ‘is emphatically the
province and duty of the judicial department,’ headed by the ‘one supreme
Court’ established by the Constitution.

105 The President has asserted that his Memorandum sets forth a binding federal rule that state courts must
follow. Brief of the U.S., supra note 44, at *20. However, the Presidential Memorandum is not a
prospective federal rule of general application that preempts a specific state legislative act. Rather, it only
applies to the cases that were part of the Avena litigation and is directed to judicial acts by state officials
rather than legislative acts. In part because the executive action here attempts to override state court
judgments rather than state legislation, this case is distinguishable from previous cases such as Crosby and
Garamendi.

106 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

107 In Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), Chief Justice Marshall wrote that the courts were
established “to decide on human rights.” Id. at 133. Thus, the courts may view their role particularly
strongly when life and liberty interests are at stake, as in Medellin.

108 Rebecca E. Zietlow, Juriscentrism and the Original Meaning of Section Five, 13 TEMP. POL. & CIV.

109 Sanchez-Llamas, 126 S. Ct. at 2684 (citing Marbury, 5 U.S. at 177). See also Charlton v. Kelly, 229
U.S. 447, 468 (1913) (The views of the Executive Branch are “not conclusive upon a court called upon to
construe a treaty in a manner involving personal rights.”).
The Supreme Court’s ultimate role in treaty interpretation was also confirmed in the recent *Hamdan v. Rumsfeld*110 case where the Court rejected the Executive Branch’s interpretation of Common Article 3 of the 1949 Geneva Conventions.111 Thus, it is not the role of the president alone to determine the meaning and effect of a federal treaty obligation in a particular case or controversy under Article III of the Constitution, but rather the job of the U.S. Supreme Court, while according proper deference to the views of the Executive Branch.

And while the President is correct that he has some discretion in choosing how to implement the United States’ legal obligations, he has no constitutional right to ignore a valid legal obligation of the United States all together.112 In making such sweeping assertions of unilateral executive power regarding implementation of international judgments, the President seems to be saying that not only is he responsible for executing the law, but he also has the discretion to choose which laws to execute.113 This assertion

112 Of course, the President is not ignoring the United States’ international obligations with respect to the *Avena* defendants, but his broad assertion of executive power would leave him with the ability to act differently in the future. In this regard, the President claims that he should have the power to decide whether to comply with a decision of the ICJ at all as the President did in the *Nicaragua* case. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 70 (Nov. 26). However, *Nicaragua* can be distinguished because there were not individual rights or state court proceedings at issue there. As Professor Damrosch has argued, *Nicaragua* is not applicable because the ICJ judgment was not based on a self-executing treaty and addressed itself to political action rather than judicial action. See Bradley, Damrosch & Flaherty, supra note 48, at 677-78.
113 The Bush Administration has taken a similar position in its expanded use of Presidential Signing Statements, but these actions have been highly controversial as well. In 2006, an American Bar Association Task Force issued a recommendation condemning the issuance of signing statements that claim the authority to disregard all or a portion of duly enacted federal laws. See American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Recommendation (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.
would seem to run contrary to his duty to faithfully execute the laws.\textsuperscript{114} And under international law, the United States has a duty to carry out its treaty obligations in good faith.\textsuperscript{115}

Accordingly, the U.S. Supreme Court acted appropriately in 2005 when it sent the \textit{Medellin} case back to state court following the ICJ’s decision in \textit{Avena} and the issuance of the Presidential Memorandum. That action allowed the Texas state courts a chance to review and reconsider the matter in light of the United States’ treaty obligations under the VCCR. Unfortunately, the Texas Court of Criminal Appeals did not appropriately apply U.S. federal law. As envisioned by Article III of the Constitution, however, the Supreme Court retains the power to supervise state courts as to matters of federal law such as treaties. This course is being followed here as the U.S. Supreme Court accepted certiorari in the \textit{Medellin} case again in April 2007.\textsuperscript{116}

For the reasons discussed above, the U.S. Supreme Court should not treat President Bush’s Memorandum as determinative of Medellin’s case.\textsuperscript{117} Rather, the Court should treat the Presidential Memorandum as a statement of interest and accord the usual deference that is normally due the Executive Branch in matters involving foreign affairs.\textsuperscript{118} In determining whether to defer to the Executive Branch’s assertions of power

\textsuperscript{114} In this regard, it may be argued that the President is asserting a power similar to prosecutorial discretion. However, this situation is distinguishable because the President is asserting such a broad claim of authority, it appears he is claiming the power to determine whether to enforce valid treaty law at all, not which cases to pursue by allocating limited resources.

\textsuperscript{115} The international law principle of \textit{pacta sunt servanda} holds that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” VCLT, \textit{supra} note 100, art. 26.


\textsuperscript{117} Likewise, as the U.S. Supreme Court held in \textit{Sanchez-Llamas}, the ICJ’s decision in \textit{Avena} should not be treated as binding legal authority. \textit{See Sanchez-Llamas}, 126 S. Ct. at 2684. However, as discussed in more detail below, it certainly is entitled to “respectful consideration.” \textit{Id.} at 2685.

\textsuperscript{118} The federal government frequently files “statements of interest” in cases involving foreign affairs. \textit{See}, \textit{e.g.}, Sarei v. Rio Tinto, 487 F.3d. 1193, 1098-99 (9th Cir. 2006); Rozenkier v. AG Schering; Bayer AG, 196 Fed. Appx. 93, 96 (3rd Cir. 2006). With respect to the courts’ treatment of these statements of interest, the Supreme Court has stated that when “the State Department choose[s] to express its opinion on the
over foreign affairs in past cases, U.S. courts have taken into account factors such as the
federal government’s need to speak with one voice, the president’s need for flexibility in
dealing with other nations, the president’s access to confidential sources of information,
and his need for secrecy in foreign negotiations. In Medellin, the President has
asserted an interest in protecting Americans abroad and upholding the United States’
international legal obligations, in order to maintain better foreign relations. As a practical
matter, deferring to the Executive Branch may lead to the same result as treating the
Presidential Memorandum as determinative. However, giving the courts the option of not
following the Executive’s lead in the rare case where that is the appropriate decision,
such as when the President acts contrary to the express or implied will of Congress,
maintains judicial independence and avoids the appearance of political interference in the
adjudication of particular cases. Allowing independent evaluation by the judiciary also is
likely to lead to more uniformity in the treatment of those cases due to our common law

impressions of exercising jurisdiction over particular petitioners in connection with their alleged conduct,
that opinion might well be entitled to deference as the considered judgment of the Executive on a particular
See also Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (“Although not conclusive,
the meaning attributed to treaty provisions by the government agencies charged with their negotiation and
a strong argument that federal courts should give serious weight to the Executive Branch’s view of the
case’s impact on foreign policy.”). Professor Robert Chesney’s recent article suggests a nuanced approach
to judicial deference to Executive Branch views in the context of treaty interpretation which still preserves
a significant role for the courts. Robert Chesney, Disaggregating Deference: The Judicial Power and
Executive Treaty Interpretations, 92 IOWA L. REV. 1723, 1771-73 (2007). See also Sloss, supra note 36 at
23.

119 See, e.g., Japan Line Ltd. v. Co. of Los Angeles, 441 U.S. 434, 449 (1979) (“the Federal Government
must speak with one voice when regulating commercial relations with foreign governments.”); Crosby, 530
U.S. at 380 (the President has “intended authority to speak for the United States among the world’s
nations”); United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936) (“[The President], not Congress, has
the better opportunity of knowing the conditions which prevail in foreign countries, and especially this is
true in time of war. He has confidential sources of information.”).

120 This situation occurred in Barclay’s Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994), wherein the
Supreme Court upheld California’s worldwide combined reporting requirement for calculating corporate
franchise taxes despite Executive Branch pronouncements opposed to worldwide combined reporting. The
Court rejected the Executive Branch position in part because it held that Congress had the primary role with
respect to regulating foreign commerce and Congress had indicated a willingness to tolerate states’
worldwide combined reporting mandates. Id. at 327-29.
system of following precedent and rules of stare decisis rather than relying on ever-shifting political winds.\textsuperscript{121}

Moreover, it is appropriate for the courts to provide a remedy where there is a breach of an obligation. Since \textit{Marbury v. Madison},\textsuperscript{122} it has been accepted that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. Blackstone states . . . “that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right.”\textsuperscript{123}

The principle that a violation of an obligation gives rise to a corresponding duty to provide a remedy holds true in international law as well.\textsuperscript{124}

In this regard, the VCCR itself states that: “The rights referred to in paragraph 1 of this Article [36] shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”\textsuperscript{125} Accordingly, proper implementation of Article 36 of the VCCR requires that the rights created thereunder must be given “full effect” by the courts. Thus far in addressing remedies under the VCCR, the Supreme Court has stated that

\textsuperscript{121} \textit{Sanchez-Llamas}, 126 S. Ct. at 2700 (Breyer, J., dissenting) (“[U]niformity is an important goal of treaty interpretation.”).
\textsuperscript{122} 5 U.S. (Cranch) 137 (1803).
\textsuperscript{123} Id. at 163. Professor David Sloss would call this a “transnationalist” model of treaty enforcement. See Sloss, \textit{supra} note 36 at 23-24.
\textsuperscript{124} The Rainbow Warrior Case (N.Z. v. France), 20 R. Int’l Arb. Awards 215, 251 (1990) (“any violation by a State of any obligation of whatever origin gives rise to State responsibility and consequently, the duty to make reparation.”); The Diplomatic and Consular Staff Case (U.S. v. Iran), 1980 I.C.J. 3, 41-42 (“Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions . . . and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequence of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States.”).
\textsuperscript{125} VCCR, \textit{supra} note 6, art. 36(2).
suppression of evidence is not an appropriate remedy, but has not yet provided guidance as to what would be an appropriate remedy to give Article 36 rights the “full effect” to which they are entitled.\textsuperscript{126}

In the case of Medellin and the other Mexican nationals involved in the \textit{Avena} litigation, the best course of action would be for the U.S. Supreme Court and the state courts to accord deference both to the ICJ’s judgment and to the President’s determination that it is in the best interest of the United States to comply with that international obligation by providing review and reconsideration.\textsuperscript{127}

Deference is owed to the ICJ’s interpretation of the VCCR because the United States agreed at the relevant time that the ICJ was the appropriate body to resolve disputes under the Convention. The United States also undertook an obligation when it ratified the U.N. Charter to comply with judgments of the ICJ. Thus, according deference to the ICJ’s judgment furthers the political will of the elected branches who are responsible for ratification of the U.N. Charter, the VCCR and the Optional Protocol. Furthermore, U.S. tribunals have long recognized and enforced judgments of foreign tribunals based on principles of international comity.\textsuperscript{128}

\begin{footnotes}
\item[126] \textit{Sanchez-Llamas}, 126 S. Ct. at 2681 (“Suppression would be a vastly disproportionate remedy for an Article 36 violation.”)
\item[127] In \textit{Sanchez-Llamas}, 126 S. Ct. at 2685, the U.S. Supreme Court simultaneously recognized its primary role in treaty interpretation, while also recognizing the deference due the Executive Branch where it stated: “[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight” (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).
\item[128] Most courts in the United States follow the common law rules for recognition and enforcement of foreign judgments as a matter of international comity set forth by the U.S. Supreme Court in \textit{Hilton v. Guyot}, 159 U.S. 113 (1895). While recognizing foreign judgments as a matter of comity was originally done out of respect for equal sovereign nations and the hope that foreign tribunals would, in turn, recognize judgments of U.S. courts, the same respect would seem to be due to the judgment of an international tribunal to which the United States has expressly given jurisdiction to resolve a treaty dispute. President Bush’s Memorandum specifically relied on “general principles of comity” as a basis for giving effect to the decision of the ICJ in \textit{Avena}.
\end{footnotes}
Deference is owed to the President’s determination because, as the Chief Executive charged with managing the United States’ foreign relations, the President has the best and most complete information with which to make a determination that compliance with the VCCR and the ICJ’s interpretation thereof will serve U.S. interests. Millions of U.S. citizens travel abroad every year and rely upon their right to contact the U.S. consulate if they should be arrested or detained by foreign authorities.\footnote{Approximately 6,000 Americans are arrested or detained abroad each year. Kevin Herbert, “Threat to Citizens Overseas,” \textit{in THE TERRORIST THREAT TO AMERICAN PRESENCE ABROAD: A REPORT OF A CONSULTATION OF THE CRITICAL INCIDENT ANALYSIS GROUP AND THE INSTITUTE FOR GLOBAL POLICY RESEARCH} 17 (1999), available at http://www.healthsystem.virginia.edu/internet/ciag/publications/report_terrorist_threat_abroad_c1999.pdf.} Making that right meaningful for foreign nationals visiting the United States will help ensure that the rights of U.S. citizens traveling abroad are respected. Thus, the U.S. Supreme Court should order the Texas court\footnote{In reconsidering its earlier decision that neither the ICJ’s judgment in \textit{Avena} nor the Presidential Memorandum constitute a new factual or legal basis within the meaning of the Texas Code of Criminal Procedure, the Texas court could find that the U.S. Supreme Court’s ruling now provides the necessary new legal basis for considering Medellin’s habeas application.} to provide review and reconsideration with a view to determining whether actual prejudice resulted from the lack of consular notification.\footnote{To date, neither the ICJ nor the U.S. courts have provided a definitive answer as to the standard of review for violations of Article 36(1)(b) of the VCCR. In \textit{Breard v. Greene}, 523 U.S. 371 (1998), the U.S. Supreme Court stated in dictum that, “it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.” However, the Court did not specify whether the defendant must show that consular assistance would have resulted in an acquittal or whether some other effect on the trial would be sufficient, nor did the Court specify which party would shoulder the burden of proof. See John Quigley, \textit{Application of Consular Rights to Foreign Nationals: Standard for Reversal of a Criminal Conviction}, 11 ILSA J. INT’L & COMP. L 403, 409-10 (2005). Likewise, the ICJ decision in \textit{Avena} requesting that U.S. courts provide “review and reconsideration” to determine whether the lack of consular notification caused “actual prejudice” also does not specify what would constitute actual prejudice, or which party would bear the burden of proof. In performing this review and reconsideration, U.S. courts could borrow the notion of prejudice from the Sixth Amendment context involving ineffective assistance of counsel to determine whether any of these defendants actually suffered any prejudice as a result of not being informed of their consular notification rights. U.S. CONST. amend. VI. Borrowing from Sixth Amendment jurisprudence is appropriate because the underlying concerns are the same. Both the rule requiring access to counsel for criminal defendants and the consular notification rule are concerned with protecting the rights of persons who are likely to be unfamiliar with the U.S. legal system and who may lack the resources, financial and otherwise, to obtain competent assistance, including competent legal counsel, on their own. See Powell v. Alabama, 287 U.S. 45, 71 (1932) (Factors the Court found relevant to the need for access to counsel to ensure due process included “the ignorance and illiteracy of the defendants, . . . the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly
The Supreme Court should do so not because the courts are bound by the Presidential Memorandum, but because it is the proper result, for both legal and policy reasons.\footnote{132}

Preserving the proper roles of each branch of the federal government is important to the correct functioning of our democratic republic. It ensures that the courts can continue to provide their check and balance function in the federal system. As Justice Frankfurter wrote in his concurring opinion in \textit{Youngstown}: “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”\footnote{133}

\textbf{B. Federalism Concerns}

Federalism refers to the allocation of power between the national and state governments.\footnote{134} When the U.S. Constitution was created, it did not produce “[a]n entire consolidation of the States into one complete national sovereignty.”\footnote{135} Instead, pursuant

\footnote{132} As a practical matter, such review and consideration might not lead to any change in Medellin’s conviction or sentencing because he is unlikely to be able to demonstrate actual prejudice. The trial court made findings that Medellin lived most of his life in the United States; that he speaks, reads and writes the English language; that he attended Houston public schools beginning with elementary school; and that he has been employed in the United States. \textit{See Ex parte Jose Ernesto Medellin, No. 675430-A (Tex. 339th Dist. Ct. Jan. 22, 2001) in} Brief for Respondent at app. 51, Medellin v. Texas, No. 06-984 (U.S. filed Aug. 23, 2007), 2007 U.S. S. Ct. Briefs LEXIS 628. The Court further found that it was reasonable to infer that Medellin was familiar with the laws and procedures of the U.S. criminal justice system based on his prior criminal history. \textit{See id. at} app. 52. Consular notification can make a difference in some cases, however. For example, in \textit{Valdez v. State}, 46 P.3d 704 (2002), Mexican authorities unearthed evidence that had not been discovered by counsel that the defendant suffered from severe organic brain damage. This evidence led the Oklahoma Court of Criminal Appeals to order that Valdez’s capital sentence be reconsidered.\footnote{133} \textit{Youngstown}, 343 U.S. at 594.

\footnote{134} \textit{See} Redlich, Attanasio & Goldstein, \textit{UNDERSTANDING CONSTITUTIONAL LAW}, \textit{supra} note 85, at 6, 151.

\footnote{135} \textit{The Federalist No. 32}, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
to the Tenth Amendment, states retained the powers that were not expressly given to the federal government. 136

The Presidential Memorandum ordering state courts to provide review and reconsideration for the Avena defendants violates principles of federalism. Under the U.S. federal system, U.S. presidents generally do not have the power to unilaterally order state courts to take a specific action. There is nothing in Article II of the Constitution setting forth the executive powers that would suggest otherwise.

Four states were sufficiently alarmed at the sweeping assertion of federal authority claimed by the Executive Branch in Medellin that they filed an *amici curiae* brief in support of the State of Texas, arguing that the Presidential Memorandum:

is best read as a request to the state courts ‘to give effect’ to the International Court of Justice’s Avena decision to the extent that state law permits them to do so – not as an order that preempts state rules of procedural default and requires state courts to exercise jurisdiction over successive habeas corpus petitions that state law does not confer. 137

The *Amici* States’ Brief further argued that to read the Presidential Memorandum as a mandatory order would make that order unconstitutional. 138

These *Amici* States are correct that the President does not have the power to unilaterally issue orders to state courts under these circumstances. 139 Allowing the

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136 The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
137 States’ Brief, *supra* note 93, at *2-3.
138 *Id.* at *3.
139 *Id.* The States’ Brief also argued that if the President’s Memorandum is construed as an order directing the state courts to take action, this construction would violate the anti-commandeering principles set forth in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). *Id.* at *4. However, both those cases may be distinguished on the ground that they involved Congress using its commerce power to commandeering state legislative processes and state executive officers, not state courts. Pursuant to the Supremacy Clause, state courts are bound to properly implement federal law, including treaties. U.S. CONST. art. VI. In addition, the U.S. Supreme Court has suggested in cases such as *Missouri v. Holland*, 252 U.S. 416 (1920), that the treaty power may be broader than Congress’s commerce clause
President this sort of authority would violate the powers reserved to the states to create and implement their own legislative and judicial systems under the Tenth Amendment to the Constitution.\textsuperscript{140} While Congress may create laws that preempt state law, and the President and the legislative branches may together create and implement federal law, including treaty law, that is supreme over state law, the President does not have the authority to unilaterally order state courts to take specific actions in pending cases.\textsuperscript{141}

Even in the area of foreign affairs, where federal courts have granted the president an exceptional amount of latitude, the courts usually have still required that the president have at least Congressional acquiescence, if not express approval, before upholding a president’s actions.\textsuperscript{142} In addition, the President generally has not directly ordered a branch of state government to take or not take an action with respect to cases involving power. Thus, ordering state courts to apply federal treaty law does not violate anti-commandeering principles.\textsuperscript{146}

\textsuperscript{140} U.S. CONST. amend. X. Allowing the President to act alone also would undermine the states’ ability to influence Congress to create different legislative outcomes. See Brannon P. Denning & Michael D. Ramsey, \textit{American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs}, 46 WM. & MARY L. REV. 825, 939-40 (2004).

\textsuperscript{141} Were the Presidential Memorandum directed to federal rather than state courts, it is likely it would be unconstitutional on separation of powers grounds. The Supreme Court has been very protective of its prerogative to say what the law is when Congress has tried to interfere in cases through the use of its control over the courts’ jurisdiction. See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (Supreme Court struck down federal law purporting to reopen final judgments of federal courts and extend the applicable statute of limitations). Given that the President has even less constitutional basis for interfering with the courts than Congress given Congress’ Article III power to control the jurisdiction of the courts, it is extremely doubtful the President could order the federal courts to take specific actions in particular cases.

\textsuperscript{142} For example, in \textit{Dames & Moore}, 453 U.S. at 654, the U.S. Supreme Court’s determination that Congress had acquiesced in most of the President’s actions by providing the President with certain statutory authority was crucial to the Court’s decision upholding the Executive Agreement with Iran and resulting Executive Orders and administrative regulations. See also A. Mark Weisburd, \textit{International Judicial Decisions, Domestic Courts and the Foreign Affairs Power}, 2005 CATO SUP. CT. REV. 287 (“the Court, especially in \textit{Dames & Moore} and \textit{Garamendi}, emphasized the long history of congressional acquiescence in, or indeed active facilitation of, the exercise of presidential authority regarding international claims settlements”). And in those cases where the President acted without express Congressional authorization, such as in \textit{Pink} and \textit{Belmont}, the Court stressed that the President was relying largely on his own express constitutional power to establish diplomatic relations with foreign governments. U.S. v. Pink, 315 U.S. 203 (1942); Belmont, 301 U.S. at 326.
life and liberty interests.Rather, past cases affording the President wide powers in the areas of foreign affairs usually have involved voluntary actions by various governmental actors, including state courts, to implement Executive Orders affecting settlements of monetary claims against foreign parties. And while the courts have generally complied with the President’s directives in those Executive Orders, the courts still performed an independent examination of the lawfulness of those orders to determine whether they were within the President’s power to issue. Accordingly, while the president has the right, and even the duty, to appear in a state court proceeding that implicates U.S. treaty obligations and other foreign relations matters to provide the state court with relevant information and the views of the federal government as to the impact of the state court’s actions on U.S. foreign relations, the president does not have the sole power to order the state courts to take any particular action.

IV. Ideas for Better Implementation of International Obligations in the Future

Abiding by its international obligations is important for the United States. It encourages other States to enter into mutual commitments with the United States by demonstrating that the United States is a trustworthy partner. It also demonstrates the

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143 Because Medellin is sentenced to death, he arguably has a much stronger interest at stake than a simple monetary claim. Accordingly, courts should perform their guardian role with respect to the protection of individual rights and closely review any assertions of power by other branches of government that may impinge on life and liberty interests especially.

144 See, e.g., Dames & Moore, 453 U.S. at 667 (Supreme Court upheld Executive Agreement with Iran which nullified private parties’ attachments and liens on Iranian bank accounts in U.S.); Belmont, 301 U.S. at 326 (Supreme Court upheld Executive Agreement with Soviet Union which caused funds in private bank accounts nationalized by the Soviet government to be assigned to U.S. government despite contrary state policy). Garamendi also may be categorized with cases involving the president’s ability to settle monetary claims against foreign parties, even though the case for preemption of state law due to Executive Branch action was weaker in Garamendi because the relevant executive agreement did not expressly preempt the California law at issue and the position of Congress was ambivalent. See Denning & Ramsey, supra note 135, at 945-46. Medellin, by contrast, involves a claim against the United States seeking compliance with treaty obligations which implicate life and liberty interests. While the case for preemption of state law in Medellin is therefore stronger than in Garamendi, for the reasons argued herein, it should be the Supreme Court that makes the final decision regarding preemption, not the President.

145 See Dames & Moore, 453 U.S. at 680.
United States’ commitment to the rule of law as the United States tries to promote the rule of law in less stable countries around the globe. Finally, it encourages other States to abide by their own international obligations, ensuring that the United States receives the benefits of any reciprocal international commitments it has negotiated. With respect to the Vienna Convention in particular, abiding by the consular notification requirements helps to ensure that other States will provide consular notification to Americans who are arrested or detained while traveling abroad.

This discussion of how the United States should respond to a decision of the ICJ finding the U.S. in violation of its treaty obligations raises questions about how this matter could be better addressed in the future, not only in the context of violations of the VCCR, but also with respect to potential violations of other treaty obligations more generally. This last section sets forth some ideas regarding what the United States might do differently when joining or implementing treaty-based obligations to minimize these kinds of potential conflicts.

A. Give Meaning to “Respectful Consideration”

In both the Breard and Sanchez-Llamas decisions involving VCCR Article 36 claims, the U.S. Supreme Court stated that the ICJ’s decisions are entitled to “respectful consideration.”146 Unfortunately, however, this “respectful consideration” appeared to be more form than substance. In both cases, the Supreme Court went on to largely disregard the opinions of the ICJ, without fully engaging the various aspects of the ICJ’s reasoning.147 Truly treating the ICJ’s judgments with respectful consideration and only

146 Breard, 523 U.S. at 375; Sanchez-Llamas, 126 S. Ct. at 2685.
147 See Breard, 523 U.S. at 375-77; Sanchez-Llamas, 126 S. Ct. at 2685-86. In Sanchez-Llamas, the U.S. Supreme Court focused exclusively on the idea that state procedural rules should prevail over international obligations. Sanchez-Llamas, 126.S. Ct. at 2685-86. In doing so, the U.S. Supreme Court drew a
disregarding all or a portion of a judgment after carefully examining the reasoning of the ICJ and explaining why a different approach is required would have a number of positive benefits, including better uniformity of treaty interpretation and the improvement of U.S. foreign relations. In addition, it allows U.S. courts to retain their role both respect to treaty interpretation and also as a check on the other branches.

1. Why ICJ Judgments Are Entitled to Respectful Consideration

Respectful consideration for the ICJ’s judgments in cases like *Avena* is warranted for a number of reasons. First, the ICJ is composed of experts in international law from all over the world. They devote one hundred percent of their time and attention to resolving international law-related disputes. As a result, they are some of the world’s foremost experts in treaty interpretation. By contrast, the justices on the U.S. Supreme Court may have little or no formal training in international law. In addition, at most, the U.S. Supreme Court might hear a handful of treaty-related disputes in any given term. Thus, the justices on the U.S. Supreme Court have far less experience with treaty interpretation and resolving international law-related disputes more generally.

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148 According to the ICJ Statute: “The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.” ICJ Statute, *supra* note 28, art. 2.

149 According to research conducted by the author, the U.S. Supreme Court has not decided more than four cases involving the interpretation or application of international law in any given term during the last three terms of the Court (2004-07).
Accordingly, it makes sense for the U.S. Supreme Court justices to listen carefully to the ICJ judges who have far more experience with international law.  

Second, giving respectful consideration to the ICJ’s judgments with respect to treaty interpretation in particular would promote uniformity of treaty obligations, ensuring that treaty partners are held to the same standards.  

As discussed above, ensuring that treaty partners observe consular notification obligations under the Vienna Convention is especially important to protect Americans traveling abroad.  

Third, by joining Optional Protocol I to the Vienna Convention, the United States agreed that the ICJ would be proper forum to resolve disputes arising out of that Convention. Therefore, failing to give respectful consideration to the ICJ’s judgments relating to the Vienna Convention would actually frustrate the will of the political branches in this regard. It also would make it more difficult for the United States to insist on compliance with the ICJ’s judgment when the United States is on the winning side of the case in future disputes.  

2. How Should Respectful Consideration Be Handled?  

Giving respectful consideration to judgments of the ICJ could mean that courts in the United States begin with a presumption of proper treaty interpretation by the ICJ, particularly in cases where the United States has agreed that the ICJ should resolve disputes relating to that particular treaty.  

As Justice Breyer stated in Sanchez-Llamas, respectful consideration “reflects an understanding of the ICJ’s expertise in matters of treaty interpretation, a branch of international law.” Sanchez-Llamas, 126 S. Ct. at 2700 (Breyer, J., dissenting).  

As Justice Breyer also stated in Sanchez-Llamas, “respective consideration' reflects the understanding that uniformity is an important goal of treaty interpretation. Id.  

The United States is one of the most frequent litigants at the ICJ. See Williams, supra note 102, at 370.  

This presumption is somewhat akin to the Charming Betsy doctrine, pursuant to which the U.S. Supreme Court presumes that Congress does not intend to violate the United States’ international obligations and attempts to reconcile federal statutes with those obligations. See Murray v. Schooner Charming Betsy, 6
from or reject the reasoning and conclusions of the ICJ only after a careful examination of the detailed reasoning of the ICJ and an explanation as to why the U.S. Supreme Court believes the ICJ is in error. In performing this review, the U.S. Supreme Court should employ proper treaty interpretation rules as set forth in the Vienna Convention on the Law of Treaties to explain its reasoning.\textsuperscript{154}

Courts in Europe have struggled with this very same issue and have developed some approaches that the United States could borrow. \textsuperscript{155} National courts in European countries are often asked to implement treaty-based decisions of international bodies such as the European Court of Human Rights (ECHR). The analogy to the ECHR is particularly appropriate because, like the ICJ’s decision in \textit{Avena}, the ECHR’s jurisdiction to decide cases is treaty-based and its decisions deal with human rights issues. \textsuperscript{156} In addition, approximately half the States party to the European Convention on Human Rights do not give direct effect to the judgments of the ECHR in their domestic law.\textsuperscript{157}


legal systems and, thus, must grapple with how to implement those decisions in their domestic legal systems. Two European scholars summarize the situation as follows:

It is generally accepted that states are in principle free to choose the means which suit them best for ensuring effective employment of the rights and freedoms set forth in the Convention, be it incorporation or not. Like other rules of international law, the Convention requires that the parties guarantee a certain result – the conformity of their domestic law and practices with the conventional duties – but it leaves the manner in which this result is achieved to the discretion of the Parties.

Two examples of States Parties to the European Convention on Human Rights that do not allow for direct effect of treaty obligations are the United Kingdom and Germany. In determining how to reconcile national law with the Convention, both the United Kingdom, by statute, and Germany, by case law, require that national courts “take into account” decisions of the ECHR. In Germany, for example, the Federal Constitutional Court of Germany, the Bundesverfassungsgericht, developed the doctrine requiring German courts to “take into account” decisions of the ECHR in cases where Germany is party. According to the Bundesverfassungsgericht:

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157 See id. at 296-97; Blackburn & Polakiewicz, supra note 155, at 33.
158 Blackburn & Polakiewicz, supra note 155, at 33. The authors refer to the obligation to follow judgments of the ECHR as “obligations of result.” Id. at 57.
159 See Human Rights Act, 1998, c. 42, § 2(1) (Eng.). See also Blackburn & Polakiewicz, supra note 155, at 42, 935.
159a Blackburn & Polakiewicz, supra note 155, at 338-39.
160 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 14, 2004, 111 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 307 (F.R.G.) at para. 29 (hereinafter Görgülü), official English translation at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html (Görgülü involved a father’s claim of access to his child who was born outside of marriage and put up for adoption by the mother without the father’s consent). See also Carsten Hoppe, Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights, 18 EUR. J. INT’L L. 317, 326 (2007). Although Article 25 of the German Constitution, known as the Basic Law for the Federal Republic of Germany, expressly states that “international law shall be an integral part of federal law,” the Bundesverfassungsgericht has stated that international law is not directly applicable on the domestic level. See, e.g. Görgülü, at para 34. Rather, international law rules must be incorporated into domestic law by acts of the German parliament. Id.
161 International treaties such as the European Convention on Human Rights have the status of federal statutes and are not endowed with the status of constitutional law. See id. at para. 31, 34. Thus, the German legal system shares many similarities with the United States in its treatment of international law, making analogies between the two appropriate.
As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation according to the [European Human Rights] Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. ‘Take into account’ means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.”  

Thus, when confronted with a decision of the ECHR, German courts have a duty to examine that decision to ensure that it does not conflict with the constitutional law of Germany. Assuming that it does not, German courts then have a duty to interpret German law in harmony with the decision of the competent international tribunal.

Adopting a similar approach in the United States would preserve the primacy of U.S. constitutional law as well as a role for the U.S. courts in making factual determinations and interpreting U.S. laws, including treaty law, but would also accord the proper deference to the body with the greatest expertise in treaty interpretation.

### B. Provide clearer directions for implementation of treaty rights

Congress also could assist U.S. courts in the implementation of treaty obligations by spelling out a method of implementation when the U.S. joins a self-executing treaty or when enacting implementing legislation for a non-self-executing treaty, particularly one affecting individual rights. Rather than leaving interested parties and the courts to guess

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162 Görgülü, at para 62.
163 Id. See also Blackburn & Polakiewicz, supra note 155, at 43, 338-39.
164 Görgülü, at para. 48. Of particular relevance here, the Bundesverfassungsgericht recently held that a failure to provide consular notification under Article 36 of the VCCR violates the guarantee of a fair trial as provided for by the German Constitution. See Klaus Ferdinand Garditz, International Decisions, Case Nos. 2 BvR 2115/01, 2 BvR 2132/01, & 2 BvR 348/03 [Vienna Consular Relations Case], 101 Am. J. Int’l L. 627, 629, 632 (2007). In its judgment, the Bundesverfassungsgericht reasoned that international courts such as the ICJ or the ECHR should have a “guiding role” in interpretation of international law and that domestic courts should give priority to an international court’s interpretation of international law over other possible interpretations, somewhat similar to the United States’ Charming Betsy doctrine. See id.
as to who may sue under the treaty and in what forum, the treaty or its U.S. implementing legislation should spell out permissible plaintiffs, causes of action, and appropriate fora in which claims may be brought.\textsuperscript{165} Providing such direction would likely decrease litigation costs and court congestion by clarifying a number of legal issues.

In this regard, in recent years, the Senate has often added reservations, declarations and understandings (RUDs) to treaties. One common RUD the U.S. Senate has attached to its advice and consent to human rights treaties has been a declaration that the treaty or portions of the treaty are not self-executing.\textsuperscript{166} Many courts have treated such declarations as precluding individual claimants from bringing individual causes of action in U.S. courts.\textsuperscript{167} While some may disagree with this practice on a variety of grounds,\textsuperscript{168} it may at least clarify the extent to which rights are or are not created or enforceable by individuals pursuant to the treaty.

C. Establish Better Federal-State Consultation Processes

Third, the federal government also needs to do a better job of consulting states both before agreeing to new treaty obligations that affect matters traditionally regulated by


\textsuperscript{166} For example, when the U.S. Senate gave its advice and consent to the International Covenant on Civil and Political Rights, \textit{opened for signature} Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], it did so subject to a number of reservations, understandings, and declarations. Of relevance here, the Senate’s advice and consent was subject to the declaration that Articles 1 through 27 of the ICCPR are not self-executing. \textit{See} S. EXEC. DOC. NO. 95-2 (1992), 31 I.L.M. 648. Ironically, the United States did the opposite with respect to the VCCR, declaring it to be self-executing, thereby leaving open the question of the creation and enforcement of individual rights through U.S. courts under the VCCR. \textit{See} Statement of Deputy Legal Advisor J. Edward Lyerly, \textit{supra} note 98. As discussed in note 36 above, the U.S. circuit courts are presently split on this issue.

\textsuperscript{167} \textit{See, e.g.}, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001); Igartua De La Rosa v. United States, 32 F.3d 8, 10, n.1 (1st Cir. 1994).

\textsuperscript{168} For example, one wonders what international commitment the United States has made when it refuses to change any part of its domestic law to conform to its new international “obligations.” \textit{See also} Jordan J. Paust, \textit{INTERNATIONAL LAW AS LAW OF THE UNITED STATES} 363-73 (2d ed. 2003) (arguing that the partial non-self-executing declaration with respect to the ICCPR is unconstitutional).
states, as well as after a treaty is ratified at the implementation stage. Federal-state consultation can help educate state actors about the requirements of the treaty and the importance of the treaty to U.S. interests, thereby hopefully securing the cooperation of those state actors in implementation of treaty obligations, whether in response to decisions of international tribunals or otherwise.  

Post-enactment federal-state consultation is explicitly provided for in some trade treaties, such as the World Trade Organization (WTO)\textsuperscript{170} and the North American Free Trade Agreement (NAFTA).\textsuperscript{171} Pursuant to both of these treaties, the President is instructed to consult with the states for the purposes of achieving conformity of state laws and practices with the relevant treaties. To this end, intergovernmental policy boards on trade are established. Federal-state consultation is designed to help identify state laws that may be inconsistent with a treaty provision, inform states of treaty developments that may have a direct impact on states, and provide states with an opportunity to submit information and advice to the federal government with respect to those matters.\textsuperscript{172}

\textsuperscript{169} The U.S. Department of State has developed educational materials for law enforcement officers with respect to the consular notification requirements of the Vienna Convention. These materials are available on the State Department’s website at \url{http://travel.state.gov/law/consular/consular_753.html}. However, given the ongoing litigation regarding continued lack of consular notification, more educational outreach needs to be done.

\textsuperscript{170} 19 U.S.C. § 3512(b) (2000).

\textsuperscript{171} 19 U.S.C. § 3312(b) (2000).

\textsuperscript{172} Of course, federal-state consultation will not resolve every problem as is illustrated by the recent WTO dispute between the United States and Antigua and Barbuda with respect to online gambling. Appellate Body Report, \textit{Measures Affecting the Cross-Border Supply of Gambling and Betting Services}, WT/DS285/AB/R (Apr. 7, 2005). In that case, Antigua and Barbuda challenged U.S. state and federal laws that allegedly made it unlawful for persons outside the United States to supply gambling and betting services to consumers in the United States as being inconsistent with the United States’ obligations under the WTO. \textit{Id.} at para. 1, p. 1. The WTO Appellate Body found that the United States’ prohibition on Internet gambling violated its market access commitments under the General Agreement on Trade in Services (GATS). \textit{See id.} at para 373(C), p. 123-24. However, the WTO Appellate Body also determined that most of the federal laws prohibiting such gambling were justified by the “public morals” exception to the trade rules. \textit{See id.} at para 373(D), p. 124-25. Largely for procedural reasons, the Appellate Body decided that it did not need to address many of the challenged state laws, thereby leaving an open question as to whether some state laws with respect to gambling are WTO inconsistent. \textit{See id.} at para 373(A) and (C), p. 123-24. Perhaps partly as a result of concern regarding the status of these states’ laws, the Office of
Federal-state consultations also occur when certain disputes are submitted to the WTO dispute settlement process. When a WTO member claims that a particular state’s law is inconsistent with the United States’ WTO obligations, and that WTO member requests consultations with the United States under the WTO Dispute Settlement Understanding (DSU), the Uruguay Round Agreements Act (URAA)\(^{173}\) provides that the U.S. Trade Representative (USTR) shall notify the Governor of the state in question and shall consult with representatives of the state concerning the matter.\(^{174}\) The USTR also is charged with ensuring that the state concerned is involved at each stage in the consultations and any dispute settlement proceedings.\(^{175}\) If the WTO Appellate Body finds that the law of the state is inconsistent with any of the WTO Agreements, the USTR is to consult with the state to develop a mutually agreeable response.\(^{176}\)

If a mutually agreeable solution cannot be reached, the URAA gives the federal government the exclusive power to bring an action against a state to have the inconsistent state law declared invalid.\(^{177}\) Before doing so, the USTR must provide a report to the Committee on Ways and Means of the House of Representatives and the Committee on

\(^{173}\) The URAA is the implementing legislation for the WTO agreements.


\(^{175}\) See id.

\(^{176}\) See id.

\(^{177}\) See id. at § 3512(b)(2). This provision is an example of implementing legislation that clarifies the appropriate party to bring suit to enforce a treaty obligation.
Finance of the Senate describing the proposed action and the efforts to resolve the matter with the state.\textsuperscript{178}

Nothing in the WTO Agreements, including the DSU, requires that the United States change its laws to comply with a ruling by the DSB finding the United States in violation of its WTO obligations.\textsuperscript{179} However, if Congress decides not to comply, the United States potentially becomes subject to trade sanctions by the aggrieved WTO member.\textsuperscript{180} This model preserves the sovereignty of the United States to decide whether and how it wishes to implement its international obligations in its domestic system, while at the same time assuring our trade partners that they will receive some form of benefit from the commitments made in the trade agreement – either the original trade liberalizing agreement or substitute trade concessions.\textsuperscript{181}

Admittedly, there are many differences between trade treaties and treaties protecting individual rights (although trade treaties are increasingly incorporating human right issues, particular workers’ rights).\textsuperscript{182} However, lessons may still be learned. Under the WTO model, while the Executive Branch occupies the primary role in deciding what the

\textsuperscript{178} See id. The process is somewhat similar, though not identical, when the claim is that a federal law of the United States is WTO inconsistent.


\textsuperscript{180} Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 22, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The effectiveness of any trade sanctions may depend in part on the amount of trading the United States does with the aggrieved party.

\textsuperscript{181} To the extent that the United States does experiment with more enforcement mechanisms via treaties, such action may raise the transaction costs of joining treaties by limiting the United States’ freedom of action, thereby potentially discouraging the United States from becoming a party to more treaties.

\textsuperscript{182} United States-Peru Trade Promotion Agreement, U.S.-Peru, ch. 17, Apr. 12, 2006, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; United States-Colombia Trade Promotion Agreement, U.S.-Colom., ch. 17, Nov. 22, 2006, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html. Chapter 17 of each of these trade agreements contains a series of shared commitments with respect to labor rights such as freedom of association, effective recognition of the right to collective bargaining, and elimination of forced labor and child labor, among others.
U.S. response should be to an adverse ruling adopted by the WTO DSB, Congress still maintains a prominent role. If the WTO model of both congressional-executive and federal-state consultation is adopted for other treaties, this model would preserve a greater role for Congress as most representative branch in the implementation of the United States’ international obligations and provide some check on Executive discretion by Congress and the states.

With respect courts acting as a check on the other branches, experience with WTO model suggests that courts tend to side with executive interpretation of treaties even if opposed to an interpretation adopted by the competent international tribunal.\textsuperscript{183} Historically, both in the trade context and elsewhere, U.S. courts have not acted as much of a check on the other branches in the area of foreign affairs. If this scenario spilled over into the context of implementing human rights treaties, it would undermine the courts’ role as guardians of individual rights. Given that treaties represent obligations that are mutually agreed upon by many countries, U.S. courts have an obligation to respectfully consider (although not necessarily to follow) the approaches of other courts, both foreign and international, to treaty interpretation in an effort to secure as much uniformity in treaty application throughout the world as possible.\textsuperscript{184} As discussed above,

\textsuperscript{183} See Barcelo, \textit{supra} note 177, at 157-63. With respect to cases interpreting the URRAA implementing the WTO Agreements, this phenomenon is at least in part due to the application of the \textit{Chevron} doctrine, pursuant to which the courts defer to reasonable interpretations of ambiguous statutory terms by the expert agencies charged with administering the statute. \textit{See id.}, at 154-55, citing \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984); \textit{see also} Jane A. Restani & Ira Bloom, \textit{Interpreting International Trade Statutes: Is the Charming Betsy Sinking?}, 24 \textit{FORDHAM INT’L L.J.} 1533 (2001). In the context of individual rights, there is often no federal statute at issue. Therefore, the \textit{Chevron} doctrine may not be applicable and courts may be more willing to assert their traditional roles as protectors of human rights and be somewhat less deferential to the Executive Branch. For example, in the recent \textit{Hamdan} case, the U.S. Supreme Court was less deferential to the Executive Branch interpretation of the Geneva Conventions for the protection of prisoners of war and civilians. \textit{See Hamdan}, 126 S. Ct. at 2764.

European courts have much experience with this issue and have had to engage in more inter-court dialogues regarding the meaning of European treaties, such as the European Convention on the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{185}

No matter what model is adopted, the United States can do better. As issues that were traditionally thought to be governed by international, federal or state laws respectively become increasingly intertwined, it is imperative that the federal government do more to notify states about areas of potential conflict between state laws and international law that has become or is about to become part of U.S. federal law. Failure to do so is likely to lead to more conflict both between states and the federal government and between the United States and the rest of the international community. At present, most treaties to which the United States is a party and any accompanying implementing legislation are silent as to federal-state consultation. Even where such consultation is required, it may only be required post-ratification, as with the URAA which implements the WTO agreements. Consultation with affected states and education of those states’ representatives about the importance of the treaty to U.S. interests from the start of treaty negotiations is likely to go a long way toward increasing state compliance with any treaty obligations subsequently undertaken.

V. \textbf{Conclusion}

Given current trends, it appears highly likely that the United States and its citizens will be interacting more and more with other actors from around the world. As this trend towards globalization continues, the United States will increasingly be forced to

determine how it will comply with various international obligations in may undertake to facilitate international trade and travel and other relations. How it chooses to do so has significant consequences. The structure of the United States government, both with respect to relations between the three branches of federal government and between the federal government and the state governments, was purposefully designed to prevent the accumulation of power in order to avoid tyranny. If the United States wishes to ensure positive foreign relations, the promotion of the rule of law, and the proper functioning of the government, it must implement its international obligations in a manner that is consistent with this structural design. Hopefully, this article has provided some useful guidance and ideas to assist in that endeavor.