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# International Judicial Decisions, Domestic Courts, and the Foreign Affairs Power

A. Mark Weisburd\*

## I. Introduction

On December 10, 2004, the United States Supreme Court granted certiorari in *Medillin v. Dretke*.<sup>1</sup> The Court granted certiorari to address two questions: whether American courts were bound by the treaty interpretation in the judgment of the International Court of Justice (ICJ) in the *Case Concerning Avena and Other Mexican Nationals*<sup>2</sup> (*Avena*) and, if not, whether American courts in any event should defer to the ICJ's treaty interpretation as a matter of comity and in the interest of uniformity.<sup>3</sup> On February 28, 2005, however, the president issued a surprise memorandum order directing state courts to give effect to the ICJ's *Avena* judgment. On May 23, 2005, the Court dismissed the *Medellin* writ of certiorari as improvidently granted,<sup>4</sup> explaining that its action was prompted by certain procedural problems with the case unrelated to treaty interpretation.<sup>5</sup> Subsequently, Jose Ernesto Medellin, the petitioner, has pursued a petition for habeas corpus in state court, relying both on the judgment of the ICJ in *Avena* and on President Bush's February memorandum directing state courts to give effect to *Avena*.<sup>6</sup>

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<sup>1</sup>125 S. Ct. 2088 (2005).

<sup>2</sup>(*Mex. v. U.S.*), 43 I.L.M. 581 (2004) [hereinafter *Avena*].

<sup>3</sup>*Medellin*, 125 S. Ct. at 2089.

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

<sup>5</sup>*Id.* at 2089–92 (noting the possibility that subsequent proceedings in the matter would resolve the case or, at least, be reviewable in the Supreme Court).

<sup>6</sup>*Id.* at 2090.

*Medellin* therefore has raised, without resolving, a particularly interesting question: whether the president, acting unilaterally pursuant to his foreign affairs power, can order states to alter their judicial procedures. The issue, while avoided by the justices this time, may well return to the Supreme Court, as the losing party at the state level may be unwilling to acquiesce in its loss.

If the Court has to revisit the case, it will face three related issues. The first is whether the ICJ correctly interpreted the Vienna Convention on Consular Relations<sup>7</sup> (Consular Convention), the treaty at issue, in *Avena* and in the case on which *Avena* principally relied, the *LaGrand Case*<sup>8</sup> (*LaGrand*). The second issue relates to that on which certiorari was granted in *Medellin*: under relevant treaties, what degree of respect is the Supreme Court obliged to accord to the ICJ decisions in *Avena* and *LaGrand*? Finally, and most fundamentally, *Medellin*'s reliance on the president's memorandum in his state court habeas corpus action may give the Court an opportunity to consider whether the president's authority over foreign affairs extends to directing a state to reopen a case in which a final judgment has been rendered when the president believes that such an action would serve American foreign policy interests, even if that action is not clearly required by treaty. This issue is particularly interesting not only because it raises important questions about the president's foreign affairs power and federalism, but because the United States, in its amicus brief in *Medellin*, rightly took the position that the ICJ misinterpreted the Consular Convention and that American courts had, in any event, no obligation to defer to the ICJ's judgment.<sup>9</sup>

This article will first detail the facts in this matter, and then address each of the three key issues in turn.

## II. Facts

On June 24, 1993, Jose Ernesto Medellin participated with others in the rapes and murders of two teenage girls in Texas.<sup>10</sup> He was

<sup>7</sup> Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

<sup>8</sup> (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), 40 I.L.M. 1068 (2001) [hereinafter *LaGrand*].

<sup>9</sup> Brief for the United States as Amicus Curiae at 18–38, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) [hereinafter U.S. Amicus Brief].

<sup>10</sup> *Id.* at 3–4.

arrested for this crime on June 29, 1993. Medellín is a Mexican national and, upon his arrest and shortly thereafter, made statements to local authorities that should have alerted them to that fact. Nonetheless, he was not informed of his right to consult the Mexican consul, despite the obligation of American authorities to so inform him under Article 36(1)(b) of the Consular Convention,<sup>11</sup> to which both the United States and Mexico are parties. In the fall of 1994, he was convicted in Texas state court of the rapes and murders and sentenced to death; he did not raise the violation of his Consular Convention rights at trial and was therefore barred, under Texas law, from relying on any defense based on that violation in any future proceedings—a proscription known as the procedural default rule.<sup>12</sup> Medellín’s conviction and sentence were affirmed on appeal in March 1997. In April 1997, Mexican consular authorities first learned of these events. In March 1998, Medellín filed an application for a writ of habeas corpus in state court in Texas, basing his claim for relief on the denial of his rights under the Consular Convention. The application was denied in October 2001.<sup>13</sup>

Meanwhile, the ICJ decided *LaGrand*, which also involved a failure by American authorities timely to inform two foreign nationals (the LaGrands, of German nationality) of their rights under Article 36(1)(b) of the Consular Convention. In that case, the ICJ held that Article 36 created remedial rights for individual foreign arrestees,<sup>14</sup> including a right to review and reconsideration of any conviction and sentence of a person denied his Article 36 rights, even if that person had defaulted on that defense under the procedural rules of the country in which he had been tried.<sup>15</sup> The ICJ’s interpretation of the Consular Convention in *LaGrand* implied that Jose Medellín might also have a right to review and reconsideration of his conviction, notwithstanding the Texas procedural default rule.

<sup>11</sup> Consular Convention, *supra* note 7, art. 36(1)(b), 21 U.S.T. at 100–01.

<sup>12</sup> U.S. Amicus Brief, *supra* note 9, at 4.

<sup>13</sup> Brief for Petitioner at 5–7, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) [hereinafter *Petitioner’s Brief*].

<sup>14</sup> *LaGrand*, *supra* note 8, at ¶¶ 75–77.

<sup>15</sup> *Id.* at ¶¶ 79–91.

Medellin filed a petition for a writ of habeas corpus in a U.S. district court in Texas in November 2001, and an amended petition in July 2002. He argued that the district court was bound by the *LaGrand* interpretation of the Consular Convention and that he was therefore entitled to an evidentiary hearing, notwithstanding Texas' procedural default rules. The district court denied both relief and a certificate of appealability in June 2003.<sup>16</sup>

Mexico also filed a claim against the United States in the ICJ, asserting that Medellin and fifty-three other Mexicans, convicted and sentenced to death by courts in nine states, had been denied their rights under Article 36(1)(b).<sup>17</sup> The ICJ decided Mexico's claim in *Avena*, holding that Medellin and fifty of the other persons for whom Mexico had sought relief were entitled to (preferably judicial) review and reconsideration of their convictions in light of the Consular Convention violations and without regard to any procedural defaults.<sup>18</sup>

Medellin had sought a certificate of appealability from the U.S. Court of Appeals for the Fifth Circuit in October 2003. In its judgment of May 20, 2004, that court took note of the *Avena* judgment, but nonetheless held that it was inconsistent with circuit and Supreme Court precedent, including *Breard v. Greene*,<sup>19</sup> a 1998 decision in which the Supreme Court rejected another challenge under the Consular Convention to a state procedural default rule in a death penalty case. In light of this contrary precedent, the Fifth Circuit ruled that *Avena* did not control and denied relief.<sup>20</sup> Medellin subsequently sought review in the Supreme Court.<sup>21</sup> While the case was pending, President Bush issued his memorandum directing the courts of the states to provide the persons named in the *Avena* judgment with review and reconsideration of their sentences.<sup>22</sup>

<sup>16</sup>Petitioner's Brief, *supra* note 13, at 7–9.

<sup>17</sup>*Avena*, *supra* note 2, at ¶¶ 1–7, 14, 15.

<sup>18</sup>*Id.* at ¶¶ 128–143.

<sup>19</sup>523 U.S. 371 (1998).

<sup>20</sup>Petitioner's Brief, *supra* note 13, at 13.

<sup>21</sup>*Id.*

<sup>22</sup>U.S. Amicus Brief, *supra* note 9, at 41–42.

### III. The Consular Convention

The first issue this paper analyzes is the proper interpretation of the Consular Convention.<sup>23</sup> Since, as noted above,<sup>24</sup> *Avena* simply repeated *LaGrand's* conclusions regarding that treaty, the analysis must focus on the reasoning in *LaGrand*.

#### A. The *LaGrand* Decision

The first step in the ICJ's *LaGrand* analysis was determining the entities upon whom Article 36 conferred rights. The Court, rejecting

<sup>23</sup>That treaty provides, in relevant part:

[Preamble]

The States Parties to the present Convention . . .

Realizing that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure efficient performance of functions by consular posts . . . .

#### Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article 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.

Consular Convention, *supra* note 7, Preamble & art. 36, 21 U.S.T. at 79, 100–01.

<sup>24</sup>See discussion *supra* note 8 and accompanying text.

American arguments to the contrary,<sup>25</sup> held that Article 36 conferred rights on individuals, not simply on states. It relied for this conclusion on the Article's statement that "authorities shall inform the person concerned without delay of his rights" to consular assistance and on its prohibition on providing consular assistance to a person who "expressly opposes" receiving such aid.<sup>26</sup> Both statements, reasoned the ICJ, would make little sense unless the Convention conferred a right to a remedy for treaty violations on individuals, and not simply on states who had signed the treaty.

After making this determination, the court addressed whether procedural default rules violated Article 36 in cases where affected persons had not been informed of their Article 36 rights in time to raise a treaty violation as a defense. The court rejected the American argument that procedural default rules were permitted by a fair reading of the Convention, asserting that the American argument "proceed[ed], in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual."<sup>27</sup> The court went on to state:

The procedural default rule prevented counsel for the LaGrands . . . from attaching any legal significance to the fact . . . that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," and thus violated paragraph 2 of Article 36.<sup>28</sup>

#### B. *The Entities upon Whom the Convention Confers Remedial Rights*

To analyze the ICJ's reasoning, we can rely on Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>29</sup> (Treaties Convention), which the ICJ, in *LaGrand*<sup>30</sup> and *Avena*,<sup>31</sup> treated as a source of customary rules of treaty interpretation.

<sup>25</sup> *LaGrand*, *supra* note 8, at ¶ 76.

<sup>26</sup> *Id.* at ¶ 77. See also Consular Convention, *supra* note 7, art. 36(2), 21 U.S.T. at 100–01.

<sup>27</sup> *LaGrand*, *supra* note 8, at ¶ 89.

<sup>28</sup> *Id.* at ¶ 91.

<sup>29</sup> May 23, 1969, arts. 31, 32, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679, 691–92 (1969) [hereinafter *Treaties Convention*].

<sup>30</sup> *LaGrand*, *supra* note 8, at ¶ 99.

<sup>31</sup> *Avena*, *supra* note 2, at ¶ 83.

Applying the Vienna Convention standards, it would seem that *LaGrand* is incorrect. Consider first whether the Consular Convention should be seen as creating rights for individuals and not simply for states. Article 31(1) of the Treaties Convention makes clear that the primary focus in any effort at treaty interpretation must be the terms of the treaty.<sup>32</sup> As discussed, the ICJ focused on the appearance of the term “rights” in the last sentence of Article 36(1)(b) of the Consular Convention. Yet, the ICJ ignored other, contrary textual evidence: For example, the chapeau of Article 36(1), with its characterization of that provision as aimed at facilitating the exercise of state consular functions,<sup>33</sup> cuts against the court’s reading. Likewise, the statement, in the Consular Convention’s preamble, that benefitting individuals is not a purpose of that treaty counts against the Court’s conclusion—and Article 31(2) of the Treaties Convention makes clear that the text of a treaty’s preamble must be taken into account when interpreting the instrument.<sup>34</sup>

Article 32 of the Treaties Convention permits consideration of the preparatory work of a treaty (the international law analogue to “legislative history”) both to confirm conclusions reached through examination of the treaty’s text and to determine the treaty’s meaning in cases where the text leads either to ambiguities or absurdities.<sup>35</sup> As the United States pointed out to the ICJ in *LaGrand*,<sup>36</sup> the negotiating history of the Consular Convention makes clear that there was deep division among the delegations as to whether Article 36 should be seen as conferring individual, as opposed to state, rights.<sup>37</sup> Indeed, the Article’s original wording was changed in response to objections that it gave primacy to the rights of individuals.<sup>38</sup>

<sup>32</sup>Treaties Convention, *supra* note 29, art. 31(3), 8 I.L.M. at 691–92.

<sup>33</sup>Consular Convention, *supra* note 7, art. 36(1), 21 U.S.T. at 100.

<sup>34</sup>Treaties Convention, *supra* note 29, art. 31(2), 8 I.L.M. at 692.

<sup>35</sup>*Id.*, art. 32, 8 I.L.M. at 692.

<sup>36</sup>*LaGrand* (F.R.G v. U.S.), Counter-Memorial of the U.S., ¶ 100, available from the ICJ website, <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited Jul. 2, 2005) [hereinafter *LaGrand* Counter-Memorial].

<sup>37</sup>1 Official Records, U.N. Conference on Consular Relations 331–36, U.N. Doc. A/CONF.25/16 (1963) [hereinafter Consular Conference Records].

<sup>38</sup>*Id.* at 334–36.



*C. Status of Procedural Default Rules*

The court's reasoning in support of its conclusion regarding Article 36's creation of individual rights is thus doubtful. More important to its result was the ICJ's conclusion that a state violates the Consular Convention when it applies a procedural default rule to bar untimely assertions of defenses based on violations of the treaty's provisions regarding consular assistance. This second conclusion is even more weakly grounded than the first.

It facilitates understanding of this point to restate the court's reasoning. The chain of logic appears to be: (1) one of the purposes of the Convention was to permit nations the option of providing their nationals, when arrested, with legal assistance; (2) violations of the Convention's notice requirements prevented Germany from providing timely legal assistance to the LaGrands; (3) the procedural default rule, in turn, prevented the LaGrands from raising these treaty violations as a defense to the charges they faced; therefore, (4) the procedural default rule violated the Convention, by failing to give full effect to one of the purposes of the treaty, that is, permitting the "sending nation" (the nation from which foreign nationals on trial hale) to provide its nationals with legal aid.

So stated, there is an obvious problem with the court's reasoning: step three makes sense only if the Convention is understood to regulate the remedies available under domestic law when a host country fails to comply with its treaty obligations. But it does not. Article 36(1), which enumerates the rights to consular assistance afforded by the Convention, says nothing about post-deprivation remedies.<sup>39</sup> To reach its conclusion, the ICJ effectively argues that *any* laws and regulations of the host country that interfere with the general *purposes* underlying the provisions governing consular assistance violate the Convention, whether or not those laws and regulations address the rights to assistance expressly created by paragraph 1 of Article 36. Thus, the ICJ reasons that laws and regulations preventing a foreign national from asserting defenses based on late access to consular legal assistance interfere with one overarching purpose of Article 36(1)(c), that is, affording legal assistance.

To be sure, Article 36(2) states that rights to consular assistance "shall be exercised in conformity with the laws and regulations

<sup>39</sup>See *supra* notes 7 & 23.

of the receiving State," and requires, in turn, that these laws and regulations give "full effect" to the purposes "for which the rights accorded under this Article are intended."<sup>40</sup> But that provision's focus on the "rights accorded *under this Article*" underscores that it offers no support for the *LaGrand* holding. Again, Article 36 creates no right to a post-deprivation remedy. Thus, the better reading of Article 36(2) is that the specific assistance rights created by the treaty must be exercised according to host country law, and, in turn, *only those specific laws and regulations directly affecting the rights* created by the Article (for example, rules restricting the duration of prison visits) are governed by the treaty. By contrast, the ICJ reads the proviso of Article 36(2) as though the "laws and regulations" in question include the entire corpus of host country law, not merely those provisions affecting rights expressly granted.

There is another error in the ICJ's analysis. Article 31(3)(b) of the Treaties Convention provides, "There *shall* be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . ." <sup>41</sup> This language reflects an obvious point: because treaties are agreements that nations create and to which nations may adhere or not as they choose, a treaty means what the signatory parties think it means. Since the ICJ's interpretation does not derive from the express terms of the treaty, it would seem that the court would have carefully examined the parties' practice to resolve disputes about the meaning of Article 36. Yet it failed to do so.

The United States called actual state practice to the attention of the court,<sup>42</sup> relying on an affidavit by an official of the U.S. Department of State's Bureau of Consular Affairs, which provided:

States party have not viewed Article 36 as requiring them to provide remedies in their criminal justice systems for failures to provide required consular notification. Roughly 165 States are party to the Vienna Convention. Nevertheless, the United States survey did not identify any State that provides a status quo ante remedy of vacating a criminal conviction or commuting a sentence for failure of consular notification.

<sup>40</sup>Consular Convention, *supra* note 7, art. 36(2), 21 U.S.T. at 100–01.

<sup>41</sup>Treaties Convention, *supra* note 29, art. 31(2), 8 I.L.M. at 692 (emphasis added).

<sup>42</sup>*LaGrand* Counter-Memorial, *supra* note 36, at ¶¶ 92–93.

... Nor have we identified any country that has an established judicial remedy authorizing a foreign government to seek to undo a conviction and sentence through action in domestic courts because of a failure of notification.<sup>43</sup>

The court ignored this evidence; it referred only to a portion of the affidavit discussing Germany's practice in these matters and did so only in the course of rejecting American arguments regarding the inadmissibility of Germany's claim,<sup>44</sup> even though the United States had not referenced state practice in its arguments regarding inadmissibility.<sup>45</sup>

In addition to its failure properly to apply the interpretive methods prescribed by Article 31 of the Treaties Convention, the court failed to consider the preparatory work of the Consular Convention, as Article 32 of the Treaties Convention requires, notwithstanding the lack of express textual support for the court's reading of Article 36. This is important because, as the United States pointed out in its memorial, the records of the negotiations that produced the Consular Convention undercut any suggestion that it was intended to create a remedy in domestic criminal proceedings for violations of the last sentence of Article 36(1)(b).<sup>46</sup>

In the first place, the commentary accompanying the original draft of Article 36 makes clear that the laws and regulations of the host country addressed in Article 36(2) are those pertaining to such matters as visits to and correspondence with a person in custody.<sup>47</sup> Further, the records of the negotiations demonstrate that the last sentence of Article 36(1)(b)—stating that authorities “shall inform” the person of their rights to consular assistance—was added very late in the negotiating process to address an impasse. A number of delegations believed that a host country should be obliged to inform

<sup>43</sup> Declaration of Edward Betancourt, U.S. Dept. of State, LaGrand Counter-Memorial, *supra* note 36, Ex. 8 (copy in possession of author).

<sup>44</sup> LaGrand, *supra* note 8, at ¶¶ 61–63.

<sup>45</sup> See LaGrand Counter-Memorial, *supra* note 36, at ¶¶ 46–66.

<sup>46</sup> *Id.* at ¶¶ 80–81, 88–90.

<sup>47</sup> Report of the International Law Commission to the General Assembly, 16 U.N. GAOR Supp. (No. 9) at 24–25, U.N. Doc. A/4843 (1961), reprinted in [1961] 2 Y.B. Int'l Law Comm'n 112–13, U.N. Doc. A/CN.4/SER.A/1961/Add.1.

a sending country's consulate whenever one of that country's nationals is taken into custody, at least in those cases where the detainee did not expressly oppose the consulate's being informed. Other delegations feared that such an obligation would be too onerous for some nations and favored requiring that a consulate be informed of a detention only at the request of the detainee. This second approach was opposed on the ground that individuals might be unaware of their rights to contact the consul. The United Kingdom proposed adding the last sentence to paragraph 1(b) to ensure that all arrested persons would know of their rights and thus eliminate an objection to the second approach, by addressing the issue in a way that would impose a relatively *limited* administrative burden on host countries.<sup>48</sup> The court's reading of that sentence, however, has the effect of *increasing* the administrative burden on host countries, since it reads into the Article consequences for a host country's criminal justice system never contemplated by the delegates to the Vienna Conference.

From the perspective of an American court, it is also relevant that the Senate consented to ratification of the Consular Convention and Optional Protocol on two bases. First, the Senate relied on a committee report stating that ratification would not change American law.<sup>49</sup> And, second, the Senate relied on a report from the American delegation to the conference that produced the Consular Convention, which stressed (1) that paragraph 2 of Article 36 was intended to emphasize that the Article did not override a host state's law and (2) that the last sentence of that paragraph required full effect be given to the rights *expressly* set out in Article 36(1) (not, as the ICJ had it, to the implicit purposes for establishing the rights).<sup>50</sup>

Taking the parts of this discussion together, it is clear that the ICJ in *LaGrand* misread Article 36. It was probably not intended to create individually enforceable rights, and certainly was not properly interpreted as in effect superseding the procedural requirements of the criminal justice systems of the states party to the treaty. Since *Avena* simply relies on *LaGrand*, its holding, too, seems wrong.

<sup>48</sup>See Consular Conference Records, *supra* note 37, at 81–87.

<sup>49</sup>S. Exec. Rep. 91-9, 91st Cong., 1st Sess. 2 (1969).

<sup>50</sup>S. Exec. E., 91st Cong., 1st Sess. 61 (1969).

#### IV. American Courts and ICJ Judgments

In *Medellin*, the petitioner's argument regarding the effect of the *Avena* judgment was simple: because the United States had, through an Optional Protocol<sup>51</sup> to the Consular Convention, accepted the compulsory jurisdiction of the ICJ, the federal courts were obliged to implement the ICJ's judgment, and the lower courts therefore should have granted Medellin the relief he sought.<sup>52</sup>

It is true that, as a matter of international law, the United States must comply with *Avena*. The ICJ Statute provides that ICJ judgments are final and binding.<sup>53</sup> Article 94 of the United Nations Charter further provides that members of the U.N. undertake to comply with such judgments.<sup>54</sup> Since these instruments are treaties as a matter of international law, the United States has an international legal obligation in this case.

The question remains, however, whether fulfilling that obligation requires American courts to enforce *Avena*. Because treaty obligations are not automatically enforceable in domestic courts,<sup>55</sup> answering that question requires addressing another: do the Optional Protocol and/or Article 94 in and of themselves require the court systems of states party to enforce ICJ judgments?

It should first be noted that the terms of the Optional Protocol make clear that the Protocol is simply an agreement among signatory states that the ICJ will have jurisdiction to hear cases between states party arising from disputes concerning the Consular Convention<sup>56</sup>

<sup>51</sup>Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488 [hereinafter Optional Protocol].

<sup>52</sup>Petitioner's Brief, *supra* note 13, at 18–45.

<sup>53</sup>Statute of the International Court of Justice, June 26, 1945, arts. 59, 60, 59 Stat. 1055, 1062, 1063, 39 A.J.I.L. Supp. 215 (1945) [hereinafter ICJ Statute].

<sup>54</sup>U.N. Charter, art. 94.

<sup>55</sup>See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314–15 (1829).

<sup>56</sup>Optional Protocol, *supra* note 51, art. I, 21 U.S.T. at 326. The ICJ's jurisdiction over claims by countries against other countries is entirely consensual; nations may agree specially to take a case to the court after a dispute arises, or may agree to do so in advance of any dispute, either by entering into a treaty—such as the Optional Protocol—providing that specific disputes would fall within the ICJ's competence or by a general acceptance of its “compulsory” jurisdiction. See ICJ Statute, *supra* note 53, art. 36, 59 Stat. at 1062.

and has no bearing on questions regarding enforcement of judgments in such cases. This reading is confirmed by its drafting history.<sup>57</sup> The ICJ Statute is also silent with respect to enforcement of its judgments. The only treaty provision addressing enforcement of ICJ judgments is Article 94 of the United Nations Charter, which provides:

1. 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.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.<sup>58</sup>

The meaning of this Article is somewhat ambiguous. While the phrase “undertakes to comply” in paragraph 1 can be read to impose an unequivocal obligation on each signatory state, the phrasing normally employed for that purpose would be “shall comply.” Further, the discretion accorded the Security Council in paragraph 2 regarding enforcement of judgments fits uneasily with the idea that states are obliged to execute ICJ judgments through their domestic court systems.

Domestic judicial practice seems to clarify this issue, however. There appear to be no cases in which a domestic court has seen itself as obliged to enforce decisions of the ICJ or of its predecessor, the Permanent Court of International Justice (PCIJ). Thus, in “*Socobel v. Greek State*,”<sup>59</sup> a Belgian court refused to permit a private party to execute in Belgium a PCIJ judgment unless the claimant followed the procedures necessary for executing judgments of foreign courts. The court rejected the argument that the PCIJ should simply be treated as a tribunal superior to those of Belgium, with its judgments executable as though they were domestic judgments.<sup>60</sup> It also held

<sup>57</sup>Consular Conference Records, *supra* note 37, at 87–92.

<sup>58</sup>U.N. Charter, art. 94.

<sup>59</sup>18 I.L.R. 3 (Belg., Trib. Civ. de Bruxelles 1951).

<sup>60</sup>*Id.* at 4–5.

that, as a non-party to the judgment, the private party had no standing to seek its execution, even though the judgment required that a payment be made to the private party.<sup>61</sup>

The records of the negotiations of both the Charter and the ICJ Statute reinforce the conclusion that domestic courts are not necessarily obliged to enforce ICJ judgments. At no point in these sets of negotiations was any consideration given to domestic judicial enforcement of ICJ judgments. Rather, the question was whether there was a need to address enforcement of judgments at all. It appears to have been taken for granted that, if the Charter were to address enforcement, such enforcement would be carried out by the Security Council.<sup>62</sup>

Particularly relevant for American courts is the United States Senate's understanding when it consented to ratification of the U.N. Charter and consented to the compulsory jurisdiction of the ICJ. In the ratification hearings, there was clear executive branch testimony that ICJ judgments could only be enforced by the Security Council.<sup>63</sup> Further, in the debate on acceptance of compulsory jurisdiction, Senator Connally offered an amendment providing that American consent to jurisdiction did not apply to matters within the domestic jurisdiction of the United States as determined by the United States.<sup>64</sup> In the ensuing discussion, opponents of the amendment argued that Senator Connally's amendment was unnecessary, since the limitation was inherent in the ICJ's jurisdiction and, if the ICJ exceeded its jurisdiction in any particular case, the judgment could only be

<sup>61</sup> *Id.* Similar but distinguishable is *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The court in that case held that Article 94 of the U.N. Charter did not confer rights on individuals having no relationship to an ICJ judgment to enforce that judgment, *id.* at 937–38; by contrast, both *Socobel* and *Medellin* involve claims by, respectively, a corporation and an individual who are the subjects of ICJ judgments.

<sup>62</sup> United Nations Information Organization, 13 Documents of the United Nations Conference on International Organization, San Francisco, 1945, at 297–98; *id.*, vol. 14 at 209, 853.

<sup>63</sup> The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess. 286 (1945) (statement of Leo Pasvolosky, Special Assistant to the Secretary of State); Hearings on S. Res. 196 Before a Subcomm. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, Legal Advisor of the Department of State).

<sup>64</sup> 92 Cong. Rec. 10694–95 (1946).

enforced in the Security Council, where the United States had a veto.<sup>65</sup> Supporters of the amendment agreed with opponents regarding the means of enforcing ICJ judgments, but argued for avoiding a situation in which the United States would be forced to exercise its veto.<sup>66</sup> Had any Senator contemplated that acceptance of the ICJ's jurisdiction obliged American courts to enforce its judgments, the debate would necessarily have taken a different course.

Finally, it is relevant that leading commentators agree that a state's submission to the ICJ's jurisdiction does not necessarily render its judgments binding in that state's domestic legal system. Mosler asserts that, while a state's failure to comply with a judgment of the court engages its international responsibility, its courts and other organs of government "are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the state concerned."<sup>67</sup> And the American Society of International Law's Panel on the Future of the International Court of Justice recommended, in 1973, that states parties to the statute of the court "make provision in their domestic law for the execution of decisions rendered by the Court,"<sup>68</sup> a suggestion that makes sense only if adherence to the statute of the court did not, by itself, require states to execute ICJ judgments in their domestic court systems.

Moreover, consideration of the general approach to enforcement of the judgments of international tribunals reinforces the conclusion that Article 94 should not be read as, in itself, modifying the domestic law of U.N. members to require execution of ICJ judgments. The General Act on Pacific Settlement of International Disputes<sup>69</sup> required parties to submit disputes either to arbitration or to the PCIJ.<sup>70</sup> Similarly, the Revised General Act for the Pacific Settlement of International Disputes<sup>71</sup> requires parties to either arbitrate disputes or

<sup>65</sup> *Id.* at 10694 (statement of Sen. Pepper).

<sup>66</sup> *Id.* at 10695 (statement of Sen. Connally).

<sup>67</sup> Hermann Mosler, Article 94, in *The Charter of the United Nations 1003, 1005* (Bruno Simma ed., 1995).

<sup>68</sup> Leo Gross, Chapter 18: Conclusions, in 2 *The Future of the International Court of Justice 727, 731–32* (Leo Gross ed., 1976). But cf. 1 Shabtai Rosenne, *The Law and Practice of the International Court 1920–1996*, at 223–26 (1997).

<sup>69</sup> Sept. 26, 1928, 93 L.N.T.S. 343 [hereinafter General Act].

<sup>70</sup> *Id.*, art. 17, 93 L.N.T.S. at 351.

<sup>71</sup> Apr. 28, 1949, 71 U.N.T.S. 101 [hereinafter Revised General Act].



submit them to the ICJ.<sup>72</sup> Yet both make provision for the possibility that the domestic law of states party could preclude domestic execution of these courts' judgments.<sup>73</sup> Twenty-two countries are parties to one or the other of these treaties,<sup>74</sup> and the Revised General Act was approved by the General Assembly in a vote of 45-6-1,<sup>75</sup> suggesting that a large number of nations agree that a country's acceptance of an international tribunal's jurisdiction does not, without more, render that tribunal's judgments enforceable domestically. Furthermore, a number of dispute settlement treaties, both bilateral and multilateral, provide that an international judgment or arbitral award may include "equitable satisfaction" for a party harmed because a country's domestic law precludes execution of the judgment or arbitral award.<sup>76</sup>

Nor is it assumed that acceptance of the jurisdiction of other international tribunals entails domestic enforcement of the judgments of those tribunals. Though judgments of the European Court of Human Rights are final,<sup>77</sup> they are enforceable in the domestic courts of nations subject to that court's jurisdiction only if those nations' domestic law authorizes enforcement.<sup>78</sup> Similarly, although the instrument establishing the Iran–United States Claims Tribunal<sup>79</sup>

<sup>72</sup>*Id.*, art. 17, 71 U.N.T.S. at 110.

<sup>73</sup>General Act, *supra* note 69, art. 32, 93 L.N.T.S. at 357; Revised General Act, *supra* note 71, art. 32, 71 U.N.T.S. at 118.

<sup>74</sup>For the General Act, see 2 Peter H. Rohn, *World Treaty Index* 165 (2d ed. 1983); for the Revised General Act, see United Nations, *Multilateral Treaties Deposited with the Secretary-General* as at 31 Dec. 2003, at 39, U.N. Doc. ST/LEG/SER.E/22, U.N. Sales No. E.04.V2 (2004).

<sup>75</sup>United Nations, *Yearbook of the United Nations* 1948–49, at 415, U.N. Sales No. 1950.I.II (1950).

<sup>76</sup>Treaty of Friendship Conciliation and Judicial Settlement, Mar. 24, 1950, Turk.-Italy, art. 20, 96 U.N.T.S. 207, 219; Agreement Concerning Conciliation and Judicial Settlement, Nov. 24, 1954, Italy-Brazil, art. 18, 284 U.N.T.S. 325, 334; European Convention for the Peaceful Settlement of Disputes, Apr. 29, 1957, art. 30, 320 U.N.T.S. 243, 256.

<sup>77</sup>European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 44, 213 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155.

<sup>78</sup>Rudolf Bernhardt, *The Convention in Domestic Law, The European System for the Protection of Human Rights* 25, 37–38 (R. St. J. MacDonald et al. eds., 1993).

<sup>79</sup>Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of

provides that “[a]ll decisions and awards of the Tribunal are final and binding,”<sup>80</sup> the tribunal has not read that language to render its awards domestically enforceable. It has stated:

It is . . . incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as part of the State’s legal system they would have to be established, by means of legislation or other appropriate measures. Such procedures must be available on a basis at least as favorable as that allowed to parties who seek recognition or enforcement of foreign arbitral awards.<sup>81</sup>

That is, the tribunal assumes that the agreement by the United States and Iran that its decisions would be final and binding does not, of its own force, create a domestic legal obligation to enforce those decisions; any international legal obligation requires only that tribunal awards have the same standing as arbitration awards. One American court<sup>82</sup> cited this language in refusing to enforce a tribunal decision for reasons drawn from arbitral practice.<sup>83</sup> Of course, there are international tribunals whose judgments are directly enforceable in the courts of the countries subject to their jurisdiction, but in such cases, the treaty establishing the tribunal expressly provides for such enforcement.<sup>84</sup> Neither the ICJ Statute nor the United Nations Charter contains such language.

In sum, there is no support for the argument that adherence to the United Nations Charter creates a domestic law obligation for American courts to enforce ICJ judgments. The language of Article 94 is at best ambiguous on this point, and the drafting history of

America and the Government of the Islamic Republic of Iran, Dept. of State Bulletin, February 1981, at 3; 20 I.L.M. 230 (1981) [hereinafter Iran Executive Agreement].

<sup>80</sup> *Id.*, art. IV.1, Dept. of State Bulletin, February 1981, at 4; 20 I.L.M. at 232.

<sup>81</sup> Islamic Republic of Iran v. United States of America, Case No. A21, Decision No. Dec. 62-A21-FT, at 13–14 (Iran–United States Claims Tribunal, May 4, 1987), 14 Iran-U.S. Cl. Trib. Rep. 324, 331–32.

<sup>82</sup> Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992).

<sup>83</sup> *Id.* at 145–46.

<sup>84</sup> Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325), Articles 228, 244, 256; American Convention on Human Rights, Nov. 22, 1969, art. 68, 9 I.L.M. 99, 119 (1970), OAS T.S. No. 36.

that Article, the ratification debates in the Senate concerning it, and the views of commentators all argue against the existence of any such obligation. Likewise, international practice with respect to international tribunals generally is inconsistent with the argument.

It should also be noted that there is little support for any argument that ICJ decisions constitute binding precedent for domestic courts. While a court in the French Zone of Morocco in 1952 apparently treated an ICJ judgment as binding precedent,<sup>85</sup> its decision was criticized by a court in the International Zone of Morocco, which not only refused to treat the ICJ judgment as binding but rejected its reasoning as well.<sup>86</sup> Similarly, while Japanese<sup>87</sup> and Italian<sup>88</sup> courts dealing with legal issues addressed by the ICJ in *Anglo-Iranian Oil Co.*<sup>89</sup> reached results consistent with that decision, they cited that judgment as supporting, rather than as controlling, their conclusions. Indeed, such results seem compelled by Article 59 of the ICJ Statute, which provides, “The decision of the Court has no binding force except between the parties and in respect of that particular case.”<sup>90</sup>

There remains the question whether American courts, though not bound either to enforce *Avena* or to treat it as binding precedent, should nonetheless consider it and *LaGrand* as persuasive authority. And of course they should—if they are persuaded. American courts have applied that standard in similar situations,<sup>91</sup> and it is consistent with the Court’s refusal in *Breard v. Greene*<sup>92</sup> to simply accept the ICJ’s interpretation of the Consular Convention in related proceedings.<sup>93</sup> Since, as was demonstrated in the preceding section, the ICJ’s *Avena* and *LaGrand* decisions are seriously flawed, their persuasive power

<sup>85</sup> *Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat 1952).

<sup>86</sup> *Mackay Radio and Telegraph Co. v. Lal-la Fatma Bent si Mohamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct. App. Int’l Trib. 1954).

<sup>87</sup> *Anglo-Iranian Oil Co. v. Idimitsu Kosan Kabushiki Kaisha*, 20 I.L.R. 305 (Japan, High Ct. Tokyo 1953).

<sup>88</sup> *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 I.L.R. 23 (Italy, Civ. Ct. Rome 1954).

<sup>89</sup> *U.K. v. Iran*, 1952 I.C.J. 22 (July 22).

<sup>90</sup> ICJ Statute, *supra* note 53, art. 59.

<sup>91</sup> See, e.g., *Timken Co. v. United States*, 240 F. Supp. 2d 1228, 1239–42 (Ct. Int’l Trade 2002), *aff’d*, 354 F.3d 1334, 1344 (Fed. Cir. 2004).

<sup>92</sup> 523 U.S. 371 (1998).

<sup>93</sup> *Id.* at 375–76.

ought to be low. Regarding Medellín's argument from uniform treaty interpretation, other states apparently read the Consular Convention as the United States did prior to *LaGrand*.<sup>94</sup> The ICJ's adoption of a doubtful interpretation of the treaty hardly establishes otherwise.

In short, courts in the United States are obliged neither to enforce ICJ judgments nor treat them as binding precedent. If the reasoning in those judgments is persuasive, all things being equal, there is no reason not to take them into account. By the same token, however, there is no reason to defer to the ICJ if its reasoning is not persuasive—which it is not.

## V. The President's Directive

Notwithstanding the weakness of the ICJ's interpretation of the Consular Convention, the president has purported, pursuant to his inherent "foreign affairs" power, to unilaterally direct state courts to abide by the *Avena* judgment. The amicus brief of the United States in *Medellin* asserts that, since the president has directed the courts of the states to enforce *Avena* with respect to persons named in that opinion, Medellín can obtain relief in the Texas courts.<sup>95</sup> The key issue raised by this assertion is whether the president has the authority to direct the states as he has purported to do.

The U.S. amicus brief makes two arguments supporting this claim of authority. The first is that Article 94 of the United Nations Charter not only creates an international legal obligation for the United States to comply with the ruling in *Avena*,<sup>96</sup> but also "implicitly" grants the president "the lead role" in determining how,<sup>97</sup> or indeed whether,<sup>98</sup> to comply with an ICJ decision. The second is that, independently of authority derived from Article 94, the president's constitutional authority to control American foreign policy empowers him to issue his memorandum.<sup>99</sup>

The brief supports its first argument by observing that the executive branch is concerned about possible difficulties in providing

<sup>94</sup>See discussion *supra* note 43.

<sup>95</sup>U.S. Amicus Brief, *supra* note 9, at 9.

<sup>96</sup>*Id.* at 38–40.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 40–41.

<sup>99</sup>*Id.* at 45.

consular assistance to Americans abroad if American courts refuse compliance with *Avena*<sup>100</sup> and by stating that this concern led the president to issue his directive.<sup>101</sup> The brief justifies the president's decision to act without seeking implementing legislation by reference to the interplay between the Consular Convention and the president's duty of protecting American citizens abroad, and to the "complex calculations" that figure into decisions as to the proper American response to *Avena*.<sup>102</sup>

The amicus brief bases its argument regarding the president's constitutional authority over foreign policy on general language from a number of cases, including *American Insurance Association v. Garamendi*,<sup>103</sup> *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>104</sup> and *United States v. Curtiss-Wright Export Corp.*<sup>105</sup> The brief then cites *Dames & Moore v. Regan*,<sup>106</sup> *Garamendi*,<sup>107</sup> *United States v. Pink*,<sup>108</sup> and *United States v. Belmont*<sup>109</sup> for the propositions that the president has the authority to make executive agreements with other countries to settle claims and, relying on the latter three, that such agreements preempt state law.<sup>110</sup> The amicus brief asserts that the president therefore has the authority to resolve a dispute with a foreign government without entering into a formal agreement, since such governments may acquiesce in arrangements to which they would not affirmatively agree, since a situation may demand action more quickly than would be possible if an agreement had to be negotiated first, and since the requirement of an agreement would permit the foreign government to control the president's exercise of his Article II authority.<sup>111</sup>

<sup>100</sup>*Id.* at 41.

<sup>101</sup>*Id.* at 41–42 (quoting Memorandum for the Attorney General from President George W. Bush, Feb. 28, 2005, at 1aa).

<sup>102</sup>*Id.* at 42–43.

<sup>103</sup>539 U.S. 396, 414 (2003).

<sup>104</sup>343 U.S. 579, 610–11 (1952).

<sup>105</sup>299 U.S. 304, 320 (1936).

<sup>106</sup>453 U.S. 654, 679, 682–83 (1981).

<sup>107</sup>*Garamendi*, 539 U.S. at 415.

<sup>108</sup>315 U.S. 203, 223 (1942).

<sup>109</sup>301 U.S. 324, 330–31 (1937).

<sup>110</sup>U.S. Amicus Brief, *supra* note 9, at 45.

<sup>111</sup>*Id.* at 45–46.

The brief takes the position that state courts, pursuant to the order issued by President Bush, must focus solely on whether the individuals named in *Avena* suffered prejudice because they were denied their rights under Article 36 of the Consular Convention.<sup>112</sup> It also stresses, however, that these limitations apply only to the persons whose rights were adjudicated in *Avena*; courts in other cases would be free to reject *Avena's* interpretation of the Consular Convention, in light of both the limitations of Article 59 of the ICJ Statute<sup>113</sup> and the rule that non-mutual collateral estoppel may not be asserted against the United States.<sup>114</sup> The amicus brief concludes by explaining that the position taken by the United States is not inconsistent with *Breard*, which held that the procedural default rule is not barred by the Consular Convention.<sup>115</sup> The brief explains that, although the United States unequivocally accepts *Breard's* interpretation of that treaty, the president has decided that enforcing *Avena* is in the foreign policy interest of the United States nonetheless; it also asserts that *Breard* is no more a barrier to the implementation of the president's directive than it would be to enforcement of a statute providing that *Avena* be enforced.<sup>116</sup>

Analyzing this claim of presidential power requires understanding its sweep. The president is seeking to make procedural rules for state courts (that is, to legislate) and to cause cases that have gone to final judgment to be reopened (that is, to exercise judicial power). Further, the president is at pains to say that the persons who would benefit from his actions would not be entitled under the Constitution, laws, or treaties of the United States to relief but for his decision to grant it. Also, nothing in the amicus brief suggests any principle limiting the president's authority. His position seems to be that he may order the states to alter their law in any way whatever if he concludes that such alterations would further the foreign policy interests of the United States or, at least, help resolve an international dispute.

<sup>112</sup>*Id.* at 46.

<sup>113</sup>ICJ Statute, *supra* note 53, art. 59.

<sup>114</sup>U.S. Amicus Brief, *supra* note 9, at 46–47.

<sup>115</sup>*Breard v. Greene*, 523 U.S. 371, 375–76 (1998).

<sup>116</sup>U.S. Amicus Brief, *supra* note 9, at 48.

The amicus brief's arguments supporting these sweeping assertions of power are, upon examination, quite weak. First, while the brief is correct in asserting that the United States has an international legal obligation to comply with *Avena*,<sup>117</sup> as noted above,<sup>118</sup> an obligation binding in international law is not necessarily enforceable in American courts. Indeed, implementation of such an obligation may actually be forbidden by American law, as when a federal statute, enacted after a treaty has become effective, requires actions that violate the treaty.<sup>119</sup> Thus, establishing that the United States is subject to an international obligation does not establish that the United States government must implement that obligation domestically, or even that the government is allowed to do so.

Second, the argument that Article 94 implicitly delegates to the president the power to issue his directive is unfounded. Nothing in the language of Article 94 evinces any intent to delegate any authority to the president. Further, such an "implied delegation" is necessarily standardless, providing no intelligible principle to guide the president's discretion, yet the Supreme Court continues to insist that delegations of authority contain some such guidance, in order to avoid serious constitutional difficulties.<sup>120</sup> In any event, as noted above, the Senate consented to American acceptance of the compulsory jurisdiction of the ICJ on the understanding that the only means for enforcement of ICJ judgments would be action by the Security Council.<sup>121</sup> Such an understanding is inconsistent with an intention to confer upon the president legislative and judicial authority to enforce such judgments.<sup>122</sup>

There remains the argument that the president's constitutional authority suffices to support his direction to the states. We may set

<sup>117</sup>See discussion *supra* notes 53–54.

<sup>118</sup>See discussion *supra* note 55.

<sup>119</sup>Head Money Cases, 112 U.S. 580, 597–99 (1884); *Whitney v. Robertson*, 124 U.S. 190, 193–95 (1888); *Chinese Exclusion Case*, 130 U.S. 581, 598–604 (1889).

<sup>120</sup>See *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472–76 (2001).

<sup>121</sup>See discussion *supra* notes 63–65 and accompanying text.

<sup>122</sup>Irrelevant here but also puzzling is the assertion that the "delegation" to the president under Article 94 includes the discretion to refuse to comply with ICJ judgments, U.S. Amicus Brief, *supra* note 9, at 40–41; it is difficult to understand how Article 94's undertaking to comply with ICJ judgments amounts to an implied authorization not to comply with those judgments.

to one side cases asserting the proposition that the president is the prime shaper of American foreign policy. That is true, and not helpful, since the question here is whether authority over foreign policy includes authority to determine whether the judgments of the Texas courts are to be treated as final.<sup>123</sup>

More useful are the four cases dealing with claims settlement, since each involved what could be considered legislative action by the president. We consider them in turn.

The disputes in *Pink* and *Belmont* revolved around an executive agreement made in connection with recognition of the Soviet Union by the United States. That agreement transferred to the United States the Soviet Union's rights to certain property within American territory and permitted the United States to apply that property to claims against the Soviet Union and its nationals.<sup>124</sup> State courts had held that recognizing the rights of the Soviet Union in the property, and therefore the rights of the United States derived from those of the Soviet Union, would both violate state public policy, as expressed by courts, and interfere with the vested rights of non-resident aliens to whom distributions had been ordered.<sup>125</sup> In holding that the president had the authority to make such an agreement and that it superseded state law, both cases placed great weight on the fact that the executive agreement was concluded as part of the recognition process.<sup>126</sup> Both also stressed that the challenged actions taken by the president—involving international claims settlement—were clearly within the authority of the federal government.<sup>127</sup> *Pink*, furthermore, emphasized the acquiescence of Congress in the president's action.<sup>128</sup>

*Dames & Moore* addressed the domestic legal effects of an executive agreement resolving the Iran Hostage Crisis. Under the agreement, a claims tribunal was established to address claims by Americans

<sup>123</sup> While *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–18 (1936), characterizes presidential foreign affairs authority as very broad, the arguments in that case are so flawed that its authority seems doubtful, see A. Mark Weisburd, *International Courts and American Courts*, 21 Mich. J. Int'l L. 877, 913–16 (2000).

<sup>124</sup> *United States v. Belmont*, 301 U.S. 324, 326–28, 330, 332–33 (1937); *United States v. Pink*, 315 U.S. 203, 211–14, 222–23, 226–30 (1942).

<sup>125</sup> *Belmont*, 301 U.S. at 327–330; *Pink*, 315 U.S. at 226–27.

<sup>126</sup> *Belmont*, 301 U.S. at 330; *Pink*, 315 U.S. at 228–32.

<sup>127</sup> *Belmont*, 301 U.S. at 331–32; *Pink*, 315 U.S. at 230–31.

<sup>128</sup> *Pink*, 315 U.S. at 227–28.



against the Iranian government and by the Iranian government against the United States and individual Americans.<sup>129</sup> To implement this agreement, Presidents Carter and Reagan issued executive orders (1) effectively seizing previously blocked Iranian government assets and transferring them to an account to be used for paying the tribunal's awards against Iran, and (2) suspending claims pending in American courts but eligible to be presented to the tribunal.<sup>130</sup> The plaintiff in *Dames & Moore* challenged the presidents' authority to issue those executive orders.<sup>131</sup> The Court held that the presidents had clear statutory authority to deal with Iranian property and refused to hold that the executive branch and Congress together lacked constitutional authority to enact the relevant statutes.<sup>132</sup> The Court held that no statute authorized the suspension of claims<sup>133</sup> but that the suspension was nonetheless valid in light of the presidents' authority to settle claims by American citizens against foreign governments. The Court stressed that presidents had exercised this power since the 1790s and placed special weight on Congress' facilitation of presidential claims settlement by creating machinery to allocate the funds produced by such settlements; the Court also emphasized Congress' failure to object to the executive agreement there in issue.<sup>134</sup> The Court took account as well of the possibility that the establishment of the tribunal might improve the chances that holders of the suspended claims would be able to collect on them, limiting the harm the suspension caused.<sup>135</sup> The Court cautioned, however, that it was not holding that the president had "plenary power to settle claims, even as against foreign governmental entities."<sup>136</sup>

The final basis for the president's claimed authority is *Garamendi*. That case involved a conflict between a California statute aimed at

<sup>129</sup>Iran Executive Agreement, *supra* note 79.

<sup>130</sup>*Dames & Moore v. Regan*, 453 U.S. 654, 662–66 (1981).

<sup>131</sup>*Id.* at 666–67.

<sup>132</sup>*Id.* at 669–74.

<sup>133</sup>*Id.* at 675–78.

<sup>134</sup>*Id.* at 680–82, 687–88.

<sup>135</sup>*Id.* at 686–87.

<sup>136</sup>*Id.* at 688.

pressuring certain European insurance companies to pay Holocaust-related claims, some of the claimants being Californians, and an arrangement embodied in an executive agreement between the United States and Germany under which such claims would be paid by a specially funded foundation.<sup>137</sup> The California law required certain insurance companies to make extensive disclosures, beyond those required under the settlement arrangements memorialized in the executive agreement. That agreement did not purport to preempt state laws dealing with Holocaust claims. However, in response to the desire of the German government to obtain a degree of legal peace for its corporations, it included an undertaking that the United States government would represent in any court hearing that the foreign policy interests of the United States would be served if the foundation was the exclusive forum for the resolution of all claims against German companies and that those interests favored dismissing related cases in American courts.<sup>138</sup>

Insurance companies sued to enjoin enforcement of the California law, alleging that it conflicted with the federal policy expressed in the executive agreement and was therefore unconstitutional.<sup>139</sup> In agreeing with this argument, the Court stressed that intertwined actions of the Nazi government and German insurance companies had given rise to the claims at issue and that the president's clear authority to settle claims against foreign governments by executive agreement therefore extended to these claims, even though they were against private entities.<sup>140</sup> The Court made clear that California's policy was an impediment to the approach taken by the federal government in this matter<sup>141</sup> and noted that the subject of the state statute was so far removed from traditional areas of state competence that the state's interest in its enforcement was not strong.<sup>142</sup> In these circumstances, the Court held, the statute was preempted.<sup>143</sup>

<sup>137</sup> *American Insurance Association v. Garamendi*, 539 U.S. 396, 405–412 (2003).

<sup>138</sup> *Id.* at 406.

<sup>139</sup> *Id.* at 412–14.

<sup>140</sup> *Id.* at 415–16.

<sup>141</sup> *Id.* at 420–25.

<sup>142</sup> *Id.* at 420.

<sup>143</sup> *Id.* at 416–20, 425–27.

Pulling these cases together, we can note three characteristics they share.

First, all four involved problems with foreign governments that could be resolved only through negotiations. Necessarily, the negotiations were carried out by the federal executive. If those negotiations were to succeed, however, the United States had to give as well as take, which meant that the president had to be able to make undertakings on behalf of the entire United States. Thus, resolving disputes and entering into diplomatic relations with the Soviet Union depended in part on the United States offering a means to deal with American claims against the Soviet Union. Resolving the Iranian hostage crisis required dealing with claims against both governments, which in turn required a claims settlement mechanism both governments could accept. The establishment of the special foundation increased the chances that Holocaust survivors would collect on their insurance claims but depended on assuring Germany that its corporations' risks of suit in the United States would be reduced.

Second, the Court, especially in *Dames & Moore* and *Garamendi*, emphasized the long history of congressional acquiescence in, or indeed active facilitation of, the exercise of presidential authority regarding international claims settlements, the issue at the heart of all of these cases.

Finally and most basically, the actions taken by the president—superseding state public policy affecting international claims settlement and vesting authority to decide claims in an international tribunal—were seen by the Court as clearly within the power of the president and the federal government to regulate settlement of international claims. Further, in *Garamendi*, the state's action diverged so far from core state functions as to render it suspect.

The president's action in this case shares none of these characteristics. First, this situation differs from that in the claim settlement cases because the president's action is not a quid pro quo for actions by a foreign state. Even *Curtiss-Wright* justifies its expansive description of presidential foreign affairs power by reference to the president's status as the sole means of *communication* between the United States and other countries,<sup>144</sup> that is, as a function of the bargaining required by diplomatic exchanges. Here, however, the president's

<sup>144</sup>United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

action is not part of a bargain with a foreign government, for he takes the position that the United States has never undertaken to enforce ICJ judgments domestically. Therefore, the amicus brief is wrong when it argues that the president's authority is not affected by the absence of an executive agreement here.<sup>145</sup> Since the president's power to supersede state law in foreign affairs matters derives from his authority to bargain with foreign governments, the absence of a bargain eliminates any basis for presidential authority.

Indeed, the president's action is merely a policy determination regarding judicial procedure. As such, there is no reason Congress could not address this matter by statute, *if* the federal government has the authority to address it at all. Even if speed were seen as essential, Congress can act very quickly, as it demonstrated in the Schiavo matter.<sup>146</sup> *Pace* the U.S. amicus brief, it is difficult to see what "complex calculations" would be required to enact such legislation that are not present whenever a legislature must address a question of ordinary legal procedure.

The second difference between this situation and that regarding claims settlements relates to the attitude of Congress. Congress' active acceptance of presidential authority in this area was one crucial reason for the Supreme Court's willingness to uphold that authority.<sup>147</sup> Yet, Congress has emphatically not acquiesced in any power in the president to order states to reopen final judgments of their courts. The Senate consented to the compulsory jurisdiction of the ICJ on the understanding that ICJ judgments could only be executed by the Security Council.<sup>148</sup> The Foreign Relations Committee reported the Optional Protocol favorably in part because it did *not* change American law.<sup>149</sup> The president thus seeks to bring about precisely the result that the Senate thought would not flow from submitting cases, including Consular Convention cases, to the ICJ, a point the amicus brief does not really dispute.<sup>150</sup> This situation

<sup>145</sup>U.S. Amicus Brief, *supra* note 9, at 45–46.

<sup>146</sup>See Pub. L. No. 109–3, March 21, 2005, 119 Stat 15.

<sup>147</sup>See *United States v. Pink*, 315 U.S. 203, 227–28 (1942); *Dames & Moore v. Regan*, 453 U.S. 654, 680–82 (1981); *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003).

<sup>148</sup>See discussion *supra* notes 63–65.

<sup>149</sup>See discussion *supra* notes 49–50.

<sup>150</sup>U.S. Amicus Brief, *supra* note 9, at 34–38.

recalls the *Youngstown* “Steel Seizure” cases. Of course, *Youngstown* dealt with a power that Congress had affirmatively denied to the president,<sup>151</sup> while this involves an obligation for the states that the Senate was assured would not be created by Senate action. In both, however, the president claimed authority that legislators clearly intended *not* to authorize. Given the Senate’s understanding of the limited obligation of the United States regarding ICJ judgments, then, the president’s claimed authority to impose a greater obligation seems particularly suspect.

Finally, and most basically, it is by no means clear that the federal government as a whole, let alone the president acting unilaterally, may constitutionally require a state’s courts to enforce *Avena*. To understand this point, consider exactly what such enforcement would entail. At the time the ICJ handed down that judgment, as far as the American courts were concerned, Medellín’s case had been resolved. The matter was *res judicata*. The holding in *Avena*, therefore, amounts to a direction to reopen a judgment that has, under American law, become final.

It was made clear in *Plaut v. Spendthrift Farm*<sup>152</sup> that the political branches of the federal government lack power to reopen the judgments of the federal courts. In that case, the Court held unconstitutional a federal statute purporting to revive cases earlier dismissed on limitations grounds by lower federal courts. In explaining that the statute contravened separation of powers principles, the Court observed:

The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that “a judgment conclusively resolves the case” because “a ‘judicial Power’ is one to render dispositive judgments.”<sup>153</sup>

The opinion goes on:

Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard

<sup>151</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 396, 586 (1952).

<sup>152</sup>514 U.S. 211 (1995).

<sup>153</sup>*Id.* at 218–219 (emphasis in the original) (citation omitted).

to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was.<sup>154</sup>

Here, however, we deal with state courts. Since Article III of the Constitution does not apply to those courts, analysis of federal power with respect to them turns on different considerations.

On the one hand, there are circumstances in which the federal government clearly has especially broad authority to alter state law, that is, when it concludes treaties with foreign governments. Treaties predating the Constitution established legal rules on matters otherwise subject to state control;<sup>155</sup> at least one imposed duties on state officials.<sup>156</sup> Yet Article VI of the Constitution validated these treaties.<sup>157</sup> Further, Supreme Court decisions dating to the early 1800s applied treaty language to supersede state law regarding subjects that would, at the time the cases were decided, have been thought to be clearly beyond the authority of Congress to regulate by statute, e.g., the right of aliens to inherit real property through intestate succession.<sup>158</sup> Such cases, dealing with matters among those least likely to be seen as subject to federal regulation prior to the New Deal,<sup>159</sup> illustrate the striking breadth of the subjects that the Court

<sup>154</sup>*Id.* at 227 (emphasis in the original).

<sup>155</sup>Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Netherlands., art. IV (liberty of conscience), art. VI (right to testate/intestate disposition of personalty), 8 Stat. 32, 34, 36; Treaty of Amity and Commerce, Apr. 3, 1783, U.S.-Sweden, art. V (freedom of conscience), art. VI (right to testate/intestate disposition of personalty), 8 Stat. 60, 62, 64; Treaty of Amity and Commerce, Sept. 10, 1785, U.S.-Prussia, art. X (right to testate/intestate disposition of personalty, and for heirs to sell realty), art. XI (freedom of conscience), 8 Stat. 84, 88, 90.

<sup>156</sup>Convention, November 14, 1788, U.S.-France, art. IX, 8 Stat. 106, 112. See also Weisburd, *supra* note 123, at 903.

<sup>157</sup>U.S. Const. art. VI, cl. 2.

<sup>158</sup>*Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 261, 262, 271–77 (1817). Accord *Hauenstein v. Lynham*, 100 U.S. 483, 483–87, 488–90 (1880).

<sup>159</sup>See *Blythe v. Hinckley*, 180 U.S. 333, 340–42 (1901) (questions of inheritance by aliens are matters of state law); *Terrace v. Thompson*, 263 U.S. 197, 217 (1923) (states' reserved power includes authority to determine whether aliens are permitted to hold land). And for a post New Deal case supporting these conclusions, see *United States v. Burnison*, 339 U.S. 87, 91–92 (1950).

saw as properly within the scope of the treaty power.<sup>160</sup> Given these decisions and the scope of the treaty power implied by the reach of the pre-Constitution treaties, the statement in *Missouri v. Holland*<sup>161</sup> that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .”<sup>162</sup> seems understandable.<sup>163</sup>

There are, however, cases containing dicta indicating limits on the treaty power’s impact on states—including, for example, limits forbidding changes in the “character” of a state government “without its consent.”<sup>164</sup> Moreover, there are numerous cases—albeit none dealing with treaties—holding that the Constitution protects the states’ rights to structural autonomy and sovereignty, to the extent that powers are not delegated to the federal government. Thus, in holding that Texas did not cease to be a state because of its purported secession,<sup>165</sup> the Supreme Court stressed the indissoluble character of the union created by the Constitution,<sup>166</sup> and observed:

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of

<sup>160</sup>For other examinations of this issue, reaching similar conclusions and collecting cases, see Richard B. Collins, Nineteenth Century Orthodoxy, 70 U. Colo. L. Rev. 1157, 1162–63 (1999); G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations, 85 Va. L. Rev. 1, 24 (1999).

<sup>161</sup>252 U.S. 416 (1920).

<sup>162</sup>*Id.* at 433.

<sup>163</sup>While it may seem puzzling that the federal treaty power would be broader than the power of Congress, this arrangement seems compelled by the structure of American federalism. With respect to domestic legislation, there can be few subjects that *neither* Congress nor the states could address. The situation with respect to treaties is different. As indicated *supra* notes 156 & 157, treaties may well address subjects that Congress does not, and arguably cannot, regulate. However, states are forbidden to make treaties, U.S. Const. art. I, § 10, cl. 1. Therefore, if the federal government lacks power to make treaties on those subjects, Americans must do without whatever benefits the treaties might confer. Reading the treaty power broadly avoids that result.

<sup>164</sup>*DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 540–41 (1885).

<sup>165</sup>*Texas v. White*, 74 U.S. (7 Wall.) 700, 719 (1869).

<sup>166</sup>*Id.* at 725–26.

their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.<sup>167</sup>

The Court upheld an Oregon statute requiring payment of state taxes in gold or silver coin, notwithstanding the argument that federal statutes making United States notes legal tender overrode the Oregon statute.<sup>168</sup> The Court held the federal statute was not intended to compel states to accept tax payments in notes,<sup>169</sup> relying on the proposition that “in many articles of the Constitution . . . within their proper spheres, the independent authority of the States, is distinctly recognized”<sup>170</sup> and on the necessity of the taxing power to the states’ authority.<sup>171</sup>

The Court also addressed the constitutional limits on federal authority over the states in *Collector v. Day*.<sup>172</sup> The Court there held that federal taxation of the salary of a state judicial officer was unconstitutional, posing too great a risk of subjecting the existence of state judiciaries to the control of the federal government.<sup>173</sup> In its opinion, the Court stated:

We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate . . . to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent

<sup>167</sup> *Id.* (citation omitted).

<sup>168</sup> *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 72–73 (1869).

<sup>169</sup> *Id.* at 76–78.

<sup>170</sup> *Id.* at 76.

<sup>171</sup> *Id.*

<sup>172</sup> 78 U.S. (11 Wall.) 113 (1870).

<sup>173</sup> *Id.* at 126–28.



of the general government as that government is independent of the States.<sup>174</sup>

While this case was subsequently overruled in *Graves v. New York ex rel. O'Keefe*,<sup>175</sup> *Graves* did not reject *Day's* analysis of the importance of the states' autonomous control over their judiciaries, holding instead that the tax in question did not threaten that autonomy.<sup>176</sup>

The Supreme Court's recent federalism cases also stress the constitutional importance of state autonomy over structural components of state government. In *Alden v. Maine*,<sup>177</sup> the Court held that Article I of the Constitution conferred on Congress no power to abrogate the sovereign immunity of the states in their own courts.<sup>178</sup> Its opinion stressed in particular that such power would be inconsistent with the structure of the Constitution.<sup>179</sup> Acknowledging that Article III obliges state courts to hear suits involving federal law, the Court stated nonetheless that "[t]he Article in no way suggests . . . that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States."<sup>180</sup> For similar reasons, the Court held that Congress lacked the authority under the Constitution to coerce state legislatures to adopt any particular legislation,<sup>181</sup> or, as held in *Printz v. United States*,<sup>182</sup> to compel state executive officials to execute federal programs.<sup>183</sup>

We thus confront a dilemma. As the treaty cases underscore, the treaty power conveys broad federal authority to override state policy, such as that announced by state political branches. However, dicta in other treaty cases and the reasoning of the cases addressing the basic structure of the Constitution seem inconsistent with a

<sup>174</sup> *Id.* at 126.

<sup>175</sup> 306 U.S. 466, 486 (1939).

<sup>176</sup> *Id.* at 483–86.

<sup>177</sup> 527 U.S. 706 (1999).

<sup>178</sup> *Id.* at 754.

<sup>179</sup> *Id.* at 748–54.

<sup>180</sup> *Id.* at 754.

<sup>181</sup> *New York v. United States*, 505 U.S. 144, 162–63, 175–79, 187, 188 (1992).

<sup>182</sup> 521 U.S. 898 (1997).

<sup>183</sup> *Id.* at 924–34.

federal power broad enough to sustain the president's memorandum. Since the latter cases deal with federal efforts to alter state governmental structure—including the freedom of state officers from federal commandeering—while the treaty cases deal only with state policy, there is a temptation to assume that the former should control. However, the structural cases cannot be mechanically applied in the treaty context; *Printz*, for instance, seems inconsistent with the original understanding of the treaty power.<sup>184</sup> Nonetheless, the cases addressing the fundamental importance of state control over their judiciaries<sup>185</sup> speak in sweeping terms. Further, none of the treaty cases involve treaties altering a state's governmental structure without its consent.

Together these cases suggest the following synthesis: The treaty power permits the president and Senate, acting together, to supersede state policy preferences, as announced by either state political branches or courts, even where the federal action is outside the scope of federal power as enumerated in Article I of the Constitution (subject to the limitation, discussed above, that the treaty power must be used to obtain a reciprocal *quid pro quo* that benefits the nation as a whole). The president may, through exercise of executive agreements, also supersede the policy preferences of state political branches and courts to get the benefit of such a bargain, especially in cases where Congress has acquiesced in the president's actions and where the state's objection implicates matters peripheral to the state's core powers. But the federal government, in whole or in part, may not act in a fashion that alters the structure of state government—particularly the structure of state judicial decisionmaking, an issue of special structural concern. This synthesis harmonizes evidence about the original understanding of the treaty power with the structural concerns raised in some of the treaty cases and in the Court's recent federalism cases.

It therefore seems reasonable to see the structural cases as more relevant in a case, like this, involving federal efforts to control the finality, and hence the structure of, state judicial proceedings and to conclude that the federal government lacks the authority to interfere with the fundamentally judicial character—the power to decide

<sup>184</sup>See discussion at notes 156–58 *supra*.

<sup>185</sup>See discussion at notes 164–83, *supra*.

cases—of state judicial power. By analogy to *Plaut*,<sup>186</sup> that is exactly what the president’s memorandum purports to do. The conclusion is especially compelling where, as here, the president’s action implicates concerns—operation of criminal justice systems—at the core of state power.<sup>187</sup> Surely, if the federal government as a whole cannot exercise such power, the president alone cannot.

In short, states are not obliged to comply with the direction in the president’s memorandum.

## VI. Conclusion

If (when?) the Supreme Court addresses Medellín’s case again, it will confront two legal mistakes. The ICJ’s tortured treaty interpretation has imposed on the United States an illegitimate obligation. The president’s response to the ICJ is also illegitimate. The Court can best address these mistakes by observing that it need not accept the ICJ’s treaty interpretations, adhering to its own view of the Consular Convention, and making clear that the president lacks the power he claims.

<sup>186</sup>See discussion *supra* notes 152–54.

<sup>187</sup>*Garamendi* implicitly reinforces this conclusion. Unlike the limited state interest there at issue, 539 U.S. 396, 416–20, 425–27 (2003), maintaining judicial integrity is a fundamental state interest, as the cases indicate, see discussion *supra* notes 164–83.