

# Discussion

## *Medellin v. Dretke*: Federalism and International Law<sup>1</sup>

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MARTIN FLAHERTY, MODERATOR†

*Flaherty*: This evening, we're going to have, at the very least, a discussion which may blossom into a debate—we will see as the evening progresses. However one characterizes the event, we're here to discuss the *Medellin v. Dretke*<sup>2</sup> case and, more broadly, we are going to be discussing cutting edge issues of international law, including the operation of self-executing treaties and state legal systems, the weight to be given to judgments of international courts

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1. This is an edited version of a debate held at Columbia Law School on February 21, 2005. The event was co-sponsored by the *Columbia Journal of Transnational Law* and the Federalist Society. All footnotes have been supplied by the Editors of the *Journal* with the approval of Professors Bradley, Damrosch, and Flaherty. The conversational style of the debate has been retained. All errors should be attributed to the *Journal*. The *Journal* would like to thank Professors Bradley, Damrosch, and Flaherty for their participation in this event and the subsequent editing of the transcript. The *Journal* would also like to thank Blaine Evanson and the Federalist Society for co-sponsoring this event. A webcast of this discussion may be found at [rtsp://media.cc.columbia.edu/law/CJTL/CJTL050221.rm](http://media.cc.columbia.edu/law/CJTL/CJTL050221.rm).

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2. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S.Ct. 686 (2004). The oral arguments were held on March 28, 2005.

interpreting such treaties, and the duties of state and federal judiciaries in this process, all in the context of death penalty cases. Let me give you a brief overview of how we will conduct tonight's discussion. I will give a brief overview of the case and its legal context and then we will hear first from Professor Damrosch and then from Professor Bradley, each of whom will speak for about fifteen minutes. After they finish their initial presentations, there will be about a five minute colloquy between them, and then I intend to go to you, the audience, for questions and answers.

So, without taking too much time, let me talk about the background of this case. It involves the Vienna Convention on Consular Relations,<sup>3</sup> U.S. law, and the International Court of Justice (ICJ).<sup>4</sup> To understand what's going on here one first needs to look at the relevant treaties on point; in particular, the Vienna Convention on Consular Relations. Very broadly speaking, in Article 36(1)(b), it has a provision that is somewhat analogous to the requirement of giving *Miranda* warnings<sup>5</sup> in domestic law. Article 36(1)(b) says:

[I]f 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.<sup>6</sup>

And this has also been interpreted to not just involve the arresting authorities contacting the consul, but also informing the detainee of his or her right to contact the relevant consul. The Vienna Convention on Consular Relations also has an Optional Protocol calling for resolution of disputes about its operation in the International Court of Justice.<sup>7</sup> And finally, under the United Nations

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3. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 UNT.S. 261, (entered into force Mar. 19, 1967) [hereinafter Consular Convention].

4. Statute of the International Court of Justice, June 26, 1945, art. 94(1), 59 Stat. 1055, 33 UNT.S. 993 [hereinafter ICJ Statute].

5. *Miranda v. Arizona*, 384 U.S. 436 (1966) (famously laying forth the requirements that a defendant be notified of his right to remain silent; that anything he says can and will be used against him in a court of law; that he has the right to have an attorney present before any questioning; and that if he cannot afford an attorney, one will be appointed to represent him before any questioning).

6. Consular Convention, *supra* note 3, art.36(b).

7. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325, 596 UNT.S. 487, 488 [hereinafter Optional Protocol]. The Optional Protocol states in relevant part that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be

Charter, Article 94(1), as I was reminded from Professor Damrosch's brief, member states undertake to comply with ICJ judgments.<sup>8</sup>

This case is by no means the first time that the Supreme Court has visited this issue. Famously, in the *Breard v. Greene* case in 1998, a death penalty case in Virginia dealt with someone who alleged that he had not been afforded his rights under the Vienna Convention, although he had not raised it in a timely fashion and, thus, it had been barred under state procedural default rules.<sup>9</sup> This matter, at the very last minute, was brought before the ICJ, which, in essence, issued a stay asking the United States not to do anything until the ICJ could listen to the case on the merits. The United States did not do that. The Governor of Virginia declined to follow this, in effect, stay order and the United States did not do anything other than send a letter from then Secretary of State Madeline Albright to the Governor of Virginia, but the United States didn't do anything to compel Virginia to stay the execution and so the execution proceeded. The Supreme Court, in reviewing this, said that it was not bound by the stay application for a number of reasons, primarily two: (1) it was in the nature of temporary relief and (2) that federal statute from 1996 that was assigned to facilitate the death penalty over state procedural and bolster state procedural default rules took precedence over the Vienna Convention and treaties like it.

The ICJ eventually did get a chance to review this issue on the merits involving two cases: one from Germany and, eventually, the one from Mexico that involves the case before us here. The one from Germany is the *LaGrand* case, in which a German national alleged not to have been afforded his Vienna Consular right and was tried and convicted on a capital case.<sup>10</sup> The ICJ said that this was indeed a right under the Convention and that the United States should afford some review of the detainees or the convicts at this point claims notwithstanding state procedural default rules.<sup>11</sup>

This issue came up again in the *Avena* case, *Mexico v. United States*, which came down in 2004.<sup>12</sup> This case involved 51

brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”

8. U.N. CHARTER art. 94(1). This Article provides that “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.”

9. *Breard v. Greene*, 523 U.S. 371 (1998).

10. *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 446 (June 27) [hereinafter *LaGrand*].

11. *Id.* at 513–14, paras. 125–26.

12. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. \_\_\_\_ (Mar. 31) (hereinafter *Avena*), available at <http://www.icj-cij.org/icjwww/docket/imus/imusframe.htm>.

individuals from Mexico who are Mexican citizens that were in the United States.<sup>13</sup> These individuals were tried and convicted of capital crimes in the United States, and the ICJ handed down four particular decisions. It said that the United States, through its local authorities, violated the Vienna Convention because it did not inform the 51 individuals of their right to contact the consul. It further violated the Vienna Convention because it didn't inform Mexican consulate officials. Thirdly, it violated the treaty because it didn't allow Mexican consuls to arrange for legal representation of those who had been arrested. And finally, the ICJ ordered that the U.S. must review and reconsider the convictions of these 51 individuals by means of its own choosing.

The *Medellin v. Dretke* case comes out of those 51 cases that were considered in *Avena*. It went up to the Fifth Circuit and the Fifth Circuit, in a perfunctory fashion, held that the Vienna Convention did not create any private right or cause of action for those who had been arrested without having been afforded their Vienna Convention rights, and so it affirmed the capital convictions and denied relief under the *Avena* judgment.<sup>14</sup>

There are many issues which I'm sure Professors Damrosch and Bradley will deal with, and I am also sure that they will correct any misstatements I have made in my summary. But there are a number of issues that I have just put on the table. One is, first of all, the Vienna Convention, the self-executing supreme law of the land within the domestic systems of the United States. Second, does it, the Vienna Convention, pre-empt state law including and especially state procedural default rules when it comes to failure to raise claims on appeal for capital cases. Third is the question of enforcement. Are the individual rights under the treaty thought to be enforced by the individual or rather by the nation on behalf of the individual? Finally, and perhaps most importantly, what is the effect of the ICJ's *Avena* decision? Does it have direct effect, and if so, are there problems of delegating through a treaty to outside courts outside the U.S. system of judicial power? And if it doesn't have direct effect, should it have indirect effect? And is there any reason why it shouldn't be given at least substantial persuasive deference? So without any more from me, I will get out of the way and turn things over first to Professor Damrosch.

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13. The case involves 54 Mexican nationals, but only 51 were involved in the holding with respect to Article 36 of the Vienna Convention on Consular Relations for failure to inform Mexican nationals of their rights to consular assistance. *See id.* para. 106.

14. *Medellin*, 371 F.3d at 279–80.

*Damrosch*: Thanks, Professor Flaherty. We opted to sit, on the theory that this is not supposed to be a debate. I'm going to explain my views and Curtis will continue by elaborating on our shared position [Laughter]. He actually sent me an email indicating a surprising measure of agreement, so we will adopt this conversational stance. You know that there is a case pending at the Supreme Court and that I have participated in the efforts on behalf of the petitioner. I filed an amicus brief on behalf of international law experts.<sup>15</sup> Quite a large number of amicus briefs are in the case from other groups, including former diplomats,<sup>16</sup> the American Bar Association,<sup>17</sup> a number of human rights groups,<sup>18</sup> former hostages; there's quite a lot of interest in this case. The time for respondent to file has not yet elapsed<sup>19</sup> and I don't think that Professor Bradley is going to be filing any amicus brief on behalf of respondent. Anyway, we expect to agree.

One thing that is not in dispute is the fact of a treaty violation. The petitioner, Jose Ernesto Medellin, was not notified at any time before his trial, conviction, or sentence of his right to communicate with the Mexican consulate, nor was Mexico aware of his case at any time until he wrote to the consulate from death row. So the only thing that was in dispute on the international plane was the remedy. The International Court of Justice held that the remedy for the violation of the treaty is the review and reconsideration of his conviction and

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15. Brief of International Law Experts as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 176453 (S. Ct. 2005) (No. 04-5928) [hereinafter International Law Experts Amici supporting Petitioner].

16. Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 176425 (S. Ct. 2005) (No. 04-5928); Brief of International Law Experts and Former Diplomats as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2004 WL 2381135 (S. Ct. 2005) (No. 04-5928).

17. Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 176451 (S. Ct. 2005) (No. 04-5928).

18. See Brief Amicus Curiae of NAFSA: Association of International Educators and U.S. Catholic Mission Association et al. in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 166592 (S. Ct. 2005) (No. 04-5928); Brief of Amici Curiae Bar Associations and Human Rights Organizations In Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 166594 (S. Ct. 2005) (No. 04-5928); Brief of Amici Curiae Amnesty International, Association of the Bar of the City of New York, Hispanic National Bar Association, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights, and National Association of Criminal Defense Lawyers In Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 686, 2004 WL 2381134 (S. Ct. 2005) (No. 04-5928).

19. At the time of publication, the Government had filed its response. See Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, 125 S. Ct. 686, 2005 WL 504490 (S. Ct. 2005) (No. 04-5928) [hereinafter Government's Brief].

sentence in a proceeding in which the impact of the treaty violation could be evaluated as a matter of legal right rather than grace or mercy.<sup>20</sup> Here I might just digress for a moment and say that the U.S. position in the international litigation both in the *LaGrand* matter brought by Germany and the *Avena* matter brought by Mexico was that executive clemency was enough—it's enough if the governor or the clemency board in considering a petition for post-conviction relief thinks about the treaty violation and acts upon it one way or another. One can wonder whether clemency is an adequate method for considering a treaty violation. Indeed the International Court of Justice has now twice held that executive clemency is not sufficient, that the nature of the legal right in question requires that some forum, either a judicial body or a body very analogous to judicial body, has to take account of the treaty violation and determine whether there was prejudice and how the treaty violation may have affected the outcome of the case.<sup>21</sup> So, that is one area as to which we have some disagreement.

The case is not about the death penalty as such. Mexico brought the case on behalf of 54 Mexican nationals who all were on death row, but in fact, it's not a case about the death penalty. It's a case about the Consular Convention. It's not about whether the death penalty violates customary international law or any human rights treaty.<sup>22</sup> In the amicus brief that I have prepared, the statement of interest says at the very beginning that the Amici have different views on the death penalty.<sup>23</sup> And in fact, we do have different views about the death penalty: among our group are those who do not think it is illegal, or bad policy, or anything else. We joined on one common position, which is that a judgment of the International Court of Justice giving effect to a treaty is binding and should be implemented through federal judicial action. In the question period, we can talk about the implications of this case for other death penalty cases not involving consular rights or for other consular violations not involving the death penalty.

Facts do matter in these cases. Very often at the Supreme Court the facts are not of much interest, as compared to the abstract questions of law. In the 50+ cases that Mexico brought to the

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20. See *Avena*, 2004 I.C.J. para. 121.

21. See *id.* paras. 142–43; see also *LaGrand*, 2001 I.C.J. at 506–508, paras. 112–13.

22. For a discussion of such issues see WILLIAM SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2003). Also, see Justice Kennedy's majority opinion in *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (in holding the juvenile death penalty unconstitutional, Justice Kennedy relied, in part, on international and foreign law).

23. International Law Experts Amici supporting Petitioner, *supra* note 15, at \*1.

International Court of Justice, the facts are quite diverse. Now, what is common? All of the individuals have been convicted of murder. They are all Mexican nationals who are on death row, and they all did not get notification of their consular rights under the Convention. Beyond these facts, the cases diverge factually and procedurally. Here I want to emphasize that the facts really matter in death penalty cases, and especially at the penalty phase even if guilt is proved beyond a reasonable doubt. Consular participation can make a big difference in developing facts at trial and can be most important in the penalty phase at the sentencing hearing. Consular involvement can change the outcome in a death penalty case even if defendant's guilt has been established to the satisfaction of a jury beyond a reasonable doubt. How does consular participation matter? Well, there are problems of language, cultural differences, access to government records that may be on file in Mexico, and witnesses who are in Mexico. All of these matters fall within the role of the consul in assisting a foreign national in preparing his defense, retaining experts, and perhaps retaining supplementary counsel. Of the several cases that are now wending their way through the U.S. legal system in the aftermath of the ICJ judgment, the first was the case of *Torres* in Oklahoma.<sup>24</sup> He was 18 years old when the murder was committed. He was not the trigger man. And as Mexico's papers asserted both in the filings at the International Court of Justice and in the Oklahoma Court of Criminal Appeals, consular assistance could really have made a difference in his case. He was the least culpable person ever to have been sentenced to death in Oklahoma in the modern era. Mexico asserted that the consulate would have assisted counsel with mitigating evidence, expert testimony, and so on. And in that case, by the way, the Oklahoma Court of Criminal Appeals in the aftermath of the ICJ judgment did the right thing and vacated the conviction and sentence and remanded for a hearing on the treaty violation.<sup>25</sup> A few hours after that, the governor commuted the death sentence.<sup>26</sup> This is an example, I think, of the proper follow-through of the domestic legal system by state judicial and executive authorities, both of them implementing the international judgment.

In the *Medellin* case now pending at the Supreme Court, the facts matter again. Petitioner there, Medellin, was 18 years old at the

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24. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004).

25. *Id.*

26. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of Avena Decision by Oklahoma Court*, 98 AM. J. INT'L L. 580, 581 (2004).

time that the murder was committed. A pathetic defense was put on by appointed counsel. Appointed counsel was suspended for ethics violations during the pre-trial proceedings in Mr. Medellín's death penalty case. This counsel put on only a meager two-hour defense at the penalty phase. The psychology witness that he put on did not even interview the defendant. No inquiry was made into Medellín's life history. No attempt was made to bring documents or witnesses or anything from Mexico. So, again, this is a case where consular involvement at the pre-trial phase, at trial, and at the penalty phase could have made a difference in the outcome.

Treaty rights are legally distinct from constitutional rights. In other words, even if Medellín's assistance of counsel satisfies the relevant constitutional test, the treaty test is different. The treaty test is whether he was notified of his right to communicate with the consulate, because the kind of assistance that the consular office can offer in a death penalty case or any other case is different from the kind of assistance that legal counsel offers under the constitutional standard.

Now, I want to say a few things about the treaty in supplementation of the points that Professor Flaherty has already made. Here I want to pay a nod to the Federalist Society as a co-sponsor of this event. I'm assuming that those here from the *Columbia Journal of Transnational Law*, a co-sponsoring organization, know all about treaties, but maybe not everyone who's here because of the Federalist Society involvement in this program has the same background. I've spoken to Federalist Society groups on international law topics including treaty topics, and I always emphasize for the originalists in those groups that the Framers did expect the United States to comply with international law and especially with treaties. Here we can take note of our moderator's important article on the founding period, "Are We to Be A Nation?"<sup>27</sup> As the Framers understood, if we are to be a nation in any respect, it is in respect of foreign affairs.

The Vienna Convention on Consular Relations is a multilateral treaty. It has the purpose, among others, of protecting foreigners when they're outside their own country. The key provision has been summarized by Professor Flaherty. The main points about the Vienna Convention in respect of this legal procedure are first, that it was adopted under Article II of the U.S. Constitution with the Senate's advice and consent. Therefore, we have no problem with it

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27. Martin Flaherty, *Are We to Be A Nation?: "States' Rights" and the Treaty Power*, 70 COLO. L. REV. 1277 (1999).



being an executive agreement or some other funny kind of thing that the Framers didn't understand. This was in the classic Article II mode. Just for a little political coloration here we can point out that approval of this treaty was unanimous. There is no issue of federalism; this is the kind of treaty that, I think even Professor Bradley would agree, the Framers would understand as a proper use of the treaty power. It was adopted in a posture in which the executive representatives told the Senate that it was entirely self-executing and would require no implementing legislation. Therefore, it would seem to be the kind of treaty that commends itself to judicial action and is supposed to be applied by the judiciary. It enjoys the status of the supreme law of the land under Article VI of the Constitution. It, therefore, is binding on all state judges notwithstanding anything in state constitutions or laws, and it falls within the federal judicial power under Article III.

Professor Bradley and I have very different views on the treaty power in general. He has argued in several articles<sup>28</sup> about the *Missouri v. Holland*<sup>29</sup> case that you all know about from constitutional law or international law, either that *Missouri v. Holland* should be overruled or that it should be confined to the very narrowest compass. But I think even he would agree that the subject of protection of an alien when the alien is outside his own country is and has always been considered a proper subject for the treaty power. The earliest U.S. treaties included such provisions. The earliest Supreme Court cases confirmed the binding and preemptive effect of such treaties. Here I would just mention *Ware v. Hilton*,<sup>30</sup> in 1796, which established that a treaty with Britain would prevail over state laws that confiscated the property of British subjects. We put nice little quotations from *Ware v. Hilton* in our brief:<sup>31</sup> You can all read it. It very clearly establishes

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28. See Curtis A. Bradley, *Federalism and the Treaty Power*, 98 AM. SOC'Y INT'L L. PROC. 341 (2004); Curtis A. Bradley, *International Delegation, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

29. 252 U.S. 416 (1920).

30. 3 U.S. (3 Dall.) 199 (1796).

31. *Id.* at 236–37. The Court commented:

A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. – If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature,

that a treaty providing for protection of aliens is preemptive over any conflicting state law. The application of this case and many, many others, to the present case would be that all state and federal courts have the duty to apply the Vienna Convention on Consular Relations as the rule of decision in U.S. courts, and that an International Court of Justice judgment interpreting the Vienna Convention as an authoritative interpretation of the treaty must also be given effect.

Let me mention a few other things about the Vienna Convention and its Optional Protocol on the settlement of disputes and the International Court of Justice. Professor Flaherty also summarized some of these provisions. The Optional Protocol is optional in the sense that no state has to opt into the system of compulsory dispute settlement, but once a state has agreed to submit disputes under the Vienna Convention to the resolution of the International Court of Justice, that optional acceptance becomes compulsory and a case may be brought by unilateral application of any party. That's what both the United States and Mexico had done here. They both opted into this optional system and Mexico then could, by unilateral application, bring any dispute over the interpretation or application of a treaty to the ICJ and the judgment then would then become a binding obligation under the UN Charter, Article 94,<sup>32</sup> which Professor Flaherty has referenced, and the International Court of Justice Statute, Article 59,<sup>33</sup> which provides that the decision of the court has no binding force except between the parties and in respect of the particular case. So, between the United States and Mexico, and in respect of this particular matter, which includes Mr. Medellin's specific case, this judgment is indeed binding. When Professor Flaherty paraphrased the judgment, he didn't mention that Mr. Medellin is mentioned by name a half a dozen times in the judgment, both in the listing of the individuals covered and specific findings about their particular cases and then finally in the dispositive clauses. There's absolutely no ambiguity that his own rights were taken up under a proper compulsory process and were definitively adjudicated by the ICJ.

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this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. . .

Four things are apparent on a view of this 6th Article of the National Constitution. . . . 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

32. UN. CHARTER art. 94.

33. ICJ Statute, *supra* note 4, art. 59. Article 59 provides, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

We might contrast this to the system that prevailed before we had the Vienna Convention and its Optional Protocol. Before there was a multilateral treaty and before there was an agreed system for compulsory settlement of disputes, consular law was governed by customary international law. All of you who have taken international law know that that's pretty wishy-washy and unclear [Laughter]. U.S.-Mexican disputes over consular relations go back over 150 years. Two parties would disagree and the United States very frequently was claiming that U.S. citizens had been incarcerated in Mexico and had not been given access to a consular post. In an arbitration between the United States and Mexico under the U.S.-Mexican claims commission, the *Walter H. Faulkner Claim*,<sup>34</sup> an arbitral tribunal held that a foreigner not familiar with the laws of the country where he temporarily resides should be given this opportunity. So this would be an example of an ad hoc arbitration that would have to be set up on a special basis. When the Vienna Convention was being negotiated in the late 1960s, it was the United States that insisted that there should be a compulsory dispute settlement system, and the U.S. took the lead role in negotiating these dispute settlement provisions. The U.S. resisted the proposals of others to water it down. The United States was the first state party to invoke the optional protocol under the Vienna Convention. I know it well because I helped draft the pleading. This was in the *Tehran Hostages Case*<sup>35</sup> brought in 1979. When the International Court first entered a provisional measures order in 1979 and then a binding judgment in 1980, the United States certainly insisted on the binding quality of that judgment. So this is not just a matter of option or discretion. Once optionally agreed, it is compulsory. The judgment of the ICJ then is both an interpretation and an application of the treaty. My own position, which may be different from the position of some of the Amici who signed my brief, is that not every single judgment of the International Court of Justice is always and necessarily self-executing or has direct effects in U.S. law. The *Avena* judgment is special because this judgment arises under a self-executing treaty. It arises under a treaty that the executive branch explained to the Senate would require *no* implementing legislation and would be a directly applicable treaty. An example of a different kind of judgment of the International Court of Justice that might not have such effects and indeed in my view, should not, is the *Nicaragua*

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34. *Walter H. Faulkner (U.S. v. Mex.)*, Opinions of the Commissioner Under the Convention Concluded September 8, 1923 (1927), at 86, 90.

35. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

Case of 20 years ago, where the ICJ held that U.S. military policy towards Nicaragua was illegal under customary international law.<sup>36</sup> That is the kind of judgment that does not commend itself to judicial action. It addresses itself to political rather than judicial action, and I think one could understand that a different construct would apply concerning its place in domestic law. In my view, that kind of judgment is not directly applicable, but a judgment interpreting a self-executing treaty would be. I'm at the end of my opening.

*Flaherty*: Thank you very much. Now, we'll hear from Professor Bradley.

*Bradley*: Thank you, Professor Flaherty and Professor Damrosch. Thanks also to the Federalist Society and the *Columbia Journal of Transnational Law* for inviting me and for arranging our discussion or debate. We will see whether it turns out to be a discussion or debate. Finally, thanks to all of you for coming. I hope you find this topic interesting. I do think the *Medellin* case raises important issues. Although some of these issues, as you have heard, have been before the Supreme Court before, they are now before the Court in a much more developed fashion than in the past. Among other things, the case raises important questions concerning the relationship of the United States to international institutions and international courts.

I spent the last year working in the government and thus I need to make the usual caveat that nothing I say here is intended to reflect, one way or the other, the views of the government, particularly given that the issues we are discussing are still before the government.

Before addressing my views about the case, I want to emphasize three general points. First, the mere fact that the United States has an obligation under international law to do something or not do something—in this case providing review and reconsideration to the individuals covered by the *Avena* decision—does not tell us how the obligation is to be implemented within the U.S. legal system. International obligations and domestic implementation have consistently been regarded by both the United States and the international community as separate questions. Second, although the *Avena* decision interprets U.S. treaty obligations, and although I agree with Professor Damrosch that the decision is binding on the United States by virtue of other treaty obligations, the decision is not itself a treaty of the United States. Third, in thinking about what the

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36. Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

Supreme Court is likely to do, we are all hampered by not knowing at this point what, if any, views will come out of the executive branch on the meaning on any of these underlying treaties or about what the Court should do in accommodating the ICJ's decision.<sup>37</sup> I think that the views of the executive branch could have a significant impact on all of our arguments.

Fifteen minutes is not long, so let me tell you my bottom line and then we will see how much I can clarify about why I reach this conclusion, and hopefully there will be more time in the colloquy and questions to clarify some of this. I think the case should be resolved as follows: as an initial matter, I believe that there is a serious jurisdictional problem that may prevent the Supreme Court from reaching the merits of the case. In a nutshell, the federal habeas statute limits appeals from the denial of habeas corpus relief to claims involving the denial of constitutional rights, yet the petitioner here is not claiming before the Supreme Court the denial of any constitutional rights. This problem was not highlighted in the certiorari briefs, and I think it is possible that when the Court discovers the problem it will dismiss the case without addressing the merits.

If the case is resolved on the merits, I think the Supreme Court should hold—and here I think Professor Damrosch and I part company slightly—that the *Avena* decision is not directly enforceable in U.S. courts, and indeed no decisions of the International Court of Justice are directly enforceable in the U.S. legal system. Second—and this is where Professor Damrosch and I may join company—the petitioner may nevertheless have a viable claim here. That claim would come out of the underlying treaty rights in the Vienna Convention on Consular Relations, the content of which could be informed by what the ICJ viewed was the meaning of the treaty.

Importantly, I believe the petitioner should be required to pursue this claim in the state courts in the first instance. This result, is in my view, compelled by the federal habeas provision that I've mentioned and is also the outcome that is most consistent with our federal system. This is, after all, a state law case: the defendant was

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37. The Government argued that the claim was procedurally barred due to the defect described by Professor Bradley. In the alternative, the Government argued that the ICJ decision is not itself binding on the Supreme Court, nor is the petitioner granted standing to sue under the treaties involved. However, the President determined that the United States will abide by the ICJ decision through enforcement in state courts. See Government's Brief, *supra* note 19. It is also interesting to note that since its filing in *Medellin*, the United States has withdrawn from the Optional Protocol. See Charles Lane, *Foes of Death Penalty Cite Access to Envoys*, WASH. POST, March 10, 2005, at A1.

convicted in state courts for a violation of state law and his right to a hearing depends in the first instance on the application of state law. Moreover, he has not yet pursued the post-*Avena* claim in the state courts. For these reasons, if the Supreme Court does reach the merits in *Medellin*, I think the court should affirm the Fifth Circuit and direct the petitioner to the state court system.

Having given you a general description of my views, I will now say a bit more about the jurisdictional problem in this case under the federal habeas corpus statute.<sup>38</sup> The habeas statute says that when you seek habeas relief in a federal district court, you can raise claims under the constitution, federal statutes, or treaties. In this case, the petitioner did raise a constitutional claim—an ineffective assistance of counsel claim—as well as his treaty claim in the district court. The appellate portion of the habeas statute is different, however. In 1996, the habeas statute was amended to say that in order to appeal a denial of habeas relief to a federal court of appeal you have to get a certificate of appealability.<sup>39</sup> In order to get that under the amended statute, you must make a substantial showing of a denial of a constitutional right. That is the only basis for a federal appeal.<sup>40</sup> In this case, however, the only claims before the Supreme Court involve treaty-based rights.<sup>41</sup> There are no constitutional claims before the Court, and in my mind that is an easy basis for affirming the Fifth Circuit's denial of a certificate of appealability. This 1996 amendment, based on the *Breard* decision's discussion of a different part of it, and also by well-settled doctrines of the relationship between statutes and treaties, should take precedence over the Vienna Convention when there is a conflict, which there clearly would be here. The good news, from an international law perspective, is that this would simply mean that the petitioner should pursue his treaty claim in the state courts which, in fact, have not had a chance to review them in light of the *Avena* decision.

There are potential responses to the statutory problem, but I do not think any of them are very good. You could argue that there is an argument before the Court that the treaty preempts state law and that

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38. 28 U.S.C. §§ 2241-54.

39. 28 U.S.C. § 2253(c)(1) (1996).

40. 28 U.S.C. § 2253(c)(2) (1996). This Section provides that "A certificate of appealability may issue under paragraph (1) *only* if the applicant has made a substantial showing of the denial of a constitutional right" (emphasis added). As the Supreme Court has stated, this statutory standard is a "jurisdictional prerequisite." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

41. Petitioner only alleges violation of the Consular Convention. See Brief for Petitioner, *Medellin v. Dretke*, 125 S.Ct. 686, 2005 WL 176452 (S. Ct. 2005) (No. 04-5928).

this preemption issue is a constitutional issue, but the statute says it has to be a claim of constitutional right and we don't call preemption claims constitutional rights claims. In fact, if they were, *statutory* claims would be constitutional rights claims because statutes, of course, also preempt conflicting state law provisions. And the Supreme Court, in any event, has said this statute means only claims of constitutional right. Unfortunately, none of the petitioners' papers or the Texas state papers pointed out the problem at the cert stage to the Court. I assume the Court will discover the problem; I don't know what they'll do about it, but it's conceivable that we'll have to wait another day for a merits decision from the Court.

Let me now elaborate on why I do not think the ICJ judgment has direct effect in U.S. courts. As I've mentioned, that an international decision is binding on the United States does not tell us the status of that decision in the United States legal system. For a variety of reasons, I do not believe that ICJ decisions are equivalent, for example, to a Supreme Court decision or some other decision that would have a direct operative effect. In this case, keep in mind what we mean. We mean a decision that would itself override conflicting state rules of procedure at the local level.

So what is the law that would override the state rules? It might be the Vienna Convention, and I think this is where Professor Damrosch and I can agree. But if you do not have the treaty, if you are relying on the judgment, separate from the treaty, I don't see where the law would be coming from. The Protocol in which the United States consented to have the ICJ decide disputes under the Vienna Convention does not, in any way, suggest domestic judicial enforcement. In fact, only nation-states can bring the claims,<sup>42</sup> which would not suggest that this individual petitioner would then have a right to go back on his own to bring a claim. The only enforcement mechanism in the International Court of Justice system that is provided for in the UN Charter is through the UN Security Council at their discretion.<sup>43</sup> Discretionary political enforcement certainly does not by itself suggest any mandatory domestic enforcement. None of

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42. The Optional Protocol provides that "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, *supra* note 7, art. 1.

43. U.N. CHARTER art. 94(2). This Article provides:

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.

the language of either the UN Charter or the Protocol says anything about such enforcement, and, in fact, the UN Charter says that the party that loses a case in the ICJ undertakes to comply with it.<sup>44</sup> Again, this language, by any measure, suggests a non-self-executing responsibility for the United States to decide, as a domestic matter, how to implement the decision. To the extent there are any cases that have addressed this question, they all have decided it the way I have just described. The *Nicaragua* case from the D.C. Circuit, for example, says, “[n]either individuals nor organizations have a cause of action in American courts to enforce ICJ judgments.”<sup>45</sup> And I think that is clearly right, particularly if you think about it from a constitutional perspective. In the Constitution, there are only three kinds of laws that can override Texas’ laws of procedural default, only three: the Constitution itself, treaties, and federal statutes. International decisions, as I said at the outset, are not one of those laws that of their own force can override Texas’ laws. Now maybe the underlying treaty here, the Vienna Convention, should and will do so, but one would have to then, as a court, agree with the ICJ’s interpretation, not simply enforce its judgment as if the judgment itself were doing the work.

If you look at the U.S. relationship with other international tribunals, that practice further supports my argument. For example, the World Trade Organization has a dispute settlement body. None of those decisions have direct effect in U.S. courts. The only way they can be implemented is through Congress, and in fact there is a statutory scheme that directs how it has to be done.<sup>46</sup> Even in international arbitration, only the same party can come back to the United States and enforce the decisions. Medellin, however, is not even a party to the ICJ case. Even if he were, it is worth noting that arbitration decisions are enforceable only because of underlying statutes. Those statutes direct court to give certain effect to arbitration decisions subject to various statutory exceptions.<sup>47</sup> No such statute, of course, exists for ICJ decisions.

In addition, I think giving direct effect to the *Avena* decision, or any other ICJ decision, but particularly the *Avena* decision, would raise, at least in my mind, constitutional concerns. It would be

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44. *Id.* art. 94(1).

45. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934 (D.C. Cir. 1988).

46. *See* 19 U.S.C. §§ 3501–3624.

47. *See, e.g.*, 9 U.S.C. § 201 et seq. (allowing enforcement of arbitration awards falling with scope of New York Convention); 22 U.S.C. § 1650a (allowing enforcement of ICSID arbitration awards).



arguably allowing non-U.S. judges who are not appointed under the constitutional mechanisms to exercise the judicial power of the United States because they would, in effect, be exercising the power to directly displace the laws of a U.S. state. In addition, because these cases concern core matters of state criminal procedure, it would arguably intrude on state sovereignty interests. Even though Professor Damrosch and I can agree that the treaty makers of the United States may have the authority to do that, it is a different matter to say that non-U.S. judges have that direct authority, particularly since none of the states of the United States are represented in those bodies. They are, however, represented in the United States Senate and in Congress and thus would have a voice when, for example, Congress would deliberate about how to implement this decision.

I know there are counterarguments to the constitutional concerns; maybe we can talk about those. The key point is not whether you think I am ultimately right. The key point is whether there are constitutional concerns about giving non-U.S. judges this role and about the impact of such a role on U.S. federalism, and those concerns provide an additional reason to assume that the United States treaty makers did not implicitly delegate to the ICJ some sort of direct enforcement authority.

Finally, I do not think that notions of comity, of which I am supportive, provide a basis for direct enforcement of the ICJ decision. As many of you probably know, U.S. courts often do give some comity, or respect, to foreign decisions, and therefore recognize and enforce them. A French contract judgment, for example, might well be enforced in a New York state court. But there are many differences between that context and the present one. First of all, the whole notion of comity stems from respect for equivalent sovereign states, and it would be an extension of that idea to say that that the same kind of judicial relationship extends not to another sovereign, but to an international institution. More importantly, that analogy only applies in private civil cases anyway, not criminal cases. We do not give comity to penal and criminal decisions or enforcement actions of other states.<sup>48</sup> In addition, comity is always subject to be overridden by U.S. law, and that includes state and local laws and policies. There is a well-recognized public policy exception to enforcement of foreign judgments and, of course, here Texas would claim an important public policy in enforcing its procedural default rules. Moreover, these procedural default rules are the types of rules that the Supreme Court itself has approved in many constitutional

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48. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964).

cases as being legitimate, neutral rules of state procedure.<sup>49</sup> Indeed, they can be applied to bar review of the most important constitutional rights in the Bill of Rights because they are not discriminatory against the rights and because they serve legitimate state purposes. So the State of Texas has a clear, legitimate federalism interest in preserving those rules, and I do not see how comity, as a sort of a general respect, overcomes that.

To return to where I think Professor Damrosch's position and my position might converge, the best argument that I think petitioner has, although for some reason he has not actually pursued it this way, is to focus on the underlying Vienna Convention on Consular Relations. It does mention individual rights in Article 36, and treaties are the supreme laws of the land. We can look at the Constitution and we know their status. There is no mention of international decisions having the ability to preempt state law, but there is a mention of treaties like Vienna Convention having that authority. And of course, we now have a decision from the ICJ that expresses an interpretation of the treaty and one can imagine, at least other things being equal, that the Supreme Court will give that interpretation significant weight. As I have mentioned, there may be a federal statutory problem with the Supreme Court giving relief in this case, but if this goes to Texas state courts, the petitioner might well get a hearing there.

This takes us to the most uncertain part of the case, which I think may explain why the petitioner has not pursued the argument I am suggesting. His counsel may be concerned, I think, about what the executive branch will say about the treaty. If the executive branch comes in and says that it does not agree with the International Court of Justice, U.S. courts may defer to that interpretation. Under the petitioner's argument, which involves direct application of the ICJ decision, it may not matter whether the executive branch agrees with the ICJ's reasoning.

Let me conclude by emphasizing that Congress has a significant ability to respond here if it chooses to do so, just as it has done for WTO decisions and other international decisions, and it, unlike perhaps the courts, need not defer to the executive's view about the proper relief. Although requiring more congressional involvement might not seem attractive to those hoping for judicially-imposed relief in cases where the Vienna Convention has been violated, I think greater regulation of this issue by the political branches—which, unlike the courts, are in charge of managing our foreign relations—would be a positive development. Thank you.

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49. See *Howlett v. Rose*, 496 U.S. 356 (1990).

*Flaherty*: Thank you very much, Professor Bradley. I would invite first Professor Damrosch to briefly respond to whatever point she feels she wants to address.

*Damrosch*: Yes, there are a few things—there was more disagreement than I thought there might be [Laughter]. We'll begin with Professor Bradley's mention that the Supreme Court has seen some of these issues before. Indeed the lower courts felt themselves constrained by the Supreme Court's decision in *Breard* of 1998,<sup>50</sup> which basically came up over a weekend. It came up in a different procedural posture because the order of the International Court that Professor Flaherty referred to was an interim order whose legal force was disputed and uncertain at that time. Basically the Supreme Court said that the better view of these interim orders is that they're not binding, and that the better view on procedural default is that state procedural default controls over Article 36 of the Vienna Convention. Now, the Supreme Court said that with basically a day to think about the issues. Even with the benefit of a few words from amici who worked over their Passover, Good Friday, and Easter weekend to try to get some sentences to the Supreme Court, they didn't have full briefing on the merits. It turns out that they were wrong on both of those points in light of what the International Court of Justice later held in *LaGrand* and in *Avena*. In *LaGrand* and in *Avena*, the International Court held that interim orders are binding and that procedural default cannot be applied in such a way as to negate a treaty right.<sup>51</sup> In other words, it's the treaty that's supreme, and not the state procedural rule. The lower courts felt that they had to follow *Breard* unless the Supreme Court were to say that *Breard* is misplaced. That's why the certificate of appealability was denied, and that's the answer, I think, to Professor Bradley's point about this technical issue in the lower courts about whether we can even get this case to the Supreme Court.

Now, Professor Bradley has talked about whether this would come up not as a matter of giving effect to the ICJ decision as such, but rather as giving effect to the underlying treaty. I agree that the underlying treaty should be followed. It just happens that the judgment is the authoritative interpretation of the underlying treaty. I think the fallacy of what he is trying to put forward here is in his idea

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50. See e.g., *U.S. v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001); *U.S. v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000); *U.S. v. Santos*, 235 F.3d 1105 (8th Cir. 2000); *U.S. v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000); *U.S. v. Ademaj*, 170 F.3d 58 (1st Cir. 1999).

51. See *Avena*, 2004 I.C.J. paras. 112–113; *LaGrand*, 2001 I.C.J. at 497–98, paras. 90–91.

that there's some sort of bifurcation between the treaty and the interpretation of it. Under his view, he wants the United States unilaterally to be able to control the interpretation of the treaty and the measure of its own compliance. Anyone who has studied international law would know that a treaty is not a unilateral act by which one state decides how far it's going to be bound, but rather it is an international act as to which there is an authoritative international meaning. And here the United States placed no qualifications, reservations, or limitations on its acceptance. It accepted the entire Vienna Convention without reservation, and it accepted the authority of the International Court of Justice to render binding judgments interpreting and applying the treaty. That's exactly what has been done here. The judgment itself partakes of the same legal quality as the treaty because it is the authoritative interpretation of the treaty.

In spring of 2004, Justice Scalia—who is not always thought of as friendly to international law and foreign judicial interpretations—was the guest of the American Society of International Law, and gave the keynote address.<sup>52</sup> A few weeks before, he had authored a dissent in a treaty interpretation case in which he chided his colleagues on the bench for having paid insufficient attention to the opinions of some intermediate appellate courts in the states of parties to the multilateral treaties.<sup>53</sup> He said all things being equal, since the United States doesn't make up these rules on its own, but participates in a multilateral system, if there are other judicial interpretations interpreting the treaty, we should pay attention to those. I think that Professor Bradley would say that what the Supreme Court ought to be doing is the creative act of infusing its own interpretations with the interpretations of other bodies. What I'm saying here is that what Justice Scalia had to say about the persuasive force of intermediate appellate decisions from foreign tribunals is a little bit the same and a little bit different from the International Court of Justice. Here, it's a matter of obligation and duty that we give effect to the judgment of the International Court of Justice because that body, unlike a coordinate court on the horizontal level in another state party, is the body to which our political branches committed final decision making authority. Professor Bradley has said that, in the end, it should be a matter for political judgment or appreciation that Congress could enact a law saying that we should do what we've already committed ourselves to do, even though when we accepted

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52. Antonin Scalia, Keynote Address: *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

53. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting).

the Vienna Convention the political branches at that time were persuaded that there was no need for implementing legislation. To require Congress to say we agree to do what we already agreed to do seems to be a superfluity. Professor Bradley says that there could be another treaty, that this is essentially a matter for the nations to resolve. The nations did do so: that's why Mexico invoked its rights as a State Party to the Vienna Convention and its Optional Protocol to bring this case. It would make no sense to say, "let's have another treaty to do what we agreed to do in 1971,"—what we should have done at the time of his conviction and sentence, and what we should have done at each and every stage of the proceedings that have already elapsed.

Now he said something about the non-position so far of the executive branch in this particular case. It is true that the executive has not made a filing yet in the *Medellin* case. I'm sorry to say they did not file on the side of the petitioner. Those filings were due on January 24. Filings in support of respondent are due on February 28, but also on the same day that you can file in support of respondent, you can file in support of neither party. So that might be the opportunity for the executive branch to rectify its error and even though it wouldn't say it's supporting the petitioner, as such, it would say, in its independent voice, that compliance with this ICJ judgment is in the United States' interest. Now, what if the executive says nothing? Well, in our brief, we devote a couple of paragraphs to the question of executive silence. I actually know something about executive silence because, when I worked in the State Department, sometimes I was working on cases where we just couldn't reach an executive position. There was no interagency agreement; therefore, there was no filing. Sometimes courts misunderstand the effects of executive silence, so the paragraphs addressed to that question in our brief point out that executive silence doesn't mean that the courts are free to do whatever they want.<sup>54</sup> In a treaty case, the courts have their own responsibility to uphold the legal obligations of the United States to comply with the treaty.

Now, Professor Bradley has raised what I hope is the hypothetical possibility that the executive might say that the International Court of Justice reached the wrong interpretation of the treaty. It is true that the executive branch argued vigorously for a different outcome at the international level and lost.<sup>55</sup> There are

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54. International Law Experts Amici supporting Petitioner, *supra* note 15, at \*29–30.

55. Oral transcripts of the *Avena* pleadings may be found at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>. Oral pleadings for *LaGrand* can be found at

voluminous pleadings at the ICJ in which the executive position in litigation was that the correct interpretation of the treaty is X. But the International Court has said no, it's not X, it's Y. The United States has no authority to decree the unilateral interpretation of an international treaty, and the United States fought the good fight and lost. It would be quite unseemly for the United States to try to re-litigate those issues that have already been litigated with conclusive effect. I think it's probably inconceivable that the executive branch would come in and say, let's re-argue what we already argued at length in The Hague. Now should they do so, and I hope and trust that they would not, he has pointed to the general doctrine in the Supreme Court that the views of the executive in matters of treaty interpretation are entitled to great weight. However, they are not entitled to controlling weight. In fact, the U.S. Supreme Court has been quite jealous of its own prerogative that it has the final say on treaty interpretation for purposes of U.S. domestic law.<sup>56</sup> Now, I don't think that that means the Supreme Court is free to redo what was done at the international level. Rather, the Supreme Court would accept as definitive the treaty interpretation reached by the International Court and would pronounce that as the supreme law of the land, even if the position of the executive were to the contrary. And the authority for that you can find in cases involving matters of individual right where the Supreme Court has said in a matter affecting liberty of an individual, that the executive position on a matter of treaty interpretation is entitled to weight, but not to controlling weight: the Court itself will decide. So here I think that they would decide in favor of the position of the International Court.

*Flaherty:* Great. Thank you very much. Since this has, I think, become a debate, rather than simply discussion, I'll invite Professor Bradley for approximately five minutes of rebuttal.

*Bradley:* Thank you, Professor Flaherty. I will simply try to address some of the points that Professor Damrosch just raised and not raise any new ones.

On the technical jurisdiction issue, I don't think we've really engaged on the merits. The relevant statute limits all federal habeas appeals to substantial showings of denials of constitutional rights. The Fifth Circuit, by the way, did not focus on that limitation on its jurisdiction. But the limitation has been described by the Supreme

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<http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

56. See, e.g., *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) (executive views are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights").

Court in other cases as jurisdictional, so it can and must be addressed by a court whenever it becomes aware of it. In addition, the arguments that there is a constitutional rights claim here are very weak. It is true the Fifth Circuit relied on the *Breard* case, and I agree with Professor Damrosch that that the effect of that precedent is uncertain, but the Court does not need to worry about that because it can affirm on any ground, particularly on a jurisdictional ground supported by the plain language of a federal statute.

As far as my reliance on *Breard*, I agree that if the Supreme Court disagrees with some aspects of *Breard*, the Court is not going to feel beholden to that decision. The one rule I am relying on from *Breard*, because it is supported by a number of other Supreme Court decisions, is something called the “later in time rule,” which says that a federal statute will take precedence over an earlier in time treaty.<sup>57</sup> In light of the federal habeas limitation I’ve described that is relevant to *Medellin*, the later in time rule probably compels dismissal of the claims here.

Professor Damrosch now talks about the ICJ decision as being an “authoritative” interpretation of the treaty, which I think is something between giving it *res judicata* effect and my position. Importantly, my perspective actually gives more relief to more people than a *res judicata* approach. If you simply say that the decision has binding *res judicata* effect, its effect may be limited to the 51 Mexican nationals. Nobody else is entitled to the benefit of that decision. ICJ decisions are only binding as to the parties of the case and are only binding with respect to the judgment,<sup>58</sup> and the judgment here in *Avena* only covers the 51 Mexican nationals. Now, if future ICJ cases get brought, we can predict that there might be future losses for the U.S., but one could also imagine the U.S. pulling out of the court and not sustaining such losses. If all you do is say the judgment is a sort of *res judicata* binding decision, what about the Germans? What about other Mexican nationals that aren’t covered by the decision? By contrast, if you say that what is going on here is that the treaty confers certain rights and the treaty is the supreme law of the land and it is the courts applying the treaty, then all foreign nationals in the same situation will get the benefit of what the ICJ thought the 51 Mexican nationals should get the benefit of, and you would not

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57. *Breard*, 523 U.S. at 376 (citing *Reid v. Covert*, 354 U.S. 1, 18 (“that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”)); *Whitney v. Robertson*, 124 U.S. 190, 194, (holding that if a treaty and a federal statute conflict, “the one last in date will control the other”).

58. ICJ Statute, *supra* note 4, art. 59.

simply be enforcing the judgment on behalf of those individuals.

Even if the ICJ decision is authoritative as a matter of international law, I still do not think that gets you to the issue of whether it should have direct effect in the American legal system. Again, there is a difference between the United States' international obligations, whether in a treaty or by virtue of what the ICJ has said, and how we implement them. The ICJ, by the way, has said that too. It said that the United States can implement these decisions by means of its own choosing.<sup>59</sup> By the way, most parties to the Vienna Convention on Consular Relations do not yet have domestic court enforcement of this treaty. Moreover, Professor Weisburd looked at the issue of ICJ enforcement a few years ago and did not find any nation that enforced ICJ decisions directly.<sup>60</sup> Not even in the European Union. So it would not be surprising if that were not the case here either.

Professor Damrosch contends that it is not appropriate to leave enforcement of the ICJ's decision to Congress because we've already committed to be bound by the ICJ's decision and, she says, it is not sensible to say that Congress could do what we've already committed to do. But all we've committed to do is have the ICJ decide under international law what the rights and obligations are, which they have done. We have not committed to use particular domestic machinery for putting that into effect. In fact, for no other international decisions of which I'm aware do we say that the courts, the judicial machinery of the United States, have direct cognizance of the implementation of those judgments. Thus, for example, just because we have allowed the World Trade Organization to decide our trade obligations, this has never been thought to mean that we've also committed that our courts have to be the direct enforcers of our trade obligations. Rather Congress has to figure out how the WTO's decision fits in with the trade statutes, amend the relevant law, and if need be, preempt state law. Such statutory amendment may be required here, particularly on the federal side because I think there is a conflict with the federal habeas statute amended in 1996. So if you want the federal courts to hear these cases after conviction and sentence, I think Congress will have to amend the federal habeas statute. Even if Congress does not act, though, I think there is a real possibility that the state courts and again, these are all state cases, can be the proper venue for hearing and disposing of them correctly.

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59. See *Avena*, 2004 I.C.J. para. 153; *LaGrand*, 2001 I.C.J. at 514-17, para. 128.

60. A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877 (2000).



Professor Damrosch mentioned the *Torres* case,<sup>61</sup> the first case right after *Avena*. The Oklahoma state court was able to enforce *Avena* without congressional action, but it also did not need these elaborate arguments about *res judicata* or anything else. It simply decided under its own procedures to allow for review and reconsideration. There is every reason in my mind to think that the state courts would be an appropriate place to pursue the claims under the Vienna Convention, and they will, I think in large part, probably try to accommodate such claims. The big uncertainty, as I said earlier, of course, is whether the executive disagrees about the meeting of the treaty. It is true, as Professor Damrosch says, that the executive branch views should not always prevail. But imagine you're on the Supreme Court and the executive, the chief spokesperson for the United States in foreign policy, the one that has to go and interact with other nations about our obligations, adopts a particular interpretation of the treaty that happens to be different from the views of the ICJ. I'm not arguing a position; I'm simply noting that it's possible, of course, at that point, that the executive and the political branches will have decided to deviate from the international court. That decision might be bad from a foreign policy standpoint. But the executive does things, unfortunately, that are sometimes bad from a foreign policy standpoint. In their mind, of course, they're not bad and they may have reasons for doing them, but we don't say that the executive is disbarred from doing anything that we think is bad from a foreign policy standpoint. The political branches generally get to decide how we interact with the international community and that has always included how we implement these kinds of international obligations. Now the executive may not say anything, or may come in on behalf of the treaty claim here. On the other hand, I would be very surprised if it agrees with the petitioner's argument that international decisions have direct effect in the American legal system. That's not even true of the European Convention on Human rights in Europe,<sup>62</sup> so I think it's unlikely to be adopted here. They might agree, however, with the other argument that I've made, which is that the Vienna Convention is the supreme law of the land, that it should be given effect, and that we will we acquiesce in the ICJ's decision to let it be pursued particularly in the state court system.

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61. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004).

62. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221 (modified Nov. 1, 1998). See also P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 1998); FRANCIS JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 2002).

*Flaherty*: Thank you very much. I will now turn it over to the audience for questions.<sup>63</sup> I have a couple I can ask on either side myself, but I prefer to hear from you.

*Question*: Are there limits on our ability to cede the Article III interpretive authority of our Supreme Court to an international forum like the ICJ? Are there any limits on that and if so, what are they? Is the Bill of Rights a check?

*Damrosch*: That's a very good question. It relates to something that I wanted to say about Professor Bradley's position in which he summarized a whole congeries of dispute settlement systems—for example, the World Trade Organization or various arbitral systems—under which Congress has enacted implementing legislation saying that this particular dispute settlement system is not self-executing, that there is no opportunity for private claims to be brought under it, and that after we see what the dispute settlement system does, Congress will decide whether we want to implement the outcome or not. That's the WTO's model and that was a conscious decision by Congress to buffer the international and the domestic legal effect of the treaty. The Senate and the President here are the treaty makers in the classic Article II treaty mode. They made a quite conscious choice to the contrary in respect of the Vienna Convention and its Optional Protocol. They were in agreement that it was a self-executing treaty<sup>64</sup> and they didn't say anything about reserving the opportunity to decide or not whether there would be any flow-through effects. So I'm not arguing that every conceivable dispute settlement system is or should be directly applicable in U.S. law. There would be some aspects of dispute settlement that simply are not self-executing, such as a judgment to pay money. We owe it on the international plane but Congress has to appropriate the funds. So the Iran-U.S. Claims Tribunal is sitting over there in The Hague and some day it may decide that we owe Iran a zillion dollars—that would not be a self-executing judgment. Congress would have to decide whether to honor it or not.

In response to your question about ceding interpretive

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63. Note from the Editors: the device used to record the debate did not pick up the questions from the audience with sufficient clarity to permit verbatim transcription. Instead, the questions have been reconstructed with the help of the students who asked the questions, along with the aid of those involved in the discussion.

64. Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Hearing before the Senate Committee on Foreign Relations, *reprinted in* SEN. EXEC. REP. No. 91-9, 91st Cong., 1st Sess. (1969). Lyerly commented that "The Convention is considered entirely self-executive and does not require any implementing legislation."

authority to an international tribunal, I would say that's inherent in the nature of the kind of treaty that entails uniform obligations for all parties. There may be some treaties where we can opt in to part or opt in with conditions or have some reservations or qualifications, but here, as the International Court properly found, there's an interest of the parties in a uniform and high level of compliance, and uniformity itself is a virtue. So I think the terms in which you put it were a little bit loaded. It's not that we are ceding authority to an international body to make law for the United States. Rather, we are accepting the authority of an international body to clarify the meaning of a multilateral treaty that has an objective meaning, not one unilaterally decided.

*Question:* Aren't there problems with that? Shouldn't the Supreme Court decide?

*Damrosch:* I think even the Supreme Court would say that where there is an authoritative process, the Supreme Court will pay considerable attention. Whether they call it giving direct effect or considerable deference in the end is probably just a verbal formula. They're not going to make up a different meaning of the treaty from what the authoritative interpreter found. It's not an abdication of the judicial responsibility to say what the law is, it's just a fulfillment of that responsibility.

You mentioned the Bill of Rights. It is conceivable—not in this context, but in other ones that you could conjure up—that there might be some clash with some protected right in the United States. I think that Professor Bradley and I and Professor Flaherty would probably all agree that if there is some conflict with a right protected by the Bill of Rights, the Bill of Rights would prevail. But here he talked about sovereignty and federalism and Texas as having its interest in its procedural default rules—those are the kinds of considerations where the treaty interest prevails.

*Flaherty:* Thank you. Yes?

*Question:* I have a sort of two prong question for Professor Bradley. Hopefully, they're sort of connected. Let's take your hypothetical because I'm not entirely hostile to it. Assume that this case ultimately gets brought to the state courts where this issue gets resolved. Let's say the Texas Supreme Court ultimately turns its final decision on two things; one is that this person's counsel was, under the state laws and constitution, and even under the federal constitution, completely constitutionally valid. He had adequate counsel. Two is that the state procedural ground is an independent and adequate decision completely independent of the ICJ decision and

they don't have to listen to it. So the two questions I have coming from that is one, it might be easy to independently get to those two things, but maybe it's not correct to not intermingle the two, especially when the ICJ's decision is based on an idea of not getting notice and of course, having good counsel might ameliorate the problem of not getting notice and, of course, federal courts have always had trouble figuring out what to do with independent state grounds when the core issue is one where the plaintiff argues he has not received adequate notice. And the second, which is a little easier, would the Supreme Court also have the power to grant cert from the state court, and rule that the Texas Supreme Court was in error because they failed to adequately protect this guy's right to have received the substance and protection of notice and counsel and if not, could this be a situation where rights declared because nobody specifically can pick up the ball that right can just completely go off to the wayside?

*Bradley:* Those are good questions that remind me of issues from my federal courts class. In answer to your questions, first, an easy part of the answer: state grounds are only adequate if not preempted by federal law, and that would include, in my mind, a treaty. So if the state ground here conflicted with the Vienna Convention, then it would be invalid, and in addition, the Supreme Court would have the ability to review that conflict, just as it does in constitutional cases where the states try to rely on invalid state grounds.

Having said that, your question leads to something that neither Professor Damrosch nor I have talked about, which is what happens when this or any of these petitioners actually get their foot in the courthouse door and get this review. The ICJ rejected, by the way, as some of you know, all of Mexico's claims for an automatic exclusion of evidence, new trials, or new sentencing. *Avena* simply says you need to review the convictions and sentences.<sup>65</sup> What relief might be available as part of this review? The ICJ gave us some hints and it looks like, from my reading, and I would be interested in Professor Damrosch's thoughts about this, that they suggested a very tough prejudice standard. That is, there is language in *Avena* that says that the reviewer is supposed to look to whether the violation of the treaty *caused* the conviction or sentence. That is a very tough standard to meet. It will be a very rare case in which the Vienna Convention violation *caused* the person's murder conviction or their sentence, and it sounds like an even tougher prejudice standard than, or at least as

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65. *Avena*, 2004 I.C.J. paras 138-43, 152.

tough as, the standard for Sixth Amendment ineffective assistance of counsel claims, which almost always fail.

*Damrosch*: I just want to say one thing about that because that actually is something different in these cases from the *Breard* case that came up in 1998. As Professor Bradley has properly pointed out, under *Breard*, the Supreme Court said that a statute subsequent to a treaty can cut off the domestic implementation of a treaty: the later in time would prevail. Here, the procedural posture was actually different because this petitioner, Medellin, did raise his claim in the state court. That's another reason why there is something of a looking glass quality to Professor Bradley's argument that he should go back and do that over again. He did raise it in Texas court on state habeas and the Texas court dismissed the case on a state procedural default rule. Then, when he raised the same claim on federal habeas, the federal court said that the state procedural default rule was an independent and adequate state ground. It's that effort that I think is fatally undermined by the intervening judgment of the International Court, of which the Fifth Circuit was aware, but it denied the relief on that point.

*Flaherty*: Any more questions? Yes?

*Question*: Professor Bradley, in the course of this discussion we have heard the terms self-executing and non-self-executing used several times. If I understand you correctly, you take the position that the United States has never considered treaties to be self-executing. However, many of us who have studied international law or human rights here at Columbia are familiar with the story of Senator Bricker, who several decades ago unsuccessfully advocated the passage of a constitutional amendment that would have made all treaties non-self-executing. Furthermore, in recent decades, whenever the United States has ratified any of the United Nations' human rights treaties, it has included in its ratification several reservations and understandings, one of which is generally an explicit "non-self-executing" provision. These facts seem to suggest that the baseline assumption was that, absent such explicit provisions, treaties *were* self-executing. Given this background, this baseline, how can you maintain that the United States' default position is that treaties are non-self-executing?

*Bradley*: I try to avoid the words self-executing and non-executing because I usually have no idea what they mean. They mean all sorts of different things. But in response to your question I would note that the practice of attaching non-self-execution declarations to certain treaties post-dates the Vienna Convention. That is, the Senate and President, notwithstanding the Bricker Debates, did not actually

start proposing the declarations until at least a decade after the U.S. became a party to the Vienna Convention, and then did not actually start attaching them to U.S. ratifications until some time after that. Most U.S. ratifications still do not have those declarations, and the absence of such a declaration has never been thought to resolve the question of how, if at all, U.S. courts are part of the machinery for implementing them. The NATO Pact<sup>66</sup> does not have a non-self-execution provision. Nevertheless, we do not assume that the courts should implement it. It has not been thought in the U.S., or, as far as I know, in any other countries, that ICJ decisions, by their own force, are something that are treated as if they are a treaty that can be directly enforced in domestic courts. There are good reasons for this. It is not because the United States will routinely want to reject the ICJ's decisions. But we may need to do something on the statutory side to align our laws with the ICJ's decision, and courts do not amend statutes. So I don't think that recent practices would be dispositive. By the way, statements by the government in the late 1960s suggesting that the Vienna Convention is self-executing meant that they did not see the need right then to pass any legislation. The Convention has immunity provisions for consular officers, and they thought that courts could enforce those, for example, without legislation. No one was thinking that the Optional Protocol would itself cause ICJ judgments to be self-executing.

*Damrosch:* I just want to say one word on a point that Professor Bradley has mentioned more than once. He asserts that no nation treats ICJ judgments as directly binding, and he's made some comparisons to other dispute settlement systems in the European theatre and elsewhere. I looked into this as a matter of interest when we were preparing our Amicus brief, because the issue of compliance with judgments of the International Court of Justice is quite a fascinating one, and one can study how frequently they are complied with, which turns out actually to be more frequently than you would think. Usually ICJ judgments are complied with, perhaps running up to as close as 80 percent or certainly at least two-thirds of the judgments.<sup>67</sup> Now, how do states comply with such judgments? I don't think it's possible for him to say that no states treat them as directly operative, when in fact, for example, you have the *Arrest Warrant Case*<sup>68</sup> involving Belgium, decided about three years ago by

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66. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 UNT.S. 243.

67. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004).

68. Arrest Warrant of 11 April 2000, (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

the International Court. The ICJ found that Belgium had issued an arrest warrant that impinged upon the protected immunity of a foreign minister under international law, and the court instructed Belgium to vacate the arrest warrant. Now, later on, Belgium changed its law so that the situation wouldn't recur and so that there would be a different framework, but the Belgian judges actually had no difficulty just getting rid of that arrest warrant. As a matter of judicial action that could be done. If you look at the cases in which the United States has participated, the first case was one between France and the United States called *Rights of U.S. Nationals in Morocco*.<sup>69</sup> It had to do with certain situations involving consular courts in Morocco under a now fortunately obsolete colonial regime. Both France and the United States had something to do under that judgment. The United States promptly dismissed all cases before its consular courts in Morocco that were outside the limits of the jurisdiction that the International Court had determined. So we have examples where the appropriate authority—whether it's executive or judicial—just acts on the judgment. They don't wait for it to be implemented by legislation. They just do what they're supposed to do in accordance with the judgment. This has happened innumerable times.

*Flaherty*: Since we started ten minutes late, we'll go about ten minutes past. I hope this won't take up the entire ten minutes but I wanted to assert the prerogative of the chair and ask a question for each of you.

For Professor Damrosch, I wanted to follow up on the delegation upward question with respect to Article III. And the question would come down to this: I wanted to push you on whether there would be absolutely no kind of limits of reviewability—substantive limits on reviewability by Article III courts of international decisions such as this or not. When there are delegations and non-Article III courts domestically, the fail safe is that an Article III court will look over the determinations of these non-Article III bodies. Now, in certain settings this level of deference can be substantial, for example, *Chevron* deference,<sup>70</sup> Here would you accept a level of review as de minimis as *Chevron* deference, which even still has some bite to it? If the United States Supreme Court said

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69. *Rights of Nationals of the United States of American in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

70. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (the Court will defer to agency determination so long as it is reasonable). Professor Bradley has made a similar argument with regard to the deference due the political actors in foreign affairs. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

what the ICJ said about a given treaty was arbitrary, capricious, utterly irrational, would that be too much or too little deference?

For Professor Bradley, I wanted to follow up on whether there is a meaningful distinction in this context between the decision and the treaty, because in looking at Article 1 of the Optional Protocol, it says, “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”<sup>71</sup> Now, your immediate effort to distinguish this was to point out that only states can bring these claims, not individuals. My question is twofold. First, what would happen if a state brought this to the Supreme Court as a matter of original jurisdiction, as I understand *Debevoise & Plimpton* attempted to do in the *LaGrand* case? Would that then extinguish, in that setting, the distinction between the treaty and an interpretation? And more generally, could not and should not the Supreme Court— analogizing internationally to separation of powers—say, look, the only meaningful way is to have domestic enforcement of something that seems so law-like, as opposed to a lot of these other mechanisms that we’ve talked about, would be to have courts implement this higher court decision, whether it be state or federal? So, I don’t know who wants to have at either one of those.

*Damrosch*: I want to tackle the substance of the question you’ve raised, which you’ve put in terms of delegation upward, which I think is an inappropriate metaphor. Just as Professor Bradley has wanted to purge the term self-executing from the discourse, I think maybe the term delegation is a little misleading here too because this is not surrendering to the International Court of Justice some kind of lawmaking authority. So it doesn’t have the same kinds of delegation implications as your classic non-delegation cases here in constitutional law. You seem to analogize it to *Chevron* which would seem to suggest that somehow there was some kind of administrative regulatory authority going on. I don’t think that’s the case either. I think it’s really a question of who has the authority to determine the meaning of an international treaty. Can one side and its executive or judicial or even legislative authorities unilaterally determine the meaning of a treaty? We can see that that cannot be the case. Indeed, since time immemorial, international arbitral tribunals have opined on the objective meaning of international treaties as agreed between the two parties, and it is the arbitral tribunal, not one party’s highest

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71. Optional Protocol, *supra* note 7, art.1.



court, that has competence to determine the authoritative meaning. Then I think we would have to say that both parties' highest courts should give effect—or are required, bound, or obligated to give effect—to the objective meaning that is found by the dispute settlement body. Now this isn't a perfect analogy in U.S. law, but I think it's a pretty good indicator and we've tossed it into our briefing because after all, the Chief Justice wrote the opinion so, why not put it in there? It's the *Dames & Moore* case involving the arbitration with Iran that was agreed upon in the wake of the hostage crisis.<sup>72</sup> The international agreement sent to arbitration hundreds of claims that were pending in U.S. Article III courts—hundreds of cases in which U.S. claimants had sued Iran and said, “we have rights under Article III and the Fifth Amendment to maintain these lawsuits; they can't be transferred away to some funny forum in The Hague.” The Supreme Court found first that that was an executive agreement under presidential authority, not an Article II treaty. But the court reasoned it through and found that arbitration is a time-honored, traditional, and perfectly proper method of resolving disputes between nations, and that the United States and Iran have properly so agreed, and that the arbitral tribunal in The Hague could resolve those matters even against the claims of the affected U.S. persons that their Article III and Fifth Amendment rights have been impaired. The safety valve was that if it turned out in the end that there was a taking, then maybe you'd have a claim over against the Treasury, a suit for just compensation if you ended up having to litigate in The Hague and found that your claim was rendered valueless. In fact, that has not proven to be a concern there. So I think we can use that example on the Article III point.

*Bradley:* I will respond to Professor Flaherty's point in just a second. I would point out my own view about *Dames & Moore* is that it is a dangerous precedent from the petitioners' point of view because, as those of you who have read it know, it is very much about deference to the executive branch and the executive's control of foreign policy, so much so that it may distort Justice Jackson's famous framework of presidential power<sup>73</sup> by classifying almost all

72. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (Jackson, J., concurring). Justice Jackson provided his famous tripartite division of the exercise of Presidential power in the following terms:

1. When the President acts pursuant to an express or implied authorization of Congress, . . . for it includes all that he possesses in his own right plus all that Congress can delegate.

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executive actions in the top category of presidential authority. But that would mean, in this case, a heavy amount of deference to the executive, even if it comes out against the petitioner.

Professor Flaherty asked how much of my position about the ICJ's decision not being self-executing depends on the fact that only states can be parties before the International Court of Justice. So, for example, if we had a different party, Mexico, coming to the Supreme Court, presumably through an original writ, would the judgment then have direct effect? I think the answer is no. To give an example that I have already used, consider the European Convention on Human Rights, which is much more focused on individual rights than the Vienna Convention on Consular Relations. It is settled in Europe that the decisions of the European Court of Human Rights only have direct effect if it is specifically provided for in local law, and that is even when you do have individuals as potential claimants. I think there is even less of an argument for doing that here. Moreover, there are other arguments here against direct effect. The language "undertakes to comply" in the UN Charter is not the language of self-execution, and there is no hint in this language of judicial enforceability, let alone in domestic courts. In fact, the only enforcement mechanism provided in the Charter for ICJ decisions, as I said earlier, is a very political and discretionary one—the Security Council, which, by the way, has never enforced an ICJ judgment. Historical practice also weighs against giving ICJ decisions direct effect. I am not aware of any situations in U.S. history in which international decisions have been given direct effect without specific mandate of Congress. Professor Damrosch contends that there are at least some countries that give direct effect to ICJ decisions. I'm not sure of this. Professor Weisburd studied this issue several years ago and did not find any clear support for direct enforcement of ICJ decisions. Even in the *Arrest Warrant Case* that Professor Damrosch mentions, where a trial judge in Belgium vacated an arrest warrant because of an ICJ decision, it depends on how you construe it. One could construe the decision as simply agreeing with the ICJ's view of

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2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

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3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

customary international law concerning sovereign immunity of the individual there. As you might expect, in Belgium, and certain other European countries customary international law is given more direct judicial effect than tends to be the case in the United States. That scenario would be analogous to what I've argued for, which is that U.S. courts could enforce the Vienna Convention here by interpreting it the way that the ICJ has done, and they would come out and do exactly what Belgium did in that particular case. However, that is not proof that there is a common practice of giving direct domestic effect to ICJ decisions.

*Flaherty:* Time for one last question in the back.

*Question:* If the Executive Branch does not take a position in this case, will the Court feel obligated to accept the ICJ's interpretation of the treaty, or could there be a situation in which the Court would simply disagree with the ICJ? Won't the Court feel obligated to ensure that the U.S. complies with the decision?

*Bradley:* If the executive branch says nothing in this case, I think the Supreme Court can and is likely to give substantial weight to and agree with the ICJ, exactly for the reason you said, which is that they feel that it is part of their responsibility to ensure the United States complies with international law. The Court, in this situation, would likely note that the United States consented to this adjudication process, that treaties are part of the supreme law of the land, and that accepting the ICJ's interpretation will avoid placing the U.S. in breach of international law.

Having said that, I do think there can be situations in which U.S. courts will decide treaty interpretation issues differently from the ICJ. For example, if Congress had done something here that U.S. courts were required to follow, then that would trump the ICJ decision in light of the well-established domestic rule that says that at least later in time statutes are given priority in the U.S. legal system over earlier in time treaties. Of course, if there were constitutional problems, U.S. courts owe fidelity to the Constitution over international law, and it might take a constitutional amendment to try to reconcile the two. Hopefully, that would be a rare event. The situation of a contrary executive act is, of course, the hardest example. Courts have stated that they will give deference to the views of the executive branch concerning treaties so that the U.S. can speak with one voice in its treaty relations, but they also try to avoid international law violations. If there were an aspect of an ICJ decision that was an unreasonable interpretation of the relevant treaty and the executive branch opposed that interpretation, courts might defer to that foreign policy decision. There might even be an example in *Avena*: it is

possible to read the ICJ as saying in that decision that no procedural default rules can be applied to bar review and reconsideration of violations of the Vienna Convention, no matter how reasonable those default rules may be. If that means, for example, that U.S. courts are required to hear Vienna Convention claims even after a defendant deliberately and strategically avoided raising the claim at trial, that would be a very problematic conclusion, and it is easy to imagine courts deferring to the executive branch's decision not to accept that reasoning.

*Flaherty*: Final word, Professor Damrosch.

*Damrosch*: Well, a final word would just be that the hypothetical he's put before you actually has no relevance to what the court actually said. It went through quite a well-reasoned set of paragraphs on procedural default. In fact, the innumerable persons who have come up through the comparable procedure just didn't know of their treaty right, even though the treaty says that the obligation is on the detaining authorities to notify them of this. There could be absolutely no question raised of the deliberate concealment of the treaty-based claim. That hypothetical just is not well grounded in the case itself, and I wouldn't want you to think otherwise.

Here is the note on which I might end: Professor Bradley had mentioned a couple of times that it could happen that there would be a repudiation of the judgment, or it could happen that the political branches could distance themselves from it. In fact, I think a reason that the political branches have been so quiet about this case is, in fact, that they're very, very well aware that we really need this treaty, and we really need this dispute settlement system. We're now seven years into the litigation of these death penalty cases with first the *Breard* case brought by Paraguay, then the *LaGrand* case brought by Germany, and now *Avena*. We lost *Breard* at the provisional measures phase at the International Court. In *LaGrand*, there was a detailed and reasoned judgment on Germany's claim. After each of those judgments, the political branches could have said, "Okay, we've had enough of this, we're gong home. No more optional protocol. No more Vienna Convention." In fact, the United States has stayed in the system, has litigated within the system, has participated fully, has really embraced the whole system here. They never made an announcement saying, "We reject this judgment," contrary to *Nicaragua*, where such a rejection was quite prominent.<sup>74</sup> I think tacitly, one can infer from this that the political branches want it to be

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74. The United States withdrew its consent to compulsory jurisdiction of the ICJ following an adverse judgment against it in *Nicaragua*, 1986 I.C.J. 14.

this way. Maybe their silence would be the way for them to signal that.

*Flaherty*: Please join me in thanking Professors Damrosch and Bradley for not just an enlightening discussion, but a stimulating debate.