

COMMENT

FROM *BREARD* TO *MEDELLIN II*: THE VIENNA CONVENTION ON CONSULAR RELATIONS IN PERSPECTIVE

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The world is getting smaller. With the first commercial flight of the new Airbus A380 superjumbo on October 25 of last year, it is now possible for 853 passengers to fly nonstop across two continents in the same plane.¹ The number of people traveling internationally has increased considerably within the last fifteen years and the United States is as popular as ever as an international travel destination.² In 2006 alone, nearly fifty-one million international visitors came to the United States and more than sixty-three million U.S. residents went abroad.³ In 2007, the number of scheduled flights worldwide increased by 4.7% to 29.6 million, or 80,987 individual takeoffs per day.⁴ With so many people crossing so many borders on a daily basis, it stands to reason that occasionally some of them get into trouble, and Americans are no exception.

Four thousand four hundred fifty-six Americans were arrested abroad in 2006, nearly a thousand more than the previous year.⁵ Being arrested or detained in a foreign country is a nightmare scenario for many, especially if there is a language barrier between the author-

1. Press Association, *Superjumbo Completes First Commercial Flight*, GUARDIAN, Oct. 25, 2007, available at <http://www.guardian.co.uk/business/2007/oct/25/theairlineindustry.australia>; Spiegel Online, *A380 Maiden Flight Reaches Sydney*, BUS. WK., Oct. 25, 2007, http://www.businessweek.com/globalbiz/content/oct2007/gb20071025_054721.htm?chan=Globalbiz_europe+index+page_top+stories.

2. See OFFICE OF TRAVEL AND TOURISM INDUS., U.S. DEP'T OF COMMERCE, TOTAL INTERNATIONAL TRAVELERS VOLUME TO AND FROM THE U.S. 1996–2006 (2007), http://tinet.ita.doc.gov/outreachpages/inbound.total_intl_travel_volume_19962006.html; OFFICE OF TRAVEL AND TOURISM INDUS., U.S. DEP'T OF COMMERCE, INTERNATIONAL ARRIVALS TO U.S. – HISTORICAL VISITATION 1994–2000 (2003), <http://tinet.ita.doc.gov/view/f-2000-04-001/index.html>.

3. OFFICE OF TRAVEL AND TOURISM INDUS., INTERNATIONAL ARRIVALS TO U.S. – HISTORICAL VISITATION 1994–2000, *supra* note 2.

4. *OAG Reports 29.5 Million Flights Worldwide*, BREAKING TRAVEL NEWS, Dec. 14, 2007, <http://www.breakingtravelnews.com/article/20071214104331417>.

5. Christopher Reynolds, *Arrested Abroad: A Rare Glimpse of Trips Gone Wrong*, L.A. TIMES, Oct. 23, 2007, at para. 7, available at <http://travel.latimes.com/articles/la-tr-insider28oct28>.

ities and the traveler. Luckily, diplomatic relations between governments mean that there is often a consulate of the traveler's home country in the area of the world in which he or she is being detained. The United States, for example, has over 290 embassies, consulates and diplomatic missions around the world.⁶ These facilities spend a considerable amount of time each year helping Americans who find themselves in legal trouble abroad. The U.S. State Department proclaims that "[c]onsular personnel at U.S. Embassies and Consulates abroad and in the U.S. are available 24 hours a day, 7 days a week, to provide emergency assistance to U.S. citizens."⁷ This begs the question: How does an American abroad or a foreign national visiting the United States know to contact their consulate if they find themselves on the wrong side of the law? Enter the Vienna Convention on Consular Relations.

The Vienna Convention on Consular Relations (VCCR or the Convention),⁸ proposed in 1963 and ratified by the United States in 1969, codifies "the rights and obligations of member states with respect to consular relations."⁹ In essence, the VCCR maintains the lines of communication between a foreign national and his home government while he is abroad.¹⁰ Should that foreign national be arrested or detained while abroad, Article 36 of the VCCR requires that he be informed "without delay" of his right to communicate with his consulate and, if he so wishes, that his consulate be notified of his detention.¹¹ One hundred seventy countries, including the United States, have signed and ratified the VCCR,¹² thus indicating its importance to international relations. In conjunction with the Vienna Convention on Diplomatic Relations (VCDR)¹³ and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (CPPC),¹⁴ the VCCR is the

6. U.S. Dep't of State, Websites of U.S. Embassies, Consulates, and Diplomatic Missions, <http://usembassy.state.gov> (last visited Sept. 11, 2008).

7. U.S. Dep't of State, Tips for Traveling Abroad, http://travel.state.gov/travel/tips/tips_1232.html (last visited Sept. 11, 2008).

8. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

9. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 259 (1998).

10. *Id.*

11. Vienna Convention, *supra* note 8, art. 36, para. 1(b).

12. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006).

13. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

14. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

backbone of international diplomatic law.¹⁵ As a treaty to which the United States is a party, the Supremacy Clause located in Article VI of the U.S. Constitution dictates that the VCCR is “the supreme Law of the Land” and that “every State shall be bound thereby.”¹⁶ With this in mind, it is difficult to say whether it is more troubling that until relatively recently the VCCR was little known in U.S. law enforcement circles,¹⁷ or that now that it has come to the fore, the U.S. Supreme Court has failed to treat it as the binding law that it is. This article proposes that Congress must now act swiftly to ensure full VCCR compliance. Not only does America’s declining image strongly recommend such congressional action, but the protection of millions of American citizens traveling abroad demands it.

To develop this thesis, Part I of this article will address U.S. compliance with the VCCR from an external, or international, perspective through the jurisprudence of the International Court of Justice (ICJ). This section will educate the reader on the legal developments that have begun to shape an important issue on the cusp of domestic and international jurisprudence. Part II will focus on the domestic jurisprudence affecting VCCR compliance within the United States, focusing on recent pertinent Supreme Court decisions. Primarily, this section will highlight and analyze the increasingly complex relationship between the ICJ and the U.S. criminal justice system. Part III will identify and attempt to answer questions left unanswered by *Sanchez-Llamas v. Oregon*, and *Medellin v. Texas*, the two latest U.S. Supreme Court decisions dealing with the VCCR.¹⁸ These questions include whether the VCCR confers privately enforceable rights on foreign individuals and whether future U.S. compliance with the VCCR is a vain hope. This final section looks at the urgent role of Congress in the matter and proposes options for Congress to ensure compliance with the VCCR.

While I hope that this organizational scheme will allow the international and domestic components of VCCR compliance to be considered separately, it must be understood that they are not, of course, actually independent. Take note that many of the judicial

15. Asa Markel, *The Vienna Convention on Consular Relations: After the Federal Courts’ Abdication, Will State Courts Fill in the Breach?*, 7 CHL-KENT J. INT’L COMP. L. 1, 3 (2007).

16. U.S. CONST. art. VI, cl. 2.

17. Frederic L. Kirgis, *President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS, Mar. 2005, para. 2, <http://www.asil.org/insights/2005/03/insights050309.html> [hereinafter Kirgis, *Bush’s Determination*].

18. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346 (2008).

events I attempt to explain occur, not in the order I address them, but concurrently and in concert with each other. Finally, it is important to bear in mind that neither the ICJ nor the U.S. Supreme Court is operating in a vacuum: they are in dialog with each other and approach the same issues with dissimilar mandates.

PART I – AN INTERNATIONAL PERSPECTIVE

International public opinion of the United States has plummeted over the past decade, and as a result, many Americans abroad find themselves apologizing for the policies of their government.¹⁹ If the ignominy that the United States has experienced abroad in recent years was born from policy differences alone, there would be a strong argument that the situation is an acceptable corollary of being the world's only superpower. The reality, however, is that the United States is perceived as not just heavy-handed, but also as considering itself above the law. The United States advocates nuclear nonproliferation, and yet in the forty years since it signed the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), it has largely maintained its nuclear arsenal and made little progress toward "complete disarmament."²⁰ The United States condemns human rights abuses in China, Russia and Zimbabwe, among other countries, while prisoners are abused and held without charge by U.S. forces in Iraq, Guantanamo Bay²¹ and at undisclosed CIA black sites.²² These (at least perceived) hypocrisies are at the heart of international ill will towards the United States and remind those who are paying attention of the (again, at least perceived) arrogance with which the United States has appeared to disregard both the VCCR and related rulings by the ICJ.

19. Jan Friedmann, *Exchange Students Find a New Way to Deal with Germans*, SPIEGEL ONLINE INT'L, July 26, 2007, <http://www.spiegel.de/international/germany/0,1518,496731,00.html>; *U.S. Needs to Go Goodwill Hunting*, WASH. POST, Sept. 30, 2005, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092902128.html>.

20. Treaty on the Non-Proliferation of Nuclear Weapons art. VI, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Union of Concerned Scientists, *U.S. Nuclear Weapons Policy: Dangerous and Counterproductive*, Sept. 23, 2004, http://www.ucsusa.org/global_security/nuclear_weapons/us-nuclear-weapons-policy-dangerous-and-counterproductive.html.

21. The U.S. Supreme Court's recent ruling in the case of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), while a welcome step in the right direction, does little to ease the actual suffering of those held as enemy combatants at the U.S. Naval base in Guantanamo Bay, Cuba. Although the decision does allow trials for the prisoners, no time frame is set for when the trials will begin and other questions remain about the ability to provide adequate due process. *See id.*

22. *U.S. Condemns Global Rights Abuses*, BBC NEWS, Mar. 4, 2002, <http://news.bbc.co.uk/2/hi/americas/1854419.stm>; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>; *Guantanamo in Europe?*, SPIEGEL ONLINE INT'L, Nov. 7, 2005, <http://www.spiegel.de/international/0,1518,383670,00.html>; *see U.S. Raps Russia and Saudi Rights*, BBC NEWS, Feb. 28, 2005, <http://news.bbc.co.uk/2/hi/americas/4305677.stm>; *Jannat Jalil, Guantanamo Condemned Two Years On*, BBC NEWS, Jan. 11, 2004, <http://news.bbc.co.uk/2/hi/americas/3386513.stm>.

The ICJ, sometimes known as the World Court, is the principal judicial organ of the United Nations.²³ Article I of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol)²⁴ states 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.”²⁵ The United States itself proposed the Optional Protocol in 1963 and ratified it with the rest of the VCCR in 1969.²⁶ The United States was also the first country to invoke the protocol before the ICJ when it successfully sued Iran over the 1979 hostage crisis.²⁷ Since 1998, the United States has been brought before the ICJ for noncompliance with Article 36 of the VCCR three times by three different States: Paraguay, Germany, and Mexico.²⁸ What follows is an overview of the ICJ’s involvement in each of these cases.

Paraguay v. United States (1998)

In 1986, Angel Francisco Breard, a dual citizen of Paraguay and Argentina, came to the United States on a student visa.²⁹ In 1993, Mr. Breard, then twenty-seven years old, was convicted of the attempted rape and capital murder of thirty-nine-year-old Ruth Dickie by the Circuit Court of Arlington County, Virginia and sentenced to death.³⁰ Mr. Breard was never informed by the arresting authorities of his right to consular notification and assistance under Article 36 of the VCCR.³¹ On April 3, 1998, eleven days prior to Mr. Breard’s scheduled execution, Paraguay began proceedings against the United States before the ICJ.³² Six days later, on April 9, 1998, the ICJ issued a unanimous Order ruling that the United States take “all measures at its disposal” to prevent the execution of Mr. Breard pending the final resolution of the case brought before the ICJ by Paraguay.³³ The ICJ was authorized to issue this Order by Article 41 of the ICJ Statute, which

23. International Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=C6823a2fa0d313e2baf6ecd904634d2f> (last visited Sept. 12, 2008).

24. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, available at <http://fletcher.tufts.edu/multi/texts/BH444.txt>.

25. *Id.* art. I.

26. The International Justice Project, International Instruments, <http://www.internationaljusticeproject.org/nationalsInstruments.cfm> (last visited Sept. 15, 2008).

27. *Id.*

28. *Id.*

29. Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996).

30. Breard v. Greene, 523 U.S. 371, 372 (1998).

31. Peter Bekker & Keith Highet, *International Court of Justice Orders United States to Stay Execution of Paraguayan National in Virginia*, ASIL INSIGHTS, Apr. 1998, para. 2, <http://www.asil.org/insights/insigh17.htm>.

32. Memorial of the Republic of Paraguay, Case Concerning the Vienna Convention on Consular Relations pt. 2.31 (Paraguay v. U.S.) (Oct. 9, 1998), available at <http://www.icj-cij.org/docket/files/99/13106.pdf>.

33. Bekker & Highet, *supra* note 31, para. 1.

gives the fifteen-judge court the power to issue injunctive relief in the form of provisional measures of protection so that the respective rights of the parties can be preserved pending the court's final decision.³⁴ In response, on April 13, 1998, the U.S. Secretary of State, Madeleine Albright, officially requested the Virginian Governor to halt the execution of Mr. Breard.³⁵ The U.S. Supreme Court, whose decision in this case is discussed in detail in Part II of this article, also left the decision up to the Virginian Governor, who subsequently refused to block the execution.³⁶ After Mr. Breard's death the Paraguayan government discontinued the proceedings before the ICJ and no final judgment was rendered.³⁷

Germany v. United States (2001)

On March 2, 1999, the Federal Republic of Germany (Germany) filed in the Registry of the ICJ a complaint against the United States based on an alleged violation of Article 36 of the VCCR.³⁸ That same day, Germany also filed a separate request for the indication of provisional measures—the same Order that was issued in the *Breard* case to delay the execution until the case was resolved.³⁹ The subjects of this case were Karl and Walter LaGrand—two German brothers who had been living in the United States.⁴⁰ The LaGrand brothers were arrested, convicted of attempted robbery and first degree murder in connection with a failed bank robbery in Arizona, and sentenced to death.⁴¹ Despite the arresting authorities' knowledge that the LaGrands were not U.S. citizens, the LaGrands were never notified of their rights to consular assistance under the VCCR.⁴² Karl and Walter LaGrand were executed by the state of Arizona on June 27, 2001—before the ICJ issued a judgment on the merits of their case.⁴³ The ICJ ruled (1) that the United States had breached its obligations to Germany under

34. *Id.*; see Statute of the International Court of Justice art. 41, available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_III.

35. Constanze Schulte, *Jurisprudence of the International Court of Justice: Order Issued in the Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, 9 EUR. J. INT'L L. 761, 762 (1998).

36. *Id.*

37. Frederic L. Kirgis, *The Texas Court of Criminal Appeals Decides Medellin's Consular Convention Case*, ASIL INSIGHTS, Dec. 8, 2006, para. 3, available at http://www.asil.org/insights/2006/12/insights061208.html#_ednref6 [hereinafter Kirgis, *Texas Court*].

38. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 470 (Judgment of June 27).

39. *Id.*

40. Frederic L. Kirgis, *World Court Rules Against the United States in LaGrand Case Arising from a Violation of the Vienna Convention on Consular Relations*, ASIL INSIGHTS, July 2001, para. 1, available at <http://www.asil.org/insights/insigh75.htm> [hereinafter Kirgis, *World Court Rules Against the United States*].

41. *Id.* para. 3.

42. *LaGrand Case*, 2001 I.C.J. at 475; Kirgis, *World Court Rules Against the United States*, *supra* note 40, para. 1.

43. *LaGrand Case*, 2001 I.C.J. at 478–80.

Article 36 of the VCCR;⁴⁴ (2) that although the procedural default rule applied by the federal trial court to deny relief to the LaGrand brothers on their habeas corpus petition does not by itself violate Article 36 of the VCCR, in the context of this case it did since it prevented Germany from giving timely assistance to the brothers;⁴⁵ and (3) that an order of provisional measures under Article 41 of its own Statute, such as the one issued in this case to prevent the execution of Walter LaGrand, created a legal obligation that the United States breached.⁴⁶ These findings set up a direct confrontation between the ICJ and the U.S. Supreme Court that is still playing out.

Mexico v. United States (2003)

The latest case against the United States to come before the ICJ was initiated by Mexico in January of 2003.⁴⁷ In the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Mexico alleged that the United States had violated Article 36 of the VCCR in fifty-four separate cases involving Mexican nationals who had subsequently been convicted and sentenced to death in the United States.⁴⁸

The ICJ issued its decision on the merits of *Avena* on March 31, 2004. The court found that the United States had breached its obligations under the VCCR by (1) failing to inform fifty-one of the fifty-four Mexican nationals named in the suit, without delay, of their rights under Article 36 of the VCCR;⁴⁹ (2) failing to notify the appropriate Mexican consular post, without delay, of the detention of forty-nine Mexican citizens, thereby depriving Mexico of the right to render assistance to its nationals;⁵⁰ (3) by “depriving Mexico of the right to communicate with, and have access to, 49 Mexican nationals in a timely fashion;”⁵¹ (4) by depriving Mexico of the right to arrange, in a timely fashion, for legal representation of thirty-four Mexican nationals;⁵² and (5) by “not permitting the review and reconsideration, in light of the rights set forth in the Vienna Convention, of the convictions and sentences of three Mexican nationals currently awaiting execution.”⁵³ In view of these violations, the ICJ held that the United States must provide “by means of its own choosing, review and reconsideration of

44. *Id.* at 515.

45. *Id.* at 515–16.

46. *Id.* at 516.

47. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 17 (Judgment of Mar. 31).

48. *Id.* at 19–20.

49. *Id.* at 71.

50. *Id.*

51. William J. Aceves, *Consular Notification and the Death Penalty: The ICJ's Judgment in Avena*, ASIL INSIGHTS, Apr. 2004, para. 9, <http://www.asil.org/insigh130.cfm>; *Avena*, 2004 I.C.J. at 71–72.

52. *Avena*, 2004 I.C.J. at 72.

53. Aceves, *supra* note 51, para. 9; *Avena*, 2004 I.C.J. at 72.

the convictions and sentences of the Mexican nationals.”⁵⁴ The court took care to indicate that the review and reconsideration required of the United States could not be barred by procedural default as held by the U.S. Supreme Court in *Breard*.⁵⁵ It stated that the rights guaranteed under the VCCR “are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, *irrespective* of the due process rights under United States constitutional law.”⁵⁶ Going further still, the ICJ specifically addressed the clemency process and noted that, “as currently practised [sic] within the United States criminal justice system . . . it is . . . not sufficient in itself to serve as an appropriate means of ‘review and reconsideration’ as envisaged by the Court”⁵⁷

This second judgment against the United States in the course of three years induced what at first seemed a curious and tangled response. The U.S. Supreme Court’s treatment of two of the cases included in the *Avena* judgment will be explored in detail in Part II of this article, but the reaction of the Bush administration is worth mentioning here. Until late February 2005, the administration’s response to ICJ decisions declaring the United States in violation of the VCCR had been “simply to apologize to the governments whose nationals were convicted, and to issue instructions to law enforcement officials in the United States on the requirements of the convention.”⁵⁸ On February 28, 2005, however, President Bush issued a memorandum to then Attorney General Alberto Gonzales determining that the relevant state courts should comply with the ICJ’s decision in *Avena*.⁵⁹ In relevant part, the memorandum stated that the President had

determined, pursuant to the authority vested in [him] as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 128 [sic] (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.⁶⁰

54. *Avena*, 2004 I.C.J. at 72.

55. *Breard*, 523 U.S. at 375–76 (“It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted.” (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977))).

56. *Avena*, 2004 I.C.J. at 65 (emphasis added).

57. *Id.* at 66.

58. Kirgis, *Bush’s Determination*, *supra* note 17, para. 5.

59. Adam Liptak, *Texas Court Ruling Rebuffs Bush and World Court*, N.Y. TIMES, Nov. 16, 2006, available at http://www.nytimes.com/2006/11/16/washington/16death.html?_r=1&oref=slogin.

60. Kirgis, *Bush’s Determination*, *supra* note 17, para. 6 (citing the Brief for the United States as Amicus Curiae Supporting Respondent in *Medellin*, 544 U.S. 660 (No. 04-5928), available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.html>).

This was a surprising reaction to the *Avena* decision given that the Bush Administration's stance towards international bodies such as the United Nations had, until this point, been less than warm.⁶¹ Following this memorandum there was much debate as to whether the President had exceeded his authority by ordering review of the cases in *Avena*, but that issue will be discussed in Part II.⁶²

The second development that came in the wake of the ICJ's decision in *Avena* was the U.S. unilateral withdrawal from the Optional Protocol which gives the ICJ jurisdiction over the United States to hear disputes relating to the VCCR.⁶³ The withdrawal came on March 7, 2005, in a letter from Secretary of State Condoleezza Rice to then U.N. Secretary General Kofi Annan.⁶⁴ While the withdrawal from the Optional Protocol had no effect on the U.S. commitment to the VCCR itself, and while it did not nullify the existing ICJ decisions against the United States, the withdrawal does mean that with regard to the VCCR, the ICJ no longer has jurisdiction over the United States. This second prong of the response to *Avena* brought the Bush Administration's overall strategy into focus. Faced with two judgments against the United States in three years, the Administration moved first to take the issue of whether violation of the VCCR requires review and reconsideration of the cases involved, as the ICJ had ruled, as well as the issue of what weight an ICJ decision carries within the U.S. judicial system away from the U.S. Supreme Court. By instructing the state courts to comply with the ICJ ruling as the President's memorandum did, the precedential power of any subsequent review and reconsideration was contained considerably. Next, withdrawal from the Optional Protocol had the effect of cutting U.S. losses at the hands of the ICJ, thereby limiting the chances that the Supreme Court and the ICJ would ever again come into direct conflict over the VCCR. These two steps, taken a week apart, controlled and limited the effect of the *Avena* decision while concurrently reestablishing the U.S. sovereignty in the sphere of criminal justice.

PART II – DOMESTIC VCCR JURISPRUDENCE

Since the first provisional measure for protection was handed down in the *Breard* case by the ICJ in 1998, the U.S. judicial branch has grappled

61. See Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, available at <http://www.nytimes.com/2005/03/10/politics/10death.html?scp=1&sq=U.S.+optional+protocol&st=nyt>.

62. Kirgis, *Bush's Determination*, *supra* note 17, para. 7; Jack King, *President Tries to Moot Texas Death Row Case; Withdraws from Treaty Provision*, NAT'L ASS'N CRIM. DEF. LAW. NEWS & ISSUES, Apr. 7, 2005, available at <http://www.nacdl.org/public.nsf/freeform/3665313366581BAB85256FDC00591BF4?OpenDocument>.

63. Liptak, *supra* note 61; Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html>.

64. Lane, *supra* note 63; Liptak, *supra* note 61.

with how decisions of an international tribunal about the VCCR should fit into the U.S. criminal justice system. There are those who say that international judicial opinions have no place in our domestic system, some of whom sit on our nation's highest court. This view is not without merit. We are a sovereign nation with a rich common law history that has been carefully and judiciously developed by Americans for Americans. The flaw in this reasoning, however, lies in the fact that as one of the most prosperous, and certainly the most powerful, country on an earth that is increasingly easy to traverse, American laws are not just for Americans anymore. As discussed in the introduction to this article, international travel is no longer limited to the wealthy, and an increasing number of people find themselves abroad for an ever-growing number of reasons. When those people, be they U.S. citizens traveling outside the United States or foreign nationals traveling inside the United States, find themselves in trouble with the law they need to be able to rely on the protections afforded them by the VCCR. If the consequences for the absence of these protections, as adjudicated by the tribunal specially charged with the task, can simply be smothered by procedural rules in the United States, then what chance do U.S. citizens have abroad? This section of the article aims to provide an overview to the treatment the U.S. Supreme Court has given to the cases underlying the ICJ decisions discussed in Part I as well as a brief outline of an additional case that never visited the ICJ.

Breard v. Greene (1998)

On August 20, 1996, eighteen months before his case came before the ICJ, Mr. Angel Francisco Breard filed a motion for habeas corpus relief in federal district court alleging that the arresting authorities had violated the VCCR when they failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate.⁶⁵ Ignoring the catch-22 it was creating for VCCR cases, the court concluded that Breard had procedurally defaulted on this claim by failing to raise it in state court.⁶⁶ The procedural default rule, as outlined in *Coleman v. Thompson*,⁶⁷ states that

[j]ust as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements

65. *Breard v. Greene*, 523 U.S. 371, 373 (1998).

66. *Id.*; see *Breard v. Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996), *aff'd sub nom. Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), *cert. denied*, 523 U.S. 371 (1998).

67. 501 U.S. 722 (1991).

for exhaustion; there are no state remedies any longer “available” to him.⁶⁸

The decision was affirmed by the Court of Appeals for the Fourth Circuit.⁶⁹ Mr. Breard then petitioned the U.S. Supreme Court for a writ of certiorari.⁷⁰ In 1996, while Mr. Breard’s original VCCR claim was pending in federal court, Paraguayan officials brought a suit against certain Virginia officials alleging that their rights under the Vienna Convention had been violated when Breard was not informed of his treaty rights and the Paraguayan consulate was not informed of Breard’s situation.⁷¹ Ultimately, the district court concluded that it lacked subject matter jurisdiction over the claims.⁷² The Court of Appeals for the Fourth Circuit affirmed the district court’s decision and Paraguay also petitioned the Supreme Court for a writ of certiorari.⁷³

The primary issues that faced the Supreme Court in deciding whether or not to grant certiorari were whether Mr. Breard and the various Paraguayan diplomats were entitled to receive a stay of execution and other relief, respectively, under the VCCR. In a per curiam opinion that denied certiorari on both cases, the Court answered both prongs of this question in the negative.⁷⁴ The majority of the Court concluded that procedural default did apply and, as a result, Breard could not raise his VCCR claim on federal habeas corpus review.⁷⁵ With regard to the fact that as a treaty the VCCR is the “supreme Law of the Land,”⁷⁶ the Court, citing *Reid v. Covert*,⁷⁷ found 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.”⁷⁸ Using this reasoning, the Court held that the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA),⁷⁹ “provides that a habeas petitioner alleging that he is held in violation of ‘treaties of the United States’ will, as a general rule, not be afforded an evidentiary hearing if he ‘has failed to develop the factual basis of [the] claim in State court proceedings.’”⁸⁰ With these findings, the Supreme Court cemented procedural default as a bar to review of cases claiming violation of the VCCR.

68. *Id.* at 731–32; *see* 28 U.S.C. § 2254(b) (2006); *Engle v. Isaac*, 456 U.S. 107, 125–26, n.28 (1982).

69. *Breard*, 523 U.S. at 373; *see* *Breard v. Pruett*, 134 F.3d at 620.

70. *Breard*, 523 U.S. at 373.

71. *Id.* at 374.

72. *Id.*

73. *Id.*

74. *Id.* at 375–79.

75. *Id.* at 375–76.

76. U.S. CONST. art. VI, cl. 2.

77. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

78. *Breard*, 523 U.S. at 376; *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, “[T]he one last in date will control the other . . .”).

79. 28 U.S.C. § 2254(a), (e)(2) (1996).

80. *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. § 2254(a), (e)(2) (1994 ed., Supp. IV)).

Medellin v. Dretke (2005 & 2008)

José Ernesto Medellín Rojas (Mr. Medellín) is a Mexican national who was convicted by a Texas state court of the gang rape and capital murder of two teenage girls on June 24, 1993.⁸¹ Mr. Medellín, who was sentenced to death after his conviction, was never informed of his rights under the VCCR when he was arrested and became one of the fifty-four Mexican nationals whose cases were before the ICJ in *Avena*.⁸² Mr. Medellín appealed his conviction in both Texas state court and later in federal court through a preliminary petition for a writ of habeas corpus.⁸³ Although Mr. Medellín's petition was denied in federal district court, he filed a timely notice of appeal and his case was reviewed by the Fifth Circuit Court of Appeals.⁸⁴ The Fifth Circuit affirmed the denial of the petition noting that Mr. Medellín's VCCR claim failed both because it was procedurally defaulted and because the VCCR does not confer an individually enforceable right.⁸⁵ This second reason sparked heated debate and, as it is an issue that the Supreme Court has not yet directly addressed, its strengths and weaknesses are analyzed in Part III of this article.

Mr. Medellín next appealed to the Supreme Court and a writ of certiorari was granted.⁸⁶ Shortly thereafter, however, President Bush's memorandum ordering compliance with the ICJ's ruling in *Avena* was released and, in reliance on the memorandum, Mr. Medellín filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals.⁸⁷ On the reasoning that "this state-court proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding," the Supreme Court dismissed the writ of certiorari as improvidently granted.⁸⁸ As mentioned above, this essentially left the Supreme Court off the hook, allowing it to pass on deciding whether U.S. courts are bound by the ICJ's ruling that the United States must reconsider the cases of those named in *Avena* without regard to procedural default doctrines and also "whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment."⁸⁹ The manner in which the Supreme Court disposed of Mr. Medellín's case

81. *Medellin v. Dretke*, 371 F.3d 270, 273–74 (5th Cir. 2004) (per curiam).

82. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 25 (Judgment of Mar. 31).

83. *Medellin*, 371 F.3d at 274.

84. *Id.*

85. *Id.* at 279–80.

86. Linda Greenhouse, *Supreme Court Drops Case Ruled on by World Court*, N.Y. TIMES, May 24, 2005, available at http://www.nytimes.com/2005/05/24/politics/24treaty.html?_r=1&scp=1&sq=justices+drop+capital+case+ruled+on+by+world+court&st=nyt&oref=login.

87. *Medellin v. Dretke*, 544 U.S. 660, 663 (2005) (per curiam) (dismissal of federal writ as improvidently granted).

88. *Id.* at 662.

89. *Id.*

was controversial even among the Court's members,⁹⁰ but an in-depth discussion of the procedural issues raised is, though undoubtedly worthwhile, unfortunately beyond the scope of this article. Suffice it to say that those who expected *Medellín v. Dretke* to be the case that defined the relationship between the ICJ and the U.S. criminal justice system were disappointed and Mr. Medellín took his case back to Texas.

Once there, Mr. Medellín found the Texas Court of Criminal Appeals less than sympathetic to his cause and unimpressed by either the ICJ decision ordering a review of his case notwithstanding procedural default, or by the memorandum issued by the country's highest ranking diplomat directing that the ICJ decision be honored.⁹¹ In a lengthy opinion that examines, *inter alia*, the United Nations Charter and the Statute of the International Court of Justice, the court cited the Supreme Court's decision in *Breard* in holding that ICJ decisions are not binding on U.S. courts and that they were therefore under no obligation to set aside the procedural default rules for Mr. Medellín.⁹² With regard to the President's memorandum, the court held that it did not amount to an executive order and that President Bush had consequently "exceeded his constitutional authority by intruding into the independent powers of the judiciary."⁹³ The resulting appeal was filed before the ink was dry on the Texas Court of Criminal Appeal's opinion and on April 30, 2007, certiorari was granted to Mr. Medellín for the second time in three years.⁹⁴ Writing for the majority, Chief Justice Roberts held that the decision of the ICJ in *Avena* does not "constitute binding federal law that preempts state restrictions on the filing of successive habeas petitions,"⁹⁵ and that President Bush exceeded his constitutional authority when he issued the memorandum ordering state courts to comply with the *Avena* decision.⁹⁶ Next, I will explore the Court's reasoning in coming to these two conclusions.

In finding that the ICJ's *Avena* judgment has no binding effect in domestic U.S. courts, the Court's primary basis is that the VCCR is a non-self-executing treaty, and so the ICJ's holding requires additional congressional action to be enforced.⁹⁷ Despite its best efforts, however, the Court could find no evidence in the text of the VCCR to hint at whether or not it was intended to be self-executing.⁹⁸ Faced with this conundrum, the majority reads a presumption against self-execution into the history of treaty in-

90. Greenhouse, *supra* note 86.

91. *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

92. *Id.* at 332.

93. *Id.* at 335.

94. *Medellin v. Texas*, 127 S. Ct. 2129 (2007) (mem.) (certiorari granted for the second time).

95. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1367 (2008).

96. *Id.* at 1372.

97. *Id.* at 1356-57.

98. *Id.* at 1358.

terpretation in the United States.⁹⁹ However, the dissent devotes many pages to carefully chronicling the Court's legacy of treaty interpretation, and the origins of the very idea of self-executing and non-self-executing treaties, and comes to the opposite conclusion.¹⁰⁰ In support of the idea that there is no presumption against self-executing treaties, Justice Breyer notes that

by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that "it would be a bold proposition" to assert "that an act of Congress must be first passed" in order to give a treaty effect as "a supreme law of the land."¹⁰¹

Additionally, the Supreme Court has previously "held that the United States may be obligated by treaty to comply with the judgment of an international tribunal interpreting that treaty, despite the absence of any congressional enactment specifically requiring such compliance."¹⁰² If there was once, as Justice Breyer very convincingly argues, a presumption in favor of treaties being self-executing, but the passage of time has eroded that presumption, then it is necessary to pinpoint the moment at which the presumption disappeared. It is surprising, to say the least, that the conservative wing of the Court should espouse vague arguments about the evolution of such presumptions. The Justices who form the majority in *Medellin II* point with disdain to Justice Breyer's seven-step analysis for determining whether or not a treaty is self-executing and yet his is the voice of history, the voice of continuity, the voice of precedent. I am open, as I imagine Justice Breyer is, to the possibility that the presumption that once existed in favor of treaties being self-executing is no longer valid. What must not be ignored, however, is the fact that Justice Breyer's purpose was to illustrate not the continuing existence of a presumption in favor of self-executing treaties, but rather the complete absence of a presumption *against* such treaties. It is this *opposite* presumption that the majority uses to prop up its finding that the ICJ's *Avena* decision requires legislative action before it can be given effect.

Next, the majority concludes that the language of the Optional Protocol should be read as a "bare grant of jurisdiction," merely submitting the United States to the jurisdiction of the ICJ for the purposes of dispute resolution, but saying nothing of whether the United States must then be bound by a resulting decision.¹⁰³ To this argument is added a critique of Article 94

99. *Id.* at 1357 n.3 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)).

100. *Id.* at 1377–81 (Breyer, J., dissenting).

101. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1379 (2008) (Breyer, J., dissenting) (quoting *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. 353, 388 (1840) (Baldwin, J., concurring)).

102. *Id.* at 1380 (Breyer, J., dissenting).

103. *Id.* at 1349.

of the U.N. Charter, from which even the majority admits the “obligation on the part of signatory nations to comply with ICJ judgments [is] derive[d]” (which seems to indicate that there is, in fact, an obligation).¹⁰⁴ “Article 94(1) provides that ‘[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party.’”¹⁰⁵ The Court maintains that the words “undertakes to comply” indicate a rather formless “commitment . . . to take future action” through the legislature to comply with ICJ decisions.¹⁰⁶ By parsing the language in this way, the Court has made U.S. compliance not mandatory but optional.

There are two characteristics of the American political system which, when combined, have the almost certainly unintended consequence of allowing the United States to enter into international agreements with which it cannot comply. These characteristics are federalism and dualism. Federalism, or the separation between and independence of the federal and state governments,¹⁰⁷ and more specifically, federal and state law enforcement agencies, can lead to an uneven and inconsistent application of federal law. Dualism, or separation between the legislative and executive branches of government, allows the executive to enter into a treaty which cannot be enforced without the independent action of the legislature. In the case of the VCCR, the twin properties of federalism and dualism have combined in a kind of perfect storm, rendering the United States unable to live up to its international commitment. Shielded as it is by this impasse, U.S. noncompliance with the VCCR suddenly becomes not just an option, but *the only* option. In this scenario, Mexico’s only recourse is to the U.N. Security Council, which is, of course, powerless to act against the United States.

The Court next turned its attention to the issue of whether President Bush possessed the authority to instruct state courts to abide by the ICJ’s *Avena* decision. In deciding this question, the Court references “Justice Jackson’s familiar tripartite scheme”¹⁰⁸ from *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁰⁹ Observing “[t]hat comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country,”¹¹⁰ and recognizing that judicial opinions “often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote, [or] of confounding the permanent executive office with its temporary occupant,”¹¹¹ Justice Jackson laid out three categories into which

104. *Id.* at 1358.

105. *Id.* (quoting U.N. Charter art. 92) (emphasis added by the Court).

106. *Id.* at 1349.

107. See BLACK’S LAW DICTIONARY 644 (8th ed. 2004) (defining federalism as “[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government.”).

108. *Medellin II*, 128 S. Ct. at 1350.

109. 343 U.S. 579 (1952).

110. *Id.* at 634.

111. *Id.*

presidential actions fall for the purpose of determining the strength of authority upon which any such action rests. These categories are: (1) “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”;¹¹² (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”;¹¹³ and (3) “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”¹¹⁴ Taken together, these categories stand for the proposition that “[t]he President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”¹¹⁵

After overlaying the President’s memorandum with Justice Jackson’s scheme, the *Medellin II* Court held that the President had neither the express constitutional power nor congressional authorization to order the states to review the cases encompassed in *Avena*. The Court then examined whether Congress may have acquiesced in the President’s actions. Here, too, the Court came to the conclusion that “[t]he President’s Memorandum is not supported by a ‘particularly longstanding practice’ of congressional acquiescence” such as supports his authority to resolve claims disputes with foreign nations.¹¹⁶ His actions were, in fact, “unprecedented” and therefore could not be said to enjoy the blessing of Congress.¹¹⁷

In this instance too, however, the arguments of the dissent are more compelling than those relied upon by the majority. While it seems clear that under the *Youngstown* scheme, the President cannot be said to have explicit constitutional authority nor the express support of Congress, under the circumstances it seems that Congress has indeed acquiesced in the President’s exercise of authority. Congress is certainly not known for its agility, but the President’s memorandum was released on February 28, 2005. This decision was handed down by the Court on March 25, 2008—more than *three full years* later. To assume that Congress had simply not noticed or that they were somehow unable to act in disapproval for want of time is absurd. The only reasonable conclusion is that Congress acquiesced in the President’s actions putting him squarely in the middle category of Justice Jackson’s scheme and arming him with the authority to instruct the states to comply with *Avena*.

While I disagree with the Court’s assessment of where the President’s authority vis-à-vis the memorandum falls within Justice Jackson’s tripartite

112. *Id.* at 635.

113. *Id.* at 637.

114. *Id.*

115. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1368 (2008) (quoting *Youngstown*, 343 U.S. at 585; *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)).

116. *Id.* at 1372.

117. *Id.* (quoting Brief for United States as Amicus Curiae Supporting Respondents at 29–30, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 and 04-10566), 2006 WL 271823).

scheme, the more interesting and more significant analysis is of the President's foreign affairs authority to resolve claims disputes with foreign nations. By refusing to submit to the argument that this power encompasses the President's memorandum, the Court has substantially limited the President's authority in an area where it had appeared well established. In prior decisions the Court had "recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."¹¹⁸ These agreements have been used liberally by virtually every U.S. president to settle matters large and small and have, until now, been considered a flexible tool for the settling of international controversies.¹¹⁹ Their uses have even extended to trumping State law when necessary and the Court has previously recognized the legitimacy of such action, noting that "the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum must give way before the superior Federal policy evidenced by a treaty or international compact *or agreement*."¹²⁰ Similarly, the Court has also held that "even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation *unless clearly necessary to effectuate the national policy*."¹²¹ This position makes the majority's holding in *Medellin II* all the more remarkable since surely there can be no better barometer of national policy and what is necessary to effectuate it than the President himself. In releasing the memorandum directing compliance with the *Avena* decision, the President was recognizing, as the Court has in the past, that "[f]requently the obligation of a treaty will be dependent on state law."¹²² Knowing, then, that it was clearly necessary in the interest of national policy to derogate from the authority and jurisdiction of the States to "vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law," the President sought to act pursuant to his recognized authority.¹²³ In refusing to recognize this authority then, the Court has, at the very least, considerably narrowed its previous position.

118. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003).

119. *Id.* (quoting LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219, 496, n.163 (2d ed. 1996)).

120. *United States v. Pink*, 315 U.S. 203, 230–31 (1942) (emphasis added); see *Griffin v. McCoach*, 313 U.S. 498, 506 (1941).

121. *Pink*, 315 U.S. at 230 (emphasis added); see *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 143 (1938) and cases cited.

122. *Pink*, 315 U.S. at 230; see *Prevost v. Greneaux*, 60 U.S. 1 (1856).

123. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1366 (2008).

Sanchez-Llamas v. Oregon (2006)

While *Medellín* was making its arduous journey back and forth between Texas and Washington D.C., another VCCR violation opinion was handed down by the Supreme Court.¹²⁴ On June 28, 2006, the Court issued its decision in two consolidated cases involving foreign nationals who had been arrested by state officers without being given the notification required by the VCCR.¹²⁵ Unlike any of the cases discussed in this article thus far, *Sanchez-Llamas v. Oregon* involved two foreign nationals neither of whom were the subject of any ICJ proceedings.¹²⁶ As a result, the holding of the case does not advance our understanding of the complex and developing relationship between the ICJ and the U.S. judiciary, but instead answers some peripheral questions about possible remedies for VCCR violations and, more importantly, outlines what questions the Supreme Court has left unanswered.

The case from Oregon involved Moises Sanchez-Llamas, a Mexican national who shot a police officer in the leg during an exchange of gunfire.¹²⁷ Although Mr. Sanchez-Llamas was read his *Miranda*¹²⁸ rights in both English and Spanish when he was arrested, he was never informed of his rights as a foreign national under the VCCR.¹²⁹ During interrogation Mr. Sanchez-Llamas made several incriminating statements that he later attempted to have suppressed because of the violation of his rights under the VCCR.¹³⁰ The trial court rejected his motion to suppress the statements and he was convicted and sentenced to 20.5 years imprisonment.¹³¹ On successive appeals both the Oregon Court of Appeals and the Oregon Supreme Court affirmed his conviction.¹³²

The Virginia case, consolidated with *Sanchez-Llamas* for the purpose of certiorari review, involved Mario Bustillo, a Honduran national convicted of murdering James Merry with a baseball bat outside a restaurant in Springfield, Virginia, on the night of December 10, 1997.¹³³ Mr. Bustillo was never informed of his rights to consular help under the VCCR despite

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

125. The cases were *Sanchez-Llamas v. Oregon*, 548 U.S. 331, and *Bustillo v. Johnson*, 224 F. App'x. 221 (2007), a Virginia case. Frederic L. Kirgis, *The Supreme Court Decides a Consular Convention Case*, ASIL INSIGHTS, July 7, 2006, para. 1, http://www.asil.org/insights/2006/07/insights060707.html#_ednref1 [hereinafter Kirgis, *Supreme Court Decides*].

126. Kirgis, *Texas Court*, *supra* note 37, para. 5.

127. *Sanchez-Llamas*, 548 U.S. at 338–40.

128. *Miranda v. Arizona*, 384 U.S. 436 (1966) (explaining that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, are inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination).

129. *Sanchez-Llamas*, 548 U.S. at 340–41.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

the fact that his defense hinged on his identity being confused with another Honduran national who allegedly fled the country following the murder.¹³⁴ Mr. Bustillo never raised the issue of a VCCR violation at trial but attempted to do so for the first time after his conviction when he filed a petition for a writ of habeas corpus in state court.¹³⁵ The state habeas court dismissed Mr. Bustillo's VCCR claim on the now-familiar grounds of procedural default and the Supreme Court of Virginia denied his petition for appeal.¹³⁶

Certiorari was granted on these two cases from opposite sides of the country to answer three specific questions:

- (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding;
- (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and
- (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.¹³⁷

The Court dealt with these questions in reverse order and having decided the second and third found it unnecessary to decide the first.¹³⁸ Having gone unanswered by the Supreme Court then, the first question will be addressed in Part III.

On the issue of suppression of evidence as a remedy for a VCCR violation, the Court found that automatic suppression is an "entirely American legal creation" that is "still 'universally rejected' by other countries."¹³⁹ Consequently, it would be virtually impossible for a defendant to enjoy suppression of evidence as a judicially-imposed remedy for a VCCR violation in any of the 169 other countries party to the Convention and, therefore, "startling" if the Convention itself were read to require suppression.¹⁴⁰ In response to the argument that since suppression is the appropriate remedy for a violation of a defendant's *Miranda* rights in the United States it is also appropriate for a VCCR violation, the Court held that "[i]t is beyond dispute that we do not hold a supervisory power over the courts of the several States."¹⁴¹ Given this and given that the VCCR does not itself identify a remedy for its violation, the Court was loath to impose one on the States.

Next, the Court turned its attention to the issue of procedural default as a bar to raising a VCCR claim for the first time on appeal. This was an issue that had been addressed by the Supreme Court in *Breard*, but it was also

134. *Id.*

135. *Sanchez-Llamas*, 548 U.S. at 341.

136. *Id.* at 342.

137. *Id.*

138. Kirgis, *Supreme Court Decides*, *supra* note 125, para. 3.

139. *Sanchez-Llamas*, 548 U.S. at 343 (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV., 375, 399-400 (2001)).

140. *Id.* at 344.

141. *Id.* at 345 (quoting *Dickerson v. United States*, 530 U.S. 428, 438 (2000)).

directly addressed by the ICJ in *Avena*.¹⁴² As discussed *supra*, in *Avena* the ICJ specifically instructed U.S. courts to disregard procedural default in their review and reconsideration of the cases that were the subject of that action.¹⁴³ Despite the arguments of Mr. Bustillo and several amici, however, the Court held that although the ICJ's interpretation deserved "respectful consideration," it did not obligate the Court to revisit its decision in *Breard*.¹⁴⁴ Refusing to analogize a VCCR violation to a *Brady*¹⁴⁵ claim, the Court instead continued to hold that a VCCR violation, like a *Miranda* violation, is procedurally barred from being raised for the first time in a post-conviction proceeding.¹⁴⁶ Given these holdings on two of the three questions presented, I would now like to turn to the questions that have been left open by the Supreme Court's VCCR decisions.

PART III – WHAT REMAINS UNANSWERED

Although there are myriad questions about how U.S. states' failures to comply with the requirements of the VCCR can and should be addressed, as well as an equally large number of questions about how the U.S. criminal justice system should interact with international tribunals, the unanswered issues I aim to explore in this section are limited to: (1) Does Article 36 of the VCCR confer privately-enforceable rights on individual foreign nationals?; and (2) following the *Medellin II* decision, is future U.S. compliance with the VCCR a pipedream?¹⁴⁷ I will discuss them in order.

Unfortunately for those interested, the Supreme Court in *Sanchez-Llamas v. Oregon* passed over the first question it granted certiorari to answer: whether Article 36 of the VCCR confers privately-enforceable rights on individual foreign nationals. This question was given virtually identical treatment by the Court two years later in *Medellin II*. Although it was perhaps unnecessary to directly decide this question to resolve either case, it is arguably the most important issue within the sphere of VCCR jurisprudence. Whether individuals can privately enforce their VCCR-bestowed rights is central to what the resulting litigation will look like and more importantly, how accessible and responsive the judiciary will be to those individuals.

142. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 65 (Judgment of Mar. 31).

143. *Id.* at 57.

144. *Sanchez-Llamas*, 548 U.S. at 353.

145. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that failure of the prosecution to disclose known exculpatory evidence denies the defendant due process as guaranteed by the Fourteenth Amendment).

146. *Sanchez-Llamas*, 548 U.S. at 359–60.

147. These questions, among others, were first posed by MARK WARREN, HUMAN RIGHTS RESEARCH, CONSULAR NOTIFICATION AND ASSISTANCE: A GUIDE FOR DEFENSE ATTORNEYS (2007), <http://www3.sympatico.ca/aiwarren/attorneys.htm> #Sanlamas.

In the opening paragraphs of its opinion in *Sanchez-Llamas* the Court makes it clear that it “assume[s], without deciding, that Article 36 *does* grant [Mr.] Bustillo and [Mr.] Sanchez-Llamas” individually enforceable rights.¹⁴⁸ This same disclaimer also graces the pages of the *Medellin II* opinion.¹⁴⁹ Attorneys for the United States, on the other hand, have argued vigorously through virtually all of the litigation outlined above, that the VCCR only confers rights on the states that are party to it, and not to their individual citizens.¹⁵⁰ This argument has proven attractive to quite a few “of the Courts of Appeals [which] have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.”¹⁵¹ In their Brief to the Court in *Sanchez-Llamas*, the respondents quoted a nineteenth century case which held that “there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts.”¹⁵² This presumption may well have been true at the time it was written, and for that matter might still be true today if the subject of a treaty was the position of a border or size of a fleet, but it is not true if the subject is the rights of *individual* foreign nationals. The issues at stake when a VCCR violation occurs are not the stuff of high politics but rather the individual and very personal rights of a foreigner to talk to someone from his or her own country. If there is one lesson that can be gleaned from the cases outlined above it is that countries do not move quickly. Time and again these cases were filed mere days or, in the Motion for Leave to File a Complaint with the Supreme Court in the *LaGrand* case, hours before a scheduled execution. To rule that the VCCR confers no privately-enforceable rights on individuals covered by the Convention is to rule that the Convention is unenforceable in U.S. courts. Is it possible then, that despite the Court’s consistent assumptions to the contrary, it has already implicitly decided that the VCCR does *not* confer privately-enforceable rights on individuals?

A decade ago the *Breard* Court hinted that it considered VCCR rights to be privately-enforceable, noting that the VCCR “arguably confers on an individual the right to consular assistance following arrest.”¹⁵³ All this changed, however, when the *Medellin II* Court found that the ICJ’s orders enforcing the VCCR were *not* judicially enforceable. Although it formally

148. *Sanchez-Llamas*, 548 U.S. at 343 (emphasis added).

149. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1357 n.4 (2008).

150. *Sanchez-Llamas*, 548 U.S. at 343.

151. *Medellin II*, 128 S. Ct. at 1357 n.3; *see, e.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60–61 (1st Cir. 2000) (*en banc*); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

152. *Sanchez-Llamas*, 548 U.S. at 343 (quoting *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884)).

153. *Breard v. Greene*, 523 U.S. 371, 376 (1998).

sidestepped the issue of individual rights, the Court will be loath to enforce such rights in future cases when it has already proclaimed that direct instructions from the World Court to give effect to the VCCR hold no sway in domestic U.S. courts.

Moving to question (2), it would be unfair to imply that the Court is declaring U.S. compliance with the VCCR and, more to the point, the ICJ's ruling in *Avena*, a lost cause. Although this latest decision has the effect of prolonging U.S. noncompliance with the ICJ, the Court's position is that it is unable to remedy the situation, bound as it is by its inability "to disregard the existing laws on the subject."¹⁵⁴ In reality, the Court is washing its hands of the issue and declaring compliance in this instance as exclusively within the purview of the legislative branch. Since, in the Court's view, the VCCR is non-self-executing, it "can only be enforced pursuant to legislation to carry [its stipulations] into effect,"¹⁵⁵ "[t]he responsibility for [which] . . . falls to Congress."¹⁵⁶ Under these circumstances then, Congress's acquiescence, or lack thereof, to the President's actions is irrelevant to the Court and "whether the treaty will ever have [its intended] effect is governed by the fundamental constitutional principle that '[t]he power to make the necessary laws is in Congress'"¹⁵⁷ Whether Congress will heed this message and spring into action to restore the U.S.'s good name on the world stage remains to be seen.

If Congress did take up the gauntlet cast down by the Court and began to fashion a legislative cure for U.S. noncompliance with *Avena*, the shape that cure would take would be an issue of not inconsiderable controversy. The federal government must tread softly lest it disturb the balance struck by the Tenth Amendment.¹⁵⁸ As illustrated by the Texas Court of Criminal Appeals' rejection of the President's instruction to give effect to the ICJ's *Avena* decision, the several States are loath to cede an ounce more sovereignty to the federal government than is demanded by the Constitution. Moreover, where police powers are involved, the case for the States' right to reject federal legislation is a strong one. This makes a congressional edict *directly* mandating compliance with *Avena* vulnerable to a constitutional challenge, and therefore improbable. Such direct federal action would give rise to an issue similar to, but distinguishable from, that at the heart of

154. *Medellin II*, 128 S. Ct. at 1368 (quoting *Foster v. Neilson*, 27 U.S. 253, 315 (1829) (overruled on other grounds)).

155. *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

156. *Id.*

157. *Id.* at 1369 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006)) (quoting *Ex Parte Milligan*, 71 U.S. 2, 139 (1866) (opinion of Chase, C.J.)).

158. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Missouri v. Holland.¹⁵⁹ In *Missouri v. Holland* the federal government negotiated a treaty with the United Kingdom which subsequently allowed federal regulation of the hunting of migratory birds in Missouri and the other States. The treaty provided the constitutional grounds for enforcement of something the federal government could not enforce through direct legislation. In contrast, the current situation contemplates direct legislation to enforce an international tribunal's resolution of a dispute about a longstanding treaty. Although the States may feel that in both instances a treaty is permitting the federal government to interfere in an area from which it was heretofore excluded, the motive and circumstances involved are quite dissimilar.

Those who feel that federal legislation to enforce the *Avena* decision evokes *Missouri v. Holland* would do well to note that the Court has already held the VCCR and the Optional Protocol to be non-self-executing. The Bricker Amendment,¹⁶⁰ proposed in the wake of the *Missouri v. Holland* decision to prevent federal tampering with the States' constitutional rights through the use of treaties, called for a treaty to "become effective as internal law in the United States *only* through legislation which would be valid in the absence of treaty."¹⁶¹ Although the Bricker Amendment failed by a single vote to gain the requisite two thirds majority in the Senate, the Supreme Court has brought about one of the failed amendment's major goals by finding a presumption *against* self-executing treaties.

Although *Missouri v. Holland* technically still represents good law, it is unclear whether it is a hook upon which Congress can hang the weighty hat of *Avena* compliance. Should it prove insufficient for the task, Congress's next most valuable tool in trying to craft legislation to enforce the *Avena* decision will likely be the power of the purse. The Spending Clause of the U.S. Constitution gives the federal government the power to spend the revenues raised by taxation in order to meet its objectives and goals.¹⁶² The Supreme Court has long held that Congress can also use its power to spend to coerce favored conduct.¹⁶³ In this case, for example, Congress might be able to condition funding for State criminal law enforcement on VCCR compliance or compliance with the ICJ's decision in *Avena*.

159. 252 U.S. 416, 433-34 (1920) (holding that the federal government's ability to make treaties is supreme over any state concerns about such treaties having abrogated any states' rights arising under the Tenth Amendment).

160. S.J. Res. 1, 83d Cong. (as introduced by Sen. John Bricker, Jan. 7, 1953), 99 Cong. Rec. 160-61 (1953).

161. Arthur E. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 283-84 (1953) (emphasis added) (quoting from S.J. Res. 1, 83d Cong. (as proposed by S. Comm. on the Judiciary, June 15, 1953), 99 Cong. Rec. 6449 (1953)).

162. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States") (known as the Taxing and Spending Clause).

163. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The final mechanism available to Congress to give effect to the *Avena* decision would be some amalgam of the powers granted to it under Article I of the Constitution. In addition to the Spending Clause discussed *supra*, there are creative arguments to be made under the Necessary and Proper Clause¹⁶⁴ as well as the Commerce Clause.¹⁶⁵ If Congress chooses to look upon human capital as a good traded in interstate commerce (since members of the workforce frequently cross state and international borders as the labor market changes), it might be able to legislate *Avena* compliance in this way.

CONCLUSION

As the court of last resort in the United States, the Supreme Court has had the opportunity to acknowledge and shape the domestic judicial response to international jurisprudence involving the United States. In the series of decisions relating to VCCR compliance the Court has decided that a judicial response is impossible and what is required is legislative action. In so holding, it has made a decision that will, absent swift congressional action on a complex issue, greatly affect U.S. standing on the world stage. This is not lost on the Court:

The entire Court and the President agree that breach [of compliance with the ICJ's ruling in *Avena*] will jeopardize the United States' 'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.' When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.¹⁶⁶

This admonition, buried as it is at the end of a lengthy opinion upholding the right of Texas's courts to openly defy the considered judgment of the World Court and the President of the United States, will do little good in the scheme of things. Perhaps Justice Breyer alone realizes the true gravity of the decisions that have been made in the past decade with regard to the VCCR. As he noted in his dissent in *Medellin*, "[i]n a world where commerce, trade, and travel have become ever more international, [this] is a step in the wrong direction."¹⁶⁷

164. U.S. CONST. art. I, § 8, cl. 18.

165. U.S. CONST. art. I, § 8, cl. 3.

166. *Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1375 (2008) (Stevens, J., concurring) (internal citations omitted).

167. *Id.* at 1389 (Breyer, J., dissenting).

Compliance with the VCCR, and now compliance with the ICJ, are not luxuries to be indulged in when times are good and disregarded when it's politically unfavorable. They are commitments that we, as the land of the free and home of the brave, have made to the world. Whether we honor these commitments in a better-late-than-never fashion is now in the hands of our elected Congress. They must act quickly and decisively to give effect to the ICJ's *Avena* decision and to ensure continuing and complete VCCR compliance if for no other reason than that the treatment of the millions of Americans who travel abroad each year hangs in the balance.