

No. AP-75,207

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IN THE  
TEXAS COURT OF CRIMINAL APPEALS

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EX PARTE JOSÉ ERNESTO MEDELLÍN

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ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE NO. 675430 IN THE  
339<sup>TH</sup> DISTRICT COURT OF HARRIS COUNTY

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BRIEF OF AMERICAN CITIZENS ABROAD (ACA) AS  
*AMICUS CURIAE* IN SUPPORT OF  
PETITIONER JOSÉ ERNESTO MEDELLÍN

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus* is an organization dedicated to the interests of U.S. citizens abroad, including their fundamental right to timely consular information, notification and access under Article 36 of the Vienna Convention on Consular Relations.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide, including Mexico.

ACA works with other groups and organizations to achieve common goals on many issues affecting Americans residing abroad, such as fair taxation, Medicare, absentee voting and inclusion in the next U.S. census. Thousands of readers worldwide receive the *ACA News Report*, including individuals and groups, schools, U.S. embassies and consulates.

The *amicus* stresses that it takes no position in this brief on the moral or legal propriety of capital punishment in the abstract, or whether a sentence of death is an appropriate sanction for Mr. Medellín. Some of its members are opposed to the death penalty, and some are not. All are in agreement, however, that a failure by the domestic

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<sup>1</sup> No person or entity, other than the undersigned *amicus* and their counsel, has made a monetary contribution to this brief's preparation and submission. Counsel for the *amicus* certifies that copies of this brief have been served on all parties, as listed on page 26.

courts to give a vigorous and robust scope to the protections of the Vienna Convention on Consular Relations will ultimately, and inevitably, endanger the welfare of United States citizens abroad.

### **SUMMARY OF ARGUMENT**

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system. Article 36 of the Vienna Convention on Consular Relations ensures that consular officers will be allowed to perform this important service. But if officials in this country fail to provide foreign nationals with the full benefit of access to consular assistance, it is inevitable that U.S. citizens abroad will soon suffer a similar, reciprocal fate. Indeed, nothing presents a greater threat to consular assistance abroad than the failure by officials in this country to grant reciprocal assistance at home.

A failure by the Court to provide meaningful review and reconsideration of Mr. Medellín's conviction and sentence would be inconsistent with the leading role taken by the United States in creating the Convention. It is also at odds with its steadfast determination to accept and invoke the jurisdiction of the International Court of Justice.

But more ominously, if the requested remedy is not afforded, it is inevitable that U.S. citizens abroad will soon suffer in kind.

## ARGUMENT

### **I. Securing the Reciprocal Protection of Citizens Abroad Has Long Been a Core Principle of United States Law and Foreign Policy**

The framers of this nation were acutely aware of the importance that civilized countries attach to protecting the rights of their citizens abroad, enshrining in the Constitution the judicial power of review and reconsideration in all such cases:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (J. Cooke ed. 1961). *See also* *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (Federal courts were given Article III jurisdiction over treaty claims so that “all persons who have real claims under a treaty should have their causes decided by the national tribunals”); *cf. Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) (“Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law”).

Indeed, “since the beginning of the country, since the time we first had diplomatic missions overseas, the fundamental purpose of embassies is to serve American citizens when they’re in trouble as well as relating to foreign governments. That’s a service and a responsibility that the State Department takes very, very seriously.” R. Nicholas Burns, Spokesperson, U.S. Department of State Daily Press Briefing, Sept. 29, 1995.

As early as 1818, the United States was exerting diplomatic efforts at the highest levels to secure the release of American citizens unjustly imprisoned overseas. *See Meade v. United States*, 76 U.S. 691, 693 (1869) (discussing the imprisonment in Spain of U.S. citizen Richard Meade in 1816 who was “finally released only by reason of the active interposition of the government of the United States in his behalf”).

Shortly after the United States successfully protected its citizen in Spain, the U.S. Supreme Court recognized the reciprocal right of the Spanish Consul to safeguard the interests of his fellow-citizens in this country:

To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it.

*The Bello Corrunes*, 19 U.S. 152, 168 (1821).

Nor was the fulfillment of this central principle of American law and values confined to action by the Executive and Judicial Branches. Responding to the arbitrary imprisonment of Richard Meade, the U.S. House of Representatives endorsed a resolution in 1818 asserting that “it is the right and duty of the government of the United States to afford to Mr. Meade its aid and protection; and that this House will support and maintain such measures as the President may hereafter adopt, to obtain [his] release. . .”. 32 ANNALS OF CONG. 1699-1700 (1818).<sup>2</sup> Following a series of incidents in which U.S. citizens abroad were deprived of their liberty without due process, Congress enacted a statute in 1868 that remains in effect to this day:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

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<sup>2</sup> See also 31 ANNALS OF CONG. (1817) at 832-833 for Secretary of State Adams’ correspondence with the Spanish Government concerning the Meade Affair, in response to an earlier House resolution requesting information on the case, available at <http://lcweb2.loc.gov/cgi-bin/ampage?collId=llac&fileName=031/llac031.db&recNum=412>.

22 U.S.C. § 1732 (Protection of citizens abroad) (derived from act of July 27, 1868, ch. 249, Sec. 3, 15 Stat. 224).

Conversely, in an incident in 1934 where Mexico complained that California officials had not afforded consular access to a detained Mexican citizen, the Department of State stressed the importance of local compliance with the standards upheld by the United States in its dealings with other countries:

Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.<sup>3</sup>

Acting on these core principles, the United States played a pivotal role in the development of the Vienna Convention on Consular Relations (Convention) and its optional enforcement mechanism. *See* Part II, *infra*. While most Convention provisions codify customary international law, Article 36 broke new ground by requiring that foreign detainees be informed without delay of their individual right to consular notification and access. In his capacity as President of the International Court of Justice, U.S. jurist Stephen M. Schwebel later aptly observed that “the citizens of no State have a

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<sup>3</sup> Secretary Hull to Governor Rolph, telegram of April 10, 1934, Dept. of State file 311.1221 Aragon, Jose/3, reprinted in 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 836-37 (1942).

higher interest in the observance of those obligations than the peripatetic citizens of the United States.”<sup>4</sup>

President Bush has now issued a determination that the United States will abide by its international obligations under the *Avena* Judgment of the International Court of Justice “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.” Presidential Determination (February 28, 2005), Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928). As the United States explained in its brief filed with the U.S. Supreme Court, compliance “serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States’ commitment in the international community to the rule of law.” Brief for the United States as *Amicus Curiae*, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928), at 11-12.

Given the initiatives briefly outlined above, it is readily apparent that the Presidential Determination is consistent with the unbroken policy throughout this nation’s history of securing reciprocal protection for the rights of American citizens detained in a foreign country.

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<sup>4</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, Order of 9 April, Declaration of President Schwebel.

## II. The United States Played a Leading Role in Developing the Legal Protections Provided by the Vienna Convention

The United States has long recognized what can scarcely be gainsaid: the Vienna Convention on Consular Relations<sup>5</sup> provides vital safeguards to persons imprisoned by a contracting State.<sup>6</sup> But equally clear, and no less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)<sup>7</sup> are substantially the product of U.S. leadership.

The Convention codified the pre-existing law on consular relations between States, an area that had previously been regulated “mainly by bilateral agreements or other less formal arrangements and by national laws.”<sup>8</sup> In that respect, the Convention brought unity to this multiplicity by forging a single, global agreement on consular

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<sup>5</sup> April 24, 1963, 21 U.S.T. 77, 596 UNTS 261.

<sup>6</sup> See, e.g., Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p. 174 (“A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations”); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, available at <http://www.state.gov/s/l/16139.htm> (“Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad. . . . protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas”).

<sup>7</sup> April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

<sup>8</sup> Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. EXEC. DOC. E, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess., May 8, 1969, at 41 (hereinafter “Report”).

relations, thereby “contribut[ing] to the promotion of friendly relations between nations.”<sup>9</sup> The United States actively participated in creating this agreement, and took a substantial part in drafting Article 36, the text of which was agreed to “after much debate.”<sup>10</sup> Rejecting the initial draft of Article 36 (which called for mandatory notification of the consulate irrespective of the national’s wishes), the U.S. delegation proposed an amendment that led to the adopted requirement that notification of the consulate would occur only at the informed request of the detainee. The United States explained that the purpose of its amendment was “to protect the rights of the national concerned.”<sup>11</sup>

Significantly, the United States recognized even before ratification that vigorous enforcement of Article 36 would provide important reciprocal benefits to U.S. citizens overseas. The Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes that Article 36(1)(b), which requires that “[arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph,”<sup>12</sup> establishes a “requirement which is not beyond means of practical implementation in the

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<sup>9</sup> Report at 41.

<sup>10</sup> Report. at 59.

<sup>11</sup> United Nations Conference on Consular Relations, Official Records, vol. I, UN Doc. A/Conf.25/16, p. 337, para. 39.

<sup>12</sup> Convention, art. 36(1)(b).

United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.”<sup>13</sup>

While the Convention therefore represents an important codification of consular notification obligations, the United States additionally recognizes that consular rights must be afforded to all foreigners, irrespective of nationality:

Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, in all cases, the minimum requirements are to notify a foreign national who is arrested or detained that the national’s consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.<sup>14</sup>

The United States likewise played an integral role in drafting the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, which provides in relevant part that any “[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>15</sup> Indeed, this language derives

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<sup>13</sup> Report at 60. Elsewhere, the Report notes that “[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice. *Id.* at 74.

<sup>14</sup> BUREAU OF CONSULAR AFFAIRS, U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS 44 (2003), available at [http://travel.state.gov/law/consular/consular\\_744.html](http://travel.state.gov/law/consular/consular_744.html).

<sup>15</sup> Protocol, art. 1 (emphasis added).

substantially from the original proposal of the United States, which provided that “[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon.”<sup>16</sup> At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the compulsory jurisdiction of the ICJ.<sup>17</sup> While the final language of the Protocol is slightly different than the wording proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the United States.

That the United States would have argued so assiduously for an Optional Protocol providing for the compulsory jurisdiction of the ICJ should come as no surprise: the United States has been involved in more cases at the ICJ than any other nation in the world, and has invoked the jurisdiction of the World Court more often than any other State.<sup>18</sup>

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<sup>16</sup> Report at 72.

<sup>17</sup> The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that “[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation.” *Id.* at 73.

<sup>18</sup> See International Court of Justice, *List of Cases brought before the Court since 1946*, available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

The United States resorted to the ICJ in 1979 when it submitted an application against the Islamic Republic of Iran “concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.”<sup>19</sup> In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ “adjudge and declare” that Iran was under a “particular obligation immediately to secure the release of all United States nationals currently being detained.”<sup>20</sup> The U.S. Government emphasized before the ICJ that Article 36 “establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.”<sup>21</sup> The ICJ indicated provisional measures against Iran on December 15, 1979, and entered a final judgment in favor of the United States May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court’s judgment.<sup>22</sup>

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<sup>19</sup> *United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

<sup>20</sup> *Id.* at 6.

<sup>21</sup> Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p. 174.

<sup>22</sup> *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: “The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions.”

In sum, having played a prominent role in drafting the Convention, having successfully led the international charge for the compulsory jurisdiction of the ICJ, and having sought relief from that Court more than any other country, the Executive Branch properly determined that the United States is legally bound by the terms of the *Avena* Judgment.

### **III. Failure to Provide Vigorous and Robust Enforcement of the Vienna Convention Could Have Grave Consequences for U.S. Citizens Abroad**

In a legal system that has no independent enforcement mechanism, the integrity of the process depends on nothing less than the acceptance of mutually shared obligations. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. This notion of reciprocity is both an inescapable reality and the animating force to a bedrock principle of international law – *pacta sunt servanda* (“pacts must be observed”) – which captures the requirement that nations must comply with their agreements in good faith.<sup>23</sup> In matters both mundane and monumental, membership in the international community implies a

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<sup>23</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §321 cmt. a (1987) (*pacta sunt servanda* “lies at the core of the law of international agreements and is perhaps the most important principle of international law.”)

solemn obligation to honor treaty obligations, “undertaking to do (or not to do) unto others what they would have done (or not done) unto them.”<sup>24</sup>

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The State Department now estimates that “[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year.”<sup>25</sup> More than one million U.S. citizens reside in Mexico, the largest expatriate American community in any country.<sup>26</sup> The State Department also reports that over 2,500 Americans are arrested abroad annually.<sup>27</sup> This total does not include the number of citizens detained outside the formal criminal justice process; all told, roughly 6,000 Americans are arrested or detained abroad every year.<sup>28</sup> The largest number in long-term

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<sup>24</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* 30 (2d ed. 1979).

<sup>25</sup> BUREAU OF RESOURCE MANAGEMENT, U.S. DEPARTMENT OF STATE, FY 2003 PERFORMANCE AND ACCOUNTABILITY REPORT 141 (2003), available at <http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm>.

<sup>26</sup> See Association of Americans Resident Overseas, *Top 10 Countries Outside the U.S. Where Most Americans Live*, available at <http://www.aaro.org/map.html>.

<sup>27</sup> Office of Overseas Citizens Services, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), available at [www.internationalbenefits.com/travel-tips/overseas-citizens-services.htm](http://www.internationalbenefits.com/travel-tips/overseas-citizens-services.htm).

<sup>28</sup> Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, available at [www.healthsystem.virginia.edu/internet/ciag/reports/report\\_terr\\_citizens.cfm](http://www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm). (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

detention – some 400 – are in Mexico.<sup>29</sup> Accordingly, one of the “fundamental responsibilities” of U.S. consulates is “helping Americans who are incarcerated; advising them of their legal rights when they’re incarcerated, when their imprisoned in foreign countries; helping to get them legal assistance.” R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995).<sup>30</sup>

The statistics cited above are both descriptively and normatively instructive: they demonstrate that at one time or another many U.S. citizens will find themselves overseas in need of legal help, and they suggest that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. This risk to U.S. citizens has not gone unnoticed. The State Department Foreign Affairs Manual (1984) instructs American consuls abroad to secure “immediate [consular] notification, no matter what the language of applicable treaties legally requires.”<sup>31</sup> Apart from ensuring the timely provision of legal information, prompt notification and access “is necessary to forestall physical abuse of the prisoner. . . or to ascertain when such abuse has occurred.”<sup>32</sup> American consuls are

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<sup>29</sup> Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* [www.hri.org/news/usa/std/1998/98-04-15.std.html](http://www.hri.org/news/usa/std/1998/98-04-15.std.html).

<sup>30</sup> *Available at* <http://www.hri.org/docs/statedep/1995/95-09-29.std.html>.

<sup>31</sup> U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL (1984), 7 FAM 411.3, *Relations with Local Authorities*.

<sup>32</sup> *Id.*, 7 FAM 412, *Access*.

required to determine if there has been “any physical abuse or violation of rights”<sup>33</sup> and to look for signs of ill-treatment, bearing in mind that “many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence.”<sup>34</sup> Consular officers also should arrange for detainees to be “examined by a private medical doctor to determine the extent and probable cause of any injury”<sup>35</sup> when appropriate and observe “the physical conditions under which the prisoner is being held.”<sup>36</sup> Finally, the consulate is required by law “to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life.”<sup>37</sup>

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord

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<sup>33</sup> *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

<sup>34</sup> *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

<sup>35</sup> *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

<sup>36</sup> *Id.*, 7 FAM 414.2, *Conditions of Detention*.

<sup>37</sup> *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance)*.

other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.<sup>38</sup>

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including “attempting to ensure that they understand the foreign country’s legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner’s situation and in some cases, to influence the outcome of the proceedings.”<sup>39</sup> She has also cautioned that non-compliance with the orders of the International Court of Justice “could be seen as a denial by the United States of the significance of international law and the court’s processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad.”<sup>40</sup>

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in order to carry out their “primary mission” of protecting Americans:

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<sup>38</sup> S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright’s letter to Governor Bush, dated November 27, 1998).

<sup>39</sup> Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles (November 27, 1998), quoted in footnote 211 of the Memorial of Mexico, *Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), available at [www.icj-cij.org/icjwww/idocket/imus/imusframe.htm](http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm).

<sup>40</sup> Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright’s letter to Virginia Governor James Gilmore).

If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.<sup>41</sup>

Secretary Albright's position is neither surprising nor unusual. It has been consistently echoed by others at the State Department – most recently by William H. Taft, IV, the Department's Chief Legal Advisor. As he observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention “is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live abroad.”<sup>42</sup> Other State Department officials have voiced the same sentiment.<sup>43</sup>

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<sup>41</sup> U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* <http://www.state.gov/s/l/16139.htm>.

<sup>42</sup> S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at* [www.signonsandiego.com/uniontrib/20040507/news\\_1n7penalty.html](http://www.signonsandiego.com/uniontrib/20040507/news_1n7penalty.html).

<sup>43</sup> For example, State Department Spokesman James P. Rubin stated that “[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard.” Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* <http://secretary.state.gov/www/briefings/statements/1998/ps981104.html>. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

A lot of American citizens who are tourists ... find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American -- and millions of Americans travel overseas every year -- that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995), *supra*.

Robust enforcement of the Vienna Convention is not merely the concern of cabinet level officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access. . . . It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.<sup>44</sup>

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.<sup>45</sup>

In another case, one jurist asked, perhaps only rhetorically:

Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen

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<sup>44</sup> 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

<sup>45</sup> *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998)(Butzner J., concurring)(internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999)(“Treaty violations not only undermine the ‘Law of the Land,’ but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.”).

locked up in a Mexican jail without notice to any U.S. government official we ought to remember these cases.<sup>46</sup>

Another judge drew on her personal experience as an expatriate American to underscore the reciprocal benefits of full compliance:

Having grown up abroad and having lived in three different foreign countries, I have seen first-hand the vastly different foreign legal systems and how our nationals are often treated in a foreign land. Article 36 of the Vienna Convention may provide our nationals their only safeguard against a hostile legal system. . . . When we excuse our failure to advise the defendant of his consular rights on the ground that there was “no plain error,” we provide the very words and tools to other countries to use to excuse their denial of rights to our nationals, and the protections of the treaty become meaningless.<sup>47</sup>

Influential newspapers within Texas have consistently raised similar concerns.

One editorial board concluded:

We should also consider the effect of ignoring the World Court’s order. If we can dismiss complaints that Mexican citizens were not allowed to meet with their consular officials, what ground will we have to stand on when the same happens to American citizens in other countries arrested and imprisoned -- even on trumped-up charges?<sup>48</sup>

“In many cases, the only hope of freedom that Texans in foreign jails have is gaining access to U.S. consular officials,” a major newspaper noted in response to the

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<sup>46</sup> *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999)(Chapel, J., concurring in result); *see also id.* (court’s narrow vision of the Convention “puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.”).

<sup>47</sup> *State v. Issa*, 752 N.E.2d 904, 914, 935 (Ohio 2001) (Lundberg Stratton, J., dissenting).

<sup>48</sup> Austin American-Statesman Editorial Board, *World Court complaint should at least be heard*, February 7, 2003.

*Avena* Judgment.<sup>49</sup> Another opined: “Anyone who thinks the United States should ignore the [ICJ] should consider the possible consequences to Americans overseas. It’s hard to argue that your right should be respected when you deny that right to others.”<sup>50</sup> Still another editorial called for full compliance with the *Avena* Judgment, noting that the United States “always has asserted that it has the right to talk to American prisoners in foreign jails when it wants. We can’t have it both ways, and we should never insist that there be a double standard for justice -- one for Americans and another for everybody else.”<sup>51</sup> Calling for domestic review of the cases named in *Avena*, one editorialist noted that “the nation has a duty to ensure that its system is just and unassailable in the court of world opinion. That means abiding by the Vienna Convention 100 percent of the time.”<sup>52</sup>

Moreover, the Executive Branch stressed the significance of reciprocal compliance in its determination that the *Avena* Judgment would be given effect by state courts. “Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be

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<sup>49</sup> Editorial, *To protect Americans, U.S. must heed court*, San Antonio Express-News, May 31, 2004.

<sup>50</sup> Editorial, *Keeping Your Word: Texas can't afford to ignore federal treaties*, Dallas Morning News, April 12, 2004.

<sup>51</sup> Editorial, *Standards of Justice*, Fort Worth Star-Telegram, April 3, 2004.

<sup>52</sup> Editorial, *Review cases of foreign nationals on death row*, Houston Chronicle, April 5, 2004.

adversely affected.” Brief of the United States as *Amicus Curiae* at 51, *Medellín v. Dretke, supra*.

As recent events in Mexico and elsewhere make plain, the danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states. Last year, the U.S. Embassy in Mexico City “sent a strongly worded diplomatic note to the Government of Mexico asking for a full investigation” into the case of Mario Medina Vazquez, a Texan who was denied prompt consular access and then murdered by another prisoner while in the custody of local Mexican authorities.<sup>53</sup> “Arresting authorities in Nuevo Laredo failed to notify the consulate in Nuevo Laredo of Mr. Medina's arrest, and neither a consular official nor an attorney were present when Medina was interrogated,” said Diana Page, a spokeswoman for the embassy. “The United States abhors and vigorously objects to mistreatment of its citizens.”<sup>54</sup> Mexico’s Foreign Ministry responded by declaring that the government would initiate “an exhaustive investigation” into the murder.<sup>55</sup>

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<sup>53</sup> U.S. Embassy in Mexico Press Release, *Ambassador Garza Deplores Murder Of Jailed American Citizen*, May 15, 2004, available at <http://mexico.usembassy.gov/mexico/ep040514Medina.html>.

<sup>54</sup> Jesse Bogan, *Embassy decries the treatment of American in editor's death*, San Antonio Express-News, April 3, 2004, available at [http://www.mysanantonio.com/news/metro/stories/MYSA03.20A.slain\\_editor\\_0403.100c09b.html](http://www.mysanantonio.com/news/metro/stories/MYSA03.20A.slain_editor_0403.100c09b.html).

<sup>55</sup> S. Lynne Walker, *U.S. files protest in Mexico jail killing*, Copley News Service, May 19, 2004, available at <http://www.signonsandiego.com/news/mexico/20040519-9999-1n19mexico.html>.

Similarly, Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.<sup>56</sup> She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.<sup>57</sup> These arbitrary detentions of Americans abroad prompted the House of Representatives to pass a resolution unanimously condemning the acts of the foreign government and endorsing executive intervention, just as the House had done nearly two centuries before in the Meade case.<sup>58</sup>

Denying effective judicial review and reconsideration could impair the capacity of Americans abroad to obtain effective remedies for consular rights violations. The International Court of Justice held that the necessary remedy for violations of Article 36 rights in cases that resulted in convictions and severe sentences is a judicial process that will “guarantee that the violation and the possible prejudice caused by that violation will

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<sup>56</sup> See *US Family Detained in China*, BBC News, Mar. 21, 2001, available at <http://news.bbc.co.uk/2/hi/asia-pacific/1233163.stm>; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, available at <http://www.csmonitorservices.com/csmonitor/archivesearch.jhtml>.

<sup>57</sup> See *id.*

<sup>58</sup> See H.R. Res. 160, 107th Cong. (2001) (House “condemns and deplors the lack of due process afforded” to Chinese-American scholars detained in China and the President should make their immediate release “a top priority of U.S. foreign policy”); cf. 32 ANNALS OF CONG. 1699 (1818) (imprisonment of Meade “is an act of cruel and unjustified oppression” and the House “will support and maintain such measures as the President may hereafter adopt” to obtain his release).

be fully examined and taken into account.” *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 138. The ICJ emphasized as “a point of importance” that it was addressing the specific claims raised by Mexico “from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court’s findings in the present Judgment.” *Avena*, ¶ 151. Thus, although *Avena* addresses U.S. treaty violations alone and is legally binding only on the United States and Mexico, the general remedy that it requires should be viewed as authoritative by all parties to the Convention.

In principle, an American citizen deprived of consular rights in any country that is bound by the treaty should now be entitled to cite the *Avena* Judgment as persuasive grounds for judicial review of an Article 36 violation. In practice, the extent to which foreign courts will confer precedential value on *Avena* may well depend on the degree of consideration that this Court now accords to the ICJ decision. Plainly put, it is “in our own self-interest to uphold the principle of international comity, acknowledge the notification violation that occurred in the case at bar, and provide a remedy.” *People v. Madej*, 739 N.E.2d 423, 431 (Ill. 2000) (McMorrow J., concurring in part and dissenting in part).

In sum, the *amicus* stakes its argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the

concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a like concern when they foresaw that membership in the international community implies a reciprocal obligation, but one that redounds most to the benefit of the citizens of this country.<sup>59</sup> We urge the Court to recognize the same obligation today.

### CONCLUSION

For the foregoing reasons, this Court should give full effect to the *Avena* Judgment and to the Presidential Determination.

Dated: Austin, Texas  
July 28, 2005

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<sup>59</sup> THE FEDERALIST NO. 64, at 392 (John Jay) (Clinton Rossiter ed., 2003):

Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief *Amicus Curiae* of American Citizens Abroad (ACA) in Support of José Ernesto Medellín was served by pre-paid, first-class U.S. mail on the following individuals, on this 28th day of July, 2005:

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