

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSE ERNESTO MEDELLIN

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE No. 675430 IN THE
339TH DISTRICT COURT OF HARRIS COUNTY

BRIEF OF FORMER
UNITED STATES DIPLOMATS
AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER JOSE ERNESTO MEDELLIN

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STATEMENT OF INTEREST¹

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [Vienna Convention], requires all signatory nations, including the United States, to inform “without delay” any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform “without delay” the consular office of that national’s detention or arrest. Notwithstanding these obligations, the State of Texas arrested, tried, convicted, and sentenced Petitioner Jose Ernesto Medellin—a Mexican national—to death, without ever informing him of his right to seek assistance from the Mexican Consulate.

In January 2003, the Mexican government brought suit in the International Court of Justice [ICJ] against the United States under the Optional Protocol Concerning the Compulsory Settlement of Disputes² [Optional Protocol], which both Mexico and the United States have ratified,³ alleging that the United States had violated the Vienna Convention in Petitioner’s case, among others. After full briefing and oral argument, the ICJ, on March 31, 2004, issued a final judgment holding, *inter alia*, that the United States

¹ No party, person or entity has made a monetary contribution to the preparation or submission of this brief. All counsel are contributing their services *pro bono*.

² The Optional Protocol provides that any disputes “arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice.” Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

³ On March 7, 2005, the United States gave notice that it intended to withdraw from the Optional Protocol. That withdrawal applies to future cases only and has no effect on the obligation to comply with the *Avena* Judgment. See U.S. Dep’t. of State, Daily Press Briefing, Mar. 10, 2005, available at <http://www.state.gov/r/pa/prs/dpb/2005/43225.htm>.

had violated the Vienna Convention by failing to inform 51 identified Mexican nationals—including Petitioner—“of their rights” under the Convention “to notify the Mexican consular post of the[ir] detention.” *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128, at 43 [*Avena*]. To remedy that violation, the ICJ determined that the United States should “allow the review and reconsideration of the conviction[s] and sentence[s] by taking account of the violation of the rights set forth in the Convention.” On February 28, 2005, while Medellín’s case was pending before the Supreme Court, President Bush affirmed the United States’ obligation to comply with the ICJ decision in *Avena* and determined that Texas courts must provide review and reconsideration of Medellín’s claim pursuant to the criteria set forth in *Avena*. The President declared that “the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision in accordance with general principles of comity” Presidential Determination (February 28, 2005), Brief for the United States as Amicus Curiae Supporting Respondent at Ex. B., *Medellin v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928) [Presidential Determination].

On May 23, 2005, the United States Supreme Court dismissed Medellín’s case as improvidently granted, based upon the acknowledgement that this Court “may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required, and that Medellín now seeks in this proceeding.” *Medellin v. Dretke*, 125 S.Ct. 2088, 2090 (2005) (No. 04-5928) (per curiam); *id.* at 2107-08 (stating that President Bush’s decision “that state courts should follow *Avena* means that Medellín’s claims

when considered in state court are stronger than when considered in federal court—and suggests the very real possibility of his victory in state court.”) (Breyer, J., dissenting). As Justice Ginsburg noted, concurring in the Court’s disposition, Medellin’s habeas corpus petition before this Court “raises two discrete bases for relief that were not previously available for presentation to a state forum: the ICJ’s *Avena* judgment and the President’s Memorandum.” *Id.* at 2095 (Ginsburg, J., concurring). *Amici* addressed the propriety of such review and reconsideration in a similar *Amicus* brief filed before the Supreme Court in *Medellin v. Dretke*. Now that Medellin has asked this Court to order that review and reconsideration, notwithstanding any state procedural rules that might otherwise bar review, *Amici* provide this brief in the hope of illustrating to this Court precisely how crucial Texas judicial compliance with ICJ judgments is to the conduct of United States diplomatic relations. Simply put, a decision by this Court not to comply with the ICJ’s *Avena* decision will have grave consequences for American (including Texan) interests, both diplomatic and commercial, in an ever-globalizing world.

Amici have served as Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.⁴ *Amici*

⁴ *Amici* include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former ambassadors Stephen W. Bosworth, Jeffrey Davidow, James R. Jones, J. Stapleton Roy, Nancy Soderberg, Malcolm R. Wilkey and Frank G. Wisner, former Legal Advisers Herbert J. Hansell and Abraham D. Sofaer, and Special Presidential Envoy James C. O’Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. Ambassador Wilkey and Legal Adviser Sofaer were formerly federal judges, on the United States Court of Appeals for the D.C. Circuit, and the U.S. District Court for the

vary widely in their views regarding whether or not the death penalty can ever be lawfully administered and do not express any opinion on what the ultimate resolution of Petitioner's conviction and sentence should be after review and reconsideration. Some of the signatories of this brief also disagree with the ICJ's interpretation of the Vienna Convention and agree that President Bush has the option—which he exercised on March 7, 2005—of withdrawing from the ICJ's Optional Protocol. But all *Amici* agree that this Court should respect the President's February 28, 2005 Determination that the United States is obliged to abide by the ICJ's decisions made while the United States had adopted the Optional Protocol, and that this Court's failure to respect the ICJ's judgment in *Avena* would significantly impair the credibility of American diplomats in the international arena. *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385 (2000) (“[O]pinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by [a] state Act.”).

Refusing to respect the ICJ's final judgment in *Avena* would violate U.S. obligations under four interconnected treaties that the President and Senate ratified—the Vienna Convention, its Optional Protocol, the United Nations Charter, and the annexed Statute of

Southern District of New York, respectively. *Amici* appear in their personal capacities. Current affiliations of *Amici* are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions presented here. The qualifications of *Amici* are listed in the Addendum to this brief.

the ICJ.⁵ To condone such multiple treaty violations would impair important U.S. foreign policy interests and reduce American standing in the world community.

Amici believe that “[g]reat nations, like great men [and women], should keep their word.” *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court should order review and reconsideration of Medellin’s conviction pursuant to the Presidential Determination and the criteria set forth by the International Court of Justice in *Avena*. This Court should issue a ruling that is consistent with sovereign commitments we have made which are binding on this Court under the Supremacy Clause--to ensure that a state court ruling does not disrupt our diplomatic relations with close American allies or damage critical U.S. interests governed by other treaty regimes.

STATEMENT OF FACTS

Amici agree with the Statement of Facts as set forth in Jose Ernesto Medellin’s Application for Writ of Habeas Corpus, and incorporate that Statement of Facts herein.

⁵ In 1945, the United States accepted the duty to comply with ICJ judgments when the Senate advised and consented to ratification of the U.N. Charter and the annexed Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], as a treaty under Article II of the Constitution. The ICJ is the “principal judicial organ of the United Nations.” Charter of the U.N., *entered into force* Oct. 24, 1945, art. 92, 59 Stat. 1031, 1051. Under Article 94(1) of the Charter, “[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.” *Id.* Article 93 of the Charter declares all U.N. Members to be *ipso facto* parties to the ICJ Statute, which is annexed to and an integral part of the U.N. Charter. *Id.* Under Article 59 of the ICJ Statute, decisions of the Court have “no binding force *except between the parties and in respect of that particular case.*” ICJ Statute, 59 Stat. at 1062 (emphasis added). Thus, the *Avena* decision has binding force between the United States and Mexico with respect to Petitioner Medellin and fifty other Mexican nationals who are specifically mentioned in the ICJ’s judgment. *See Avena*, 2004 I.C.J. No. 128, at 43.

STATEMENT OF ISSUES

Amici agree with the Statement of Issues as set forth in Jose Ernesto Medellin's Application for Writ of Habeas Corpus, and incorporate that Statement of Issues herein.

SUMMARY OF ARGUMENT

The ability of U.S. diplomats to carry out important foreign policy objectives from the Founding to the present day has critically depended upon strong enforcement of our treaty obligations by the federal government and federal courts. The Framers' difficult experiences under the Articles of Confederation taught them that the United States cannot credibly conduct its foreign relations unless it honors its treaty obligations. The severely limited treaty power granted to the Continental Congress nearly crippled the young nation by failing to ensure that state governments would abide by our treaty obligations. Indeed, state violations of national treaty obligations led important allies and adversaries to refuse to both honor their reciprocal treaty obligations and enter new commercial treaties with the United States.

In drafting the Constitution, the Framers made sure that the federal government would have the authority to bind the entire nation, including the individual states, to our international obligations. Since its inception, the Supreme Court has repeatedly reaffirmed that understanding, regularly holding that treaties duly entered by the national government supersede conflicting state laws and bind the states to our national commitments. Most recently, the President has confirmed that the United States has an obligation to comply with its international commitments and enforce ICJ's decision in

Avena. Texas’s noncompliance in this case with the Vienna Convention and its Optional Protocol offends the Framers’ constitutional vision and has created the kind of diplomatic failures that prompted the formation of the treaty power. Texas’s and other states’ persistent practice of ignoring the Vienna Convention obligations has strained bilateral and multilateral relations, and has disrupted important national foreign policy interests by impairing the ability of diplomats to carry out critical initiatives with foreign governments and international organizations. *Accord Dretke*, 125 S.Ct. at 2096 (“In this country, the individual States’ (often confessed) noncompliance with the treaty has been a vexing problem. . . . [that] may have considerable ramifications”) (O’Connor, J., dissenting) (citations omitted). Moreover, state noncompliance with our treaty obligations has caused allies and adversaries alike to criticize the United States and to question our longstanding leadership in international law and human rights.

This Court’s decision will affect not just the ability of the United States to enforce the Vienna Convention, but, more broadly, our nation’s capacity to participate effectively in a diverse array of treaty regimes. Our executive and legislative branches of government have regularly chosen compulsory international adjudication as a means to protect our interests in national security and international trade. American diplomats have pursued and successfully secured numerous treaties that confer jurisdiction on the ICJ and other international dispute-settlement bodies. As American private commercial interests become increasingly global, reliable mechanisms for international dispute resolution will become increasingly central to our nation’s foreign policy. The United States cannot

build or benefit from these mechanisms, so long as its states and localities continue to violate ratified treaties and jeopardize our global reputation as a dependable treaty partner.

ARGUMENT

I. THE TREATY POWER AUTHORIZES THE PRESIDENT AND THE SENATE TO ENTER INTO TREATY OBLIGATIONS THAT ARE BINDING ON THE STATES AND OVERRIDE CONFLICTING STATE LAWS

A. Numerous Diplomatic Failures Under The Articles Of Confederation Led To The Creation Of Federal Authority Under The Treaty Power

The Framers established the treaty power (U.S. CONST., art. II, § 2, cl. 2) in response to their frustrating experience under the Articles of Confederation.⁶ That experience taught that permitting the states to impair the nation's treaty obligations would significantly impede the conduct of the fledgling nation's foreign affairs.

Under the Articles of Confederation, the Continental Congress possessed the treaty power,⁷ but virtually all legislative authority rested with the states.⁸ This structure left

⁶ See generally FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL, FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973) (difficulty of obtaining state compliance with treaties motivated the Constitutional Convention); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102-49 (2000) (reviewing history).

⁷ Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the expropriation or importation of any species of goods or commodities whatsoever." ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. IX.

⁸ For example, the Continental Congress had no authority to regulate interstate or foreign commerce. See *id.* art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

Congress nominally responsible for foreign affairs, but ultimately dependent on the good faith of the states to carry out those treaty obligations. *See generally* SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 19-43 (1904). This structure caused repeated failures for Congress in its diplomatic endeavors, as the states routinely refused to carry out important national treaty obligations.

The most serious failure involved the Treaty of Peace with Great Britain of 1783, which secured recognition of both the independence of the United States of America and the U.S. claim to expansive boundaries. Negotiated by Benjamin Franklin, John Adams, and John Jay, the Treaty of Peace was quickly attacked on the ground that its principal concessions to the British—particularly the Treaty’s financial and amnesty provisions in Articles IV and VI— infringed upon the authority of the states.⁹ Almost immediately, a number of state legislatures passed laws that violated Articles IV and VI.¹⁰ As states continued to resist the terms of the Treaty of Peace, tensions with Great Britain worsened—so much so that the British refused to carry out its reciprocal obligation to

⁹ Article IV of the Treaty provided, *inter alia*, that all debts owed to British creditors that had been extinguished under state law would be resuscitated. Article VI provided that there would be no further confiscations, prosecutions, or other actions taken against Loyalists and that those Loyalists still in prison would be released. Treaty of Peace with Great Britain, Sept. 3, 1783, 12 Bevens 8, 11-12.

¹⁰ For example, in 1783, New York enacted a series of laws that patently violated Article VI, asserting that that provision was beyond Congress’s authority and, thus, null. In response, Alexander Hamilton argued in support of congressional authority to enter the obligations of the Treaty of Peace:

Does not the act of confederation place the exclusive right of war and peace in the United States in Congress? Have they not the sole power of making treaties with foreign nations? Are not these among the first rights of sovereignty, and does not the delegation of them to the general confederacy, so far abridge the sovereignty of each particular state?

Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), *reprinted in* 3 *THE PAPERS OF ALEXANDER HAMILTON* 489 (Harold C. Syrett & Jacob E. Cooke eds. 1962).

withdraw troops from military posts in the northwestern territory. CRANDALL, *supra*, at 40-42. Critically, the Framers' experience with the fractious behavior of the states under the Treaty of Peace was repeated in our diplomatic efforts to establish commercial relations as other nations became openly skeptical of the trustworthiness of the United States as a treaty partner.¹¹

The ensuing diplomatic paralysis profoundly affected the Framers' vision of the proper scope of the treaty power. During the Convention, Madison remarked upon the "constant tendency in the States . . . to violate national treaties."¹² Alexander Hamilton echoed the same concern in *The Federalist Papers*.¹³

¹¹ Indeed, foreign skepticism about the Continental Congress's ability to enter binding treaties limited that body's ability to negotiate any commercial treaties other than a limited commercial treaty with Prussia. Golove, *supra*, at 1131; *see also id.* (citing SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 66 (4th ed. 1955) ("[A]bortive negotiations with other powers, notably Austria and Denmark, failed because the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states convinced foreign nations that the Continental Congress had ceased to be a responsible body and that the United States itself might soon cease to be a nation.")).

For example, in response to the American commissioners' request to open commercial treaty negotiations with Great Britain, the Duke of Dorset replied:

I have been . . . instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested,—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States [R]epeated experience having taught . . . how little the authority of Congress could avail in any respect

¹ GEORGE TICKNOR CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 289-90 n.1 (1854) (quoting Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785)).

Likewise, Lord Sheffield contended:

No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States.

Golove, *supra*, at 1128 (quoting JOHN LORD SHEFFIELD, *OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES* 199-200 (Dublin, Luke White 2d ed. 1784)).

¹² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., rev. ed. 1937). Madison explained:

To ensure national compliance with treaties, the Framers drafted three constitutional provisions establishing that treaties would bind the states and supersede conflicting provisions of state law. The Treaty Clause of the U.S. Constitution granted the nation’s treaty power exclusively to institutions of the federal government.¹⁴ Article I, Section 10 further specified that that grant was exclusive, providing “No state shall enter into any Treaty, Alliance, or Confederation.” U.S. CONST. art. I, § 10. Finally, the Supremacy Clause declared that the Constitution, the laws of the United States made pursuant thereto, and “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby” *Id.* art. VI, cl. 2.

As the text and structure of these provisions make plain, where our nation’s foreign policy is concerned, the Constitution does not recognize dual sovereignty. *See, e.g.*, THE FEDERALIST NO. 42 (James Madison). In Madison’s famous words, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.” *Id.* When treaties

The tendency of the States to [treaty] violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have in its power to bring them on the whole.

Id. at 316.

¹³ Due to the states’ repeated violations of treaty obligations, Hamilton noted, “[t]he faith, the reputation, the peace of the whole Union are . . . continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.” THE FEDERALIST NO. 22 (Alexander Hamilton).

¹⁴ The President shall have the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

are at issue, the states disappear and the President and Senate act, in the words of the Supremacy Clause, with the sole “Authority of the United States.”¹⁵

Further confirmation of the broad treaty power that the Framers established in order to bind states comes from one of the first treaties ratified by the new American government: a Consular Convention with France, a bilateral precursor to the modern-day Vienna Convention on Consular Relations.¹⁶ That treaty, ratified by the first Senate in 1789, extended foreign consular officials extensive immunities from the operation of state laws, ceded consuls jurisdiction to administer estates of deceased French nationals, and opened the state courts to French nationals. In ratifying the treaty, the Senate had no doubt of its authority to bind the states and to supersede state laws in areas that otherwise fell within the legislative province of the states. *See generally* Golove, *supra*, at 1149-50 & nn. 223, 225.

B. The President Has Made A Binding Determination That The Foreign Policy Interest Of The United States Requires The Enforcement Of The ICJ’s Decision In *Avena*.

On February 28, 2005, the President affirmed the United States’s obligation to comply with its binding legal commitments and determined that the foreign policy interests of the United States required the enforcement of the ICJ’s decision in *Avena*. The President

¹⁵ While the Constitution does not place substantive restrictions in favor of the states on the exercise of the treaty power, the Constitution does provide for the protection of the states’ interest through the Senate’s role in the ratification process. *See generally* THE FEDERALIST NO. 64 (John Jay) (discussing the Senate’s role in protecting the interests of the states “[a]s all the States are equally represented”).

¹⁶ *See* Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1788, U.S.-France, 8 Stat. 106, 7 Bevans 794.

declared that “the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision in accordance with general principles of comity. . . .” Presidential Determination.

A determination, as a form of presidential directive equivalent to an Executive Order,¹⁷ has the force of law so long as “[t]he President’s power . . . to issue the order . . . stem[s] either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The President’s authority to issue his determination stems from his authority under Article II of the Constitution to manage foreign affairs. U.S. Const., art. II, §§ 3 & 2, cl. 2. Although the source of the President’s power to act in foreign affairs “does not enjoy any textual detail, the historic gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. at 610-611 (Frankfurter, J., concurring)).

In declaring that the foreign policy interests of the United States require compliance with the ICJ’s decision, the President has made a complex and delicate calculation taking into account the need of the United States to comply with its international obligations, to pursue its foreign policy interests, to enforce its laws effectively against foreign nationals in the United States, and to protect Americans abroad. Where, as here, the President has

¹⁷ “[I]t is the substance of a President’s determination or directive that is controlling and not whether the document is styled in a particular manner.” U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Counsel to the President, January 20, 2000, *available at* <http://www.usdoj.gov/olc/predirective.htm>.

acted within the scope of the power granted to him by the Constitution, there can be no question of the constitutional validity of that action.

C. The Supreme Court Has Consistently Recognized That States Must Comply With Our Treaty Obligations To Maintain U.S. International Credibility And To Avoid Diplomatic Failures

Since its inception, the Supreme Court has ensured that our nation upholds its binding international obligations, notwithstanding contrary internal laws and policies of the individual states. Less than a decade after the Constitution took effect, the Supreme Court first invoked its authority to enforce the provisions of federal treaties and affirmed the Framers' vision that the national treaty authority supersedes any inconsistent or conflicting state laws: In *Ware v. Hylton*, the Court held that, pursuant to the Supremacy Clause, Article IV of the Treaty of Peace—which ensured British creditors that they would “meet with no lawful impediment to the recovery” of debts—nullified a conflicting Virginia statute that permitted such debts to be discharged. 3 U.S. (3 Dall.) 199, 235, 239 (1796).¹⁸

Subsequently, the Supreme Court has consistently enforced treaty rights, making clear the fundamental principle that treaties are supreme over inconsistent state law.¹⁹ In *United States v. Pink*, the Court held that a policy of the State of New York could not

¹⁸ As the Court explained, “[a] treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature [or constitution or court] can stand in its way.” *Id.* at 236.

¹⁹ See, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (stating that “[a treaty] will be applied and given authoritative effect by the courts” and holding that a city ordinance was unenforceable because it violated a treaty between the United States and Japan); *Hauenstein v. Lynham*, 100 U.S. 483, 485-86 (1879) (holding that a treaty between the United States and the Swiss Confederation superseded inconsistent state law).

override national obligations established in an agreement between the United States and the Soviet Union, and declared: “No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.” 315 U.S. 203, 233 (1942).²⁰ And in *United States v. Belmont*, the Court made clear that “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, *state lines disappear*.” 301 U.S. 324, 331 (1937) (emphasis added).²¹

Likewise, the Supreme Court has consistently recognized that the constitutional vesting of full authority over foreign affairs in the federal government benefits our country by enabling us more effectively both to engage in relations with other nations and to protect the interests of our citizens.²² As the Supreme Court put it in *Crosby v. National Foreign Trade Council*, effective diplomacy is best served when the federal government alone speaks for the entire United States on foreign matters: “Quite simply,

²⁰ As the Court explained, “[S]tate law must yield when it is inconsistent with, or impairs the policies or provisions of, a treaty or of an international compact or agreement. . . . [The treaty power] need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policies in the courts.” *Id.* at 230-31, 233-34.

²¹ See also *id.* (“[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.”); cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (holding that the treaty power is not subject to “some invisible radiation from the general terms of the Tenth Amendment”).

²² See, e.g., *Pink*, 315 U.S. at 232 (“If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power.”); *Belmont*, 301 U.S. at 331 (relying on Madison’s statement during the constitutional debates that “[t]o counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war”).

if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence.” 530 U.S. 363, 377 (2000).²³

Taken together, these constitutional principles and precedents firmly establish the federal government’s sole authority to bind the entire nation to treaty obligations to achieve national foreign policy interests. Should this Court ignore these national obligations, it would create precisely the result that our Framers drafted the treaty clauses to avoid.

II. FAILURE TO ADHERE TO THE ICJ’S FINAL JUDGMENT IN *AVENA* WOULD UNDERMINE U.S. DIPLOMATIC CREDIBILITY

The Vienna Convention and its Optional Protocol are precisely the kind of treaties that the Framers had in mind when they rendered treaties supreme over inconsistent state law.²⁴ Texas’s noncompliance with the ICJ’s ruling in *Avena* defies the authority of the President and the federal government to bind the states to international obligations. *Amici* believe that, if left unchecked, the persistent failure of Texas and other states of the Union to comply with *Avena* will surely alienate this nation from its allies. *Accord Dretke*, 125 S.Ct. at 2096 (“In this country, the individual States’ (often confessed) noncompliance with the treaty has been a vexing problem. . . . [that] may have

²³ In *Crosby*, the Supreme Court faced a Massachusetts law that threatened to invite World Trade Organization (WTO) enforcement action by the European Communities. While “express[ing] no opinion on the merits of [those] proceedings,” the Court struck down the offensive state law, at least partly because an adverse WTO complaint against the United States would serve to “embroil the National Government . . . in international dispute proceedings” and “threaten[] relations with the United States.” *Id.* at 383 & n.19.

²⁴ See generally Brief of *Amici Curiae* International Law Experts, *Medellin v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928) (discussing the difficulties enforcing previous treaty regimes on consular assistance that lack binding dispute-resolution mechanisms).

considerable ramifications”) (O’Connor, J., dissenting) (citations omitted). Likewise, *Amici* believe that the refusal of state and federal courts to provide the “review and reconsideration” required by the ICJ’s judgment will undermine America’s credibility as a global leader and seriously hinder foreign policy objectives at a critical time in our nation’s history.

The United States has long declared that the right to consular access guaranteed by the Vienna Convention and its Optional Protocol is “widely accepted as the standard of international practice of civilized nations.”²⁵ Through its diplomats, our government routinely calls on such nations as Iraq, Syria, China, and North Korea to abide by this minimal standard when U.S. citizens are detained abroad.²⁶ Over two decades ago, when Iran flagrantly violated the Vienna Convention by taking U.S. diplomats hostage in Tehran, then flouted its obligation under the Optional Protocol to comply with the ICJ’s order to release the hostages, then-President Carter accused Iran of showing “contempt,

²⁵ Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT’L L. 375, 385 (1997) (quoting telegram sent from U.S. Department of State to its Embassy in Damascus on February 21, 1975).

²⁶ *Transcript of State Dep’t Regular Briefing*, FED. NEWS SERV., July 15, 1999 (James Rubin, State Dep’t spokesman, commenting on detention of U.S. female citizen: “We remind the government of North Korea of its obligations under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. citizens.”); *Transcript of State Dep’t Regular Briefing*, FED. NEWS SERV., Aug. 19, 1999 (James Rubin, State Dep’t spokesman, reporting on request for access and immediate grant of access to U.S. citizen detained in China); Associated Press, *Iraqis Refuse Access to Americans for Second Day*, Apr. 19, 1995 (quoting State Department spokesman: “Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We’re disappointed because that is their legal obligation under the Vienna convention.”); S. Adele Shank & John Quigley, *Foreigners on Texas’s Death Row and the Right of Access to a Consul*, 26 ST. MARY’S L.J. 719, 729 (1995) (quoting Consular Officers and Consulates, 1977 Digest § 2, at 290) (U.S. protest of delay in notification of detention of U.S. missionaries in El Salvador); see also LUKE T. LEE, CONSULAR LAW AND PRACTICE, 145-46 (2d ed. 1991) (documenting U.S. invocation of the Vienna Convention).

not only for international law, but for the entire international structure for securing the peaceful resolution of differences among nations.”²⁷ The United States led an effort to convince nations throughout the world to confer compulsory jurisdiction on the ICJ precisely because it was dissatisfied with diplomatic overtures alone as the sole mechanism for enforcing the Vienna Convention.²⁸

Today, our closest allies now accuse the United States of showing that same disregard for the Vienna Convention and the ICJ. Nations such as the United Kingdom, Mexico, Canada, Spain, Paraguay, Germany, and Italy have repeatedly objected to the U.S. practice of executing nationals of these countries after state and local violations of the Vienna Convention. Through numerous calls, meetings, and letters to both state and federal authorities, our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens, in compliance with the Vienna Convention and earlier provisional orders of the ICJ.²⁹ Perhaps in no other area of our

²⁷ Philippe Sands, *An Execution Heard Around the World*, L.A. TIMES, Apr. 16, 1998, at B9 (quoting President Carter’s comments during the Iranian hostage crisis).

²⁸ See Brief of *Amici Curiae* Ambassador L. Bruce Laingen and Capt. John J. Swift, *et al.*, at 6-16, *Medellin v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928); see also *United Nations Conference on Consular Relations Official Records*, 1st Comm., 29th mtg., ¶¶ 36, 54, U.N. Doc. A/CONF.25/16 (1963) [Official Records]; *id.* at Plenary mtg, 21st mtg., ¶¶ 17-20; VIENNA CONVENTION ON CONSULAR RELATIONS, SEN. EXEC. REP. 91-9, at 19 (1969) (statement of J. Edward Lysterly, Deputy Legal Adviser for Administration of the State Dep’t).

²⁹ See, e.g., Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Jonathan Tepperman, *Faulder: The Long-Term View*, NAT’L POST (Toronto), Dec. 11, 1998 (documenting efforts by Canadian Foreign Affairs Minister and Ambassador on behalf of Canadian citizen); Laura LaFay, *World Court—U.S. to Halt Execution*, VIRGINIAN-PILOT, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italian government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. TIMES, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General); David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, DALLAS MORNING NEWS, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog requesting support for clemency from President Clinton and

foreign policy have *Amici* so consistently heard foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations.

Indeed, officials of our closest neighbors, Canada and Mexico, have openly declared that the failure of American state authorities to provide their nationals with timely consular access has “strain[ed]” bilateral relations.³⁰ For example, in 2002, long before the ICJ issued its final judgment in *Avena*, Mexican President Vicente Fox took the extraordinary step of canceling a trip to President Bush’s Texas ranch as “an unequivocal signal of rejection of the execution” of a Mexican national who had not been informed of his consular rights.³¹

International and regional human rights bodies have echoed the protests of foreign governments. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have each strongly criticized U.S. violations of the Vienna Convention.³² The European Union has lodged

Arizona Governor Hull); see also Rodrigo Labardini, *International Court of Justice Finds U.S. Breached its Obligations Under the Vienna Convention on Consular Relations*, 20 INT’L ENFORCEMENT L. REP. 250, 251 n.8 (June 2004) (documenting six letters the government of Mexico sent to the United States regarding the execution of Irineo Tristan Montoya by Texas in 1997).

³⁰ Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 (quoting Jorge G. Castaneda, foreign policy advisor to Mexican President Fox); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die Today for 1975 Killing*, BOSTON GLOBE, Dec. 10, 1998, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen Stanley Faulder who had been denied consular rights).

³¹ Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on the Death Penalty*, INT’L HERALD TRIB., Aug. 16, 2002, at 1 (quoting President Fox’s representative).

³² See, e.g., *Ramón Martínez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69-70 (2002) (describing notification of right to consular assistance as “among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial” and failure to notify of such rights violated Mexican national’s right to due process); *Resol. On Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify

numerous official demarches with state authorities requesting reconsideration of pending executions because of violations of the Vienna Convention.³³

The widespread international opposition to the states' persistent practice of violating the Vienna Convention and refusing to abide by the decisions of the ICJ under the Optional Protocol has harmed our position as a human rights leader.³⁴ Our authority in several important international human rights bodies has been impaired.³⁵ International disapproval of our noncompliance with the Vienna Convention has also deflected attention away from serious human rights abuses in other countries and has provided our

foreign nationals of rights to consular access and noting “demonstrably extremely poor quality” of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, WASH. POST, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because of the denial of his rights under the Vienna Convention by the state of Texas); Dana Priest & John M. Goshko, *Genocide Warning Center Established; Clinton Human Rights Initiatives Include Changes at INS*, WASH. POST, Dec. 11, 1998, at A52 (referring to speech by U.N. High Commissioner for Human Rights before U.N. General Assembly, criticizing the execution of Joseph Stanley Faulder, a Canadian citizen, because of the denial of his rights under the Vienna Convention by the state of Texas).

³³ Demarches by the European Union have been filed in a number of cases, including: (1) Joseph Stanley Faulder, Canada, Dec. 8, 1998; (2) Miguel Angel Flores, Mexico, Nov. 3, 2000; (3) Hung Thanh Le, Vietnam, Dec. 4, 2003; (4) Gregory Madej, Poland, May 1, 2001; (5) Javier Suarez Medina, Mexico, July 23, 2002; (6) Osvaldo Torres, Mexico, Apr. 30 and May 6, 2004; (7) Gerardo Valdez Maltos, Mexico, June 5 and July 13, 2001.

³⁴ See, e.g., Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, at <http://web.amnesty.org/library/Index/engAMR510271998> (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: “[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights.”); George Boehmer, *Killer Loses Fight for Life*, DAILY TEL. (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German parliament’s Human Rights Committee Chairman Roth’s reaction to the LaGrand execution: “When (Secretary of State Madeleine) Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously.”).

³⁵ Shortly after the execution of two German nationals denied their Vienna Convention rights despite a provisional order of the ICJ, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body’s 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. TIMES, May 4, 2001, at A1. The United States likewise failed to win a seat on the Inter-American Commission on Human Rights for the first time since that body’s inception in 1959, and its observer status in the Council of Europe—which bans executions—has been put in jeopardy. Connie de la Vega, *Going It Alone*, AM. PROSPECT, July, 2004, at A22.

adversaries with diplomatic ammunition to raise doubts about the sincerity of our commitment to human rights.

State violations of the Vienna Convention have also called into question our commitment to the rule of law in international relations.³⁶ For example, when the German Justice Minister announced Germany's suit against the United States in the ICJ to challenge the execution of two German nationals who were denied consular rights, she declared: "Respecting international laws cannot be a one-way street."³⁷ When the United States seeks to promote the rule of law around the world, other nations will surely demand that we first comply strictly with our own binding obligations under the U.N. Charter, the ICJ statute, and the Vienna Convention and its Optional Protocol. This is particularly so given that the United States not only spearheaded the effort to create the Optional Protocol to the Vienna Convention, but engaged in energetic diplomacy to convince other nations to adopt it.³⁸

Taken together, the continued noncompliance with our obligations under the Vienna Convention and Optional Protocol has significantly hindered the ability of the President,

³⁶ See, e.g., Raymond Bonner, *Mexican Killer is Refused Clemency by Oklahoma*, N.Y. TIMES, July 21, 2001, at A8 (quoting Mexican government as declaring that execution of Mexican national denied Vienna Convention rights as "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. TIMES, Mar. 5, 1999, at 14 (quoting German Justice Minister, declaring that the execution of two German nationals whose Vienna Convention rights had been violated by state officials "is barbaric and unworthy of a [nation] based on the rule of law"); David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the Vienna Convention: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts.").

³⁷ See *Germany Sues U.S. for Breaking Law*, REUTERS, Sept. 16, 1999, available at <http://www.ub.es/penal/historia/PdeM/dpicintl.htm>.

³⁸ Official Records, *supra* note 28, 1st Comm., 29th mtg., ¶¶ 36, 54; *id.*, at Plenary mtg, 21st mtg., ¶¶ 17-20.

Amici and other diplomats to carry out foreign policy initiatives. In *Amici*'s experience, an inordinate proportion of important bilateral and multilateral meetings with our closest allies are now consumed with answering diplomatic demarches challenging these practices, diverting attention away from our core national foreign policy interests.

Our diplomatic efforts overseas have also been impeded by the public hostility stirred by the U.S. practice of executing foreign nationals who have been denied their Vienna Convention rights. The practice has led to persistent criticism in the press and angry demonstrations in front of U.S. embassies abroad.³⁹ Such protests have not only seriously disrupted important diplomatic missions, but have even threatened the physical safety of our U.S. diplomats and embassy staff trying to work in these countries.⁴⁰

³⁹ See Knowlton, *supra* note 31 (documenting intense media attention in Mexico); Nickerson, *supra* note 30 (describing execution of Stanley Faulder as a "cause celebre . . . dominating front pages and television newscasts" in Canada); Stout, *supra* note 36 (citing protest in front of U.S. embassy in Paraguay); *Paraguay Angered by US Execution*, BBC NEWS, Apr. 15, 1998, available at <http://news.bbc.co.uk/1/hi/world/americas/78602.stm> (documenting public outcry and inundation of radio channels in Paraguay with angry calls); Adam E. Jacobs & Mark A. Berman, *Rediscovering the Right to Consul*, N.J. L.J., Mar. 2, 1998, at 32 (describing demonstration in front of U.S. Consulate in Ecuador); *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. TIMES, Mar. 26, 1993, at A15 (describing street protests). After Arizona executed Jose Roberto Villafuerte, a Honduran national, 500 Hondurans protested at the U.S. Embassy in Tegucigalpa, and Honduran newspapers reported retaliatory threats against the lives of U.S. citizens in Honduran prisons. Nicaragua Solidarity Network of Greater New York, *Hondurans Protest Execution in the U.S.*, WEEKLY NEWS UPDATE ON THE AMERICAS, Apr. 26, 1998, available at http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0426.txt. In 1999, to protest the execution of a Canadian who had been denied his rights under the Vienna Convention, local activists planned demonstrations and other organized protests, including letter-writing campaigns and threatened economic boycotts. *U.N. Official Frets Over Canadian's Texas Execution; Ottawa Steps Up Bid to Spare Albertan Convicted of Murder*, TORONTO STAR, Nov. 26, 1998, at A9; *Texas Embroiled in International Legal Rights Dispute Over Preparations to Execute a Canadian Citizen* (NPR Morning Edition broadcast, Dec. 9, 1998).

⁴⁰ During public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4,000 U.S. personnel, including diplomatic staff, had to be protected by armed security. See *U.S. Boosts Security in Honduras as Tempers Flare*, REUTERS, Apr. 24, 1998; Stout, *supra* note 36. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the Vienna Convention, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, HOUS. CHRON., Sept. 28, 1997, at A1.

Indeed, the Secretary of State has written to state governors commenting on the disruption of foreign policy because of the persistent state practice of failing to provide consular notice. Most notably, in 1998, Secretary of State Madeleine Albright (a signatory to this brief, *see supra* note 4) wrote to the Governor of Virginia with regard to Angel Francisco Breard, a Paraguayan national for whom the ICJ granted a non-final provisional measure directing the United States to stay his execution because Virginia officials had ignored his Vienna Convention rights.⁴¹ In requesting that the Governor exercise his powers to stay Breard's execution, Secretary Albright explained that she was "particularly concerned about the possible negative consequences" of the execution for the many American citizens who live and travel abroad.⁴² "The execution of Mr. Breard in the present circumstances," she observed, "could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention" and "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 ensure that Americans are protected when living or traveling abroad."⁴³

Amici fear that a failure to follow the President's Determination to grant review and reconsideration as required by the ICJ's judgment in *Avena* would inevitably impair

⁴¹ Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT'L L. 666, 671-72 (1998).

⁴² *Id.*

⁴³ *Id.*

diplomatic relations with our closest allies and promote distrust of our international commitments. In an age where global cooperation is crucial to our nation's security, we cannot afford to allow the several states to exercise a veto over our national obligations and interests under the Vienna Convention and its Optional Protocol.⁴⁴

III. FAILURE TO ADHERE TO THE *AVENA* JUDGMENT WOULD ALSO DAMAGE FOREIGN POLICY INTERESTS GOVERNED BY OTHER TREATY REGIMES

The ICJ dispute-settlement provisions in the Vienna Convention's Optional Protocol are not *sui generis*. For that reason, the diplomatic fallout from America's perceived lack of respect for the ICJ and the Vienna Convention cannot be limited to just those settings. *Amici* submit that the failure of the United States to comply with the ICJ's decision in *Avena* would damage a number of existing treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States' ability to negotiate new diplomatic covenants. Because "international law is founded upon mutuality and reciprocity," *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the creation and operation of international dispute-resolution regimes depends largely upon every signatory's good-faith compliance with decisions by these judicial bodies.

⁴⁴ Certainly, these concerns are of no less importance today than they have been in the past. As Secretary of State designee Condoleezza Rice stated at her confirmation hearing on January 18, 2005: "The United States will . . . continue to work to support and uphold the system of international rules and treaties that allow us to take advantage of our freedom, to build our economies and to keep us safe and secure." *Transcript: Confirmation Hearing of Condoleezza Rice*, N.Y. TIMES, Jan. 18, 2005, at <http://www.nytimes.com/2005/01/18/politics/18TEXTRICE.html>; *id.* ("We must use American diplomacy to help create a balance of power in the world that favors freedom. The time for diplomacy is now.").

After World War II, when international trust and diplomacy were at a low ebb, the United States moved to establish numerous treaties with its former enemies that resolved disputes through binding decisions of the ICJ.⁴⁵ This diplomatic strategy of asking friends and foes alike to submit their disputes to binding international dispute-resolution bodies persists to the present day.

In return for our commitment to abide by ICJ judgments, the United States gains not only the cooperation of other states, but also a powerful diplomatic tool for encouraging non-judicial resolution of disputes. Indeed, “[m]any cases are settled before a final judgment is reached,” giving the ICJ “an important ‘pacifying effect’ on disputes at all stages of litigation.” Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT’L L. 434, 436 (2004). Even nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ.⁴⁶ This occurred, for example, after the United States inadvertently downed an Iranian civilian airliner, killing 290 passengers and crew. Despite our strained diplomatic

⁴⁵ See, e.g., Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294, 79 U.N.T.S. 171, 212; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. XXVII, 7 U.S.T. 1839, 1867, 273 U.N.T.S. 3, 36; Treaty of Peace with Japan, Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188-89, 136 U.N.T.S. 45, 72.

⁴⁶ See, e.g., Trial of Pakistani Prisoners of War (*Pak. v. India*), 1973 I.C.J. 328 (July 13), and 1973 I.C.J. 347 (Dec. 15) (dispute settled out of court).

relations, Iran sought a peaceful solution by bringing suit before the ICJ, and the parties ultimately were able to negotiate a settlement.⁴⁷

The “mutuality and reciprocity” that forms the foundation of international relations is particularly critical for the effective operation of our nation’s commercial and economic treaties. International trade agreements have always been a major component of U.S. diplomatic relations with other nations, but the last half of the twentieth century has witnessed the direct application of such agreements to commercial relationships between individuals and nations.⁴⁸

Critically, a vast array of agreements dealing with international trade and foreign investment now call for binding arbitration or resort to permanent international tribunals to resolve intractable disputes. Failure to follow the President’s Determination to grant review and reconsideration as required by the ICJ’s judgment in *Avena*, in this case, might seriously impede the ability of our nation and its citizens to rely upon the international arbitration arrangements in these commercial treaties.

Many important economic treaties vest compulsory jurisdiction before the ICJ, including international sovereign disputes ranging from the international recognition of copyrights⁴⁹ and patents⁵⁰ to the transport of goods by air.⁵¹ The United States has also

⁴⁷ Aerial Incident of 3 July 1988 (*Iran v. U.S.*), 1989 I.C.J. 132 (Dec. 13), and 1996 I.C.J. 9 (Feb. 22).

⁴⁸ See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (finding no sovereign immunity bar to suit by individual against sovereign nation regarding expropriation of private property).

⁴⁹ Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146.

agreed to submit to the jurisdiction of other binding arbitration mechanisms to protect U.S. trade and investment interests. Of most recent significance to commercial interests is Chapter 11 of the North American Free Trade Agreement (NAFTA),⁵² and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organization (WTO).⁵³ Together, NAFTA and the WTO grant private interests and sovereign nations, respectively, compulsory resort to binding arbitral tribunals.

The benefits stemming from these treaties and their binding dispute-resolution mechanisms are not illusory. Since 1996, American investors have initiated arbitral proceedings under NAFTA against the government of Canada eight times, and against the government of Mexico twelve times, with at least five of those cases resulting in compensation for the American investors, while six of the cases remain pending.⁵⁴

⁵⁰ Patent Cooperation Treaty, *opened for signature* June 19, 1970, art. 59, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262.

⁵¹ International Air Transport Agreement, *opened for signature* Dec. 7 1944, art. IV, sec. 3, 3 Bevans 922, 925, 84 U.N.T.S. 389, 394; *see also* Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, chp. XVIII, art. 84, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352.

⁵² North American Free Trade Agreement, chp. 11, Sept. 6, 1992, 32 I.L.M. 605, 639 (1993).

⁵³ In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation “to have recourse to and abide by the rules and procedures” of the DSU. Understanding on Rules and Procedures Governing the Settlement of Dispute, *entered into force* Jan. 1, 1995, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994).

⁵⁴ For a list of past and pending NAFTA Chapter Eleven cases, see NAFTA Investor-State Arbitrations, U.S. Department of State Website, at <http://www.state.gov/s/l/c3439.htm> (last visited July 12, 2005), and NAFTA-Chapter 11-Investment, Canada Department of Foreign Affairs and International Trade Website, at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp> (last updated Jan. 22, 2004).

See also *Dep't of Transp. v. Public Citizen*, 124 S. Ct. 2204, 2211 (2004) (recognizing U.S. adherence to the decision of a NAFTA arbitration panel); *Canada v. S.D. Myers, Inc.*, 2004 Fed. C.C. LEXIS 20, at *15, *16 (Fed.

Similarly, 74 of the 324 disputes that have been initiated before WTO tribunals were brought by the United States as a complainant.⁵⁵ However, an unwillingness to honor our treaty commitments in this case would jeopardize the very scheme of international judicial protection our nation is increasingly using to safeguard our individual and national economic interests.

In sum, *Amici* submit that the continuing ability of the United States to secure international treaty regimes that are critical to the realization of our national interests throughout the world, and to secure reliable enforcement of those regimes already in place, depends directly upon our reputation for honoring the international obligations that we undertake. *Amici* believe that the practice of some of the several states in ignoring our obligations under the Vienna Convention and Optional Protocol presents a serious problem in this regard—one to which this Court should put an end.⁵⁶

Ct. Jan. 13, 2004) (affording a “high level of deference” to a NAFTA Tribunal in affirming a \$7 million award to an American investor against the Canadian government, “so as to be sensitive to the need of a system for predictability in the resolution of disputes”).

⁵⁵ See, e.g., *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. Series WT/DS27, and *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. Series WT/DS26 & WT/DS48. For a list of past and pending DSU cases, see http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last updated June 20, 2005).

⁵⁶ In doing so, this Court will also help ensure that the Vienna Convention is consistently interpreted and uniformly applied by all signatories—which is one of the principle goals of nations in entering treaties in the first place. See also Transcript: A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer, Jan 13, 2005, at American University School of Law, available at <http://wcl.american.edu/secle/founders/2005/050113.cfm> (Justice Scalia stating, “[T]he object of a treaty being to come up with a text that is the same for all the countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of the agencies—that is to say, if it’s within the ballpark, if it’s a reasonable interpretation, though not necessarily the very best.”).

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to order review and reconsideration of Mr. Medellin's conviction and sentence pursuant to the Presidential Determination and the criteria set forth by the International Court of Justice in *Avena*.

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July 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Appellate Procedure 9.5, on this 29th day of July, 2005, an original and eleven copies of the foregoing *Brief Of Former United States Diplomats As Amici Curiae In Support Of Petitioner Jose Ernesto Medellin*, were hand-delivered to:

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APPENDIX

Madeleine K. Albright served as U.S. Secretary of State from 1997-2001 and as Permanent Representative to the United Nations from 1993 to 1997.

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Jeffrey Davidow, is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990), and Venezuela (1993-1996). From 1996 to 1998, he was assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired with the personal rank of Career Ambassador.

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the Permanent Court of Arbitration, The Hague, from 1978-1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States. He is also Retired Partner at the law firm of Jones Day.

James R. Jones is a partner with Manatt, Phelps and Phillips LLC, and National Chairman of the World Affairs Council of America. From 1973 to 1987, he was a member of the U.S. House of Representatives from Oklahoma. During his tenure in Congress, he was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange. He served as the U.S. Ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle Award, the highest award that can be given to a non-Mexican.

James C. O'Brien served as Special Presidential Envoy for the Balkans from 2000-1, as Principal Deputy Director of the State Department Policy Planning Staff from 1998-2000, and as a State Department official from 1989-2001.

Thomas R. Pickering served as the Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United

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J. Stapleton Roy is Managing Director of Kissinger Associates, Inc. A career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

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Strobe Talbott served as Deputy Secretary of State from 1994-2001, and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union from 1993-1994.

Malcolm Wilkey is a retired Circuit Judge of the U.S Court of Appeals for the D.C. Circuit, where he served from 1970 to 1985, and is a former U.S. Ambassador to Uruguay (1985-90). He also served as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States from 1979 to 1986.

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