

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSÉ ERNESTO MEDELLÍN

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

BRIEF OF APPLICANT
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STATEMENT OF THE CASE AND ISSUES PRESENTED

By his Subsequent Application for Post-Conviction Writ of Habeas Corpus filed March 24, 2005, applicant José Ernesto Medellín seeks enforcement of his right, under the judgment of the International Court of Justice (“ICJ”) in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31) (No. 128) (the “*Avena Judgment*”), S.A. Ex. A,¹ and the determination of the President of the United States issued February 28, 2005 (the “President’s Determination”), S.A. Ex. B, to review and reconsideration of his conviction and death sentence without regard to any inconsistent provision of Texas law, including any doctrine of procedural default. This case comes to this Court after a dismissal from the United States Supreme Court in light of this proceeding, which the Supreme Court acknowledged “may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required.” *Medellín v. Dretke*, 544 U.S. ___, 125 S. Ct. 2088 (per curiam). Because Mr. Medellín filed this subsequent application based on previously unavailable claims, the trial court has not yet addressed the claims presented in this application.

It is now for this Court to decide whether Mr. Medellín’s subsequent application for a writ of habeas corpus meets the requirements of article 11.071, section 5(a) of the Texas Code of Criminal Procedure. *See* Order of Texas Court of Criminal Appeals at 5 (June 22, 2005); *see also* TEX. CODE CRIM. PROC., ART. 11.071, § 5(c). In the event that

¹ The exhibits to Mr. Medellín’s Subsequent Application for Post-Conviction Writ of Habeas Corpus filed March 24, 2005 are cited as “S.A. Ex.”

the Court determines for any reason that those requirements are not met, or that any other provision, rule, or doctrine of Texas law would bar Mr. Medellín from receiving the review and reconsideration that first the ICJ and now the President have ordered, this Court would also have to decide whether Texas courts must in any event give effect to the *Avena* Judgment and the President’s Determination, as a matter of federal preemption of state law under the Supremacy Clause of Article VI of the United States Constitution.

STATEMENT OF FACTS

A. The Vienna Convention and Its Optional Protocol

1. The Treaties

The Vienna Convention on Consular Relations, to which the United States is a party, is one of the most widely ratified multilateral treaties in force today. LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 23-25 (2d ed. 1991). It is “widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention.” U.S. Dep’t of State, Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in id. at* 145.

The Vienna Convention was designed to provide a comprehensive framework for the work of consular officials. In particular, Article 36 of the Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign nations. *See* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36(1)(b) requires the authorities of the nation where detention occurs to notify “without delay” a detained foreign national of his right to request assistance from the consul of his own

nation and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Id.* The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973 161 (1973).

The Optional Protocol to the Vienna Convention provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes, art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. The jurisdiction of the ICJ depends entirely on the consent of the States that are party to the dispute. Parties may consent to the general jurisdiction of the ICJ on questions of treaty interpretation or international law, *see* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36(2), June 26, 1945, 59 Stat. 1055, or they may enter into treaties conferring jurisdiction on the ICJ over specific matters. *Id.*, art. 36(1). The Optional Protocol is such a treaty. By agreeing to the Optional Protocol, nations

agree that any nation that is party to the Optional Protocol can require another such party to submit disputes relating to the Vienna Convention to the ICJ for binding resolution.

Entry into the Optional Protocol is not a requirement of signing the Vienna Convention. While 167 nations have ratified the Vienna Convention,² 45 of those nations have also ratified the Optional Protocol.³ The United States was the nation that proposed the binding dispute-settlement provision that became the Optional Protocol, on the principle that “the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand” and that binding dispute resolution is “one of the most important points connected with the convention on consular relations.” *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Conference on Consular Relations, 1st Sess., 29th mtg., at 249, U.N. Doc. A/CONF.25/16 (1963).⁴

2. United States Ratification

The United States Constitution places the treaty-making power in the hands of the democratically elected branches of the federal government. Specifically, Article II provides that the President “shall have Power . . . to make Treaties.” U.S. CONST. art. II, §

² See Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp> (last visited July 14, 2005).

³ See Multilateral Treaties Deposited with the Secretary-General: Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp> (last visited July 14, 2005).

⁴ On March 7, 2005, the United States gave notice that it intended to withdraw from the Optional Protocol. 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>. The United States made clear, however, that it continues to be bound by the Vienna Convention itself and that its withdrawal from the Optional Protocol would apply only to future cases and have no effect on this case or the obligation to comply with the *Avena* Judgment. *Id.*

2, cl. 2. It also provides that the President may do so only “with the Advice and Consent of the Senate,” and, for the Senate to grant consent, “two thirds of the Senators present [must] concur.” *Id.* This requirement of supermajority approval by the Senate ensures that the United States takes on treaty obligations only with the clear support of the elected representatives of the American people representing a broad cross-section of the states. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 36-37 (2d ed. 1996).

The United States followed this constitutionally prescribed process when it entered into the Vienna Convention and its Optional Protocol. President Richard M. Nixon signed both instruments on behalf of United States on April 24, 1963, and sent them to the Senate for its advice and consent to ratification on May 8, 1969. On October 22, 1969, after hearings held earlier that month, the Senate unanimously gave its advice and consent. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). Texas Senators Ralph Yarborough (D) and John G. Tower (R) joined in that unanimous vote. *Id.* On December 24, 1969, President Nixon ratified the Vienna Convention and Optional Protocol on behalf of the United States. *See* 21 U.S.T. 77, 185.

As President Nixon stated when he announced the entry into force of the treaty, the “[Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.” 21 U.S.T. 77, 185. Hence, the Vienna Convention and its Optional Protocol are now fully effective as United States law. By

ratifying both the Vienna Convention and the Optional Protocol, the United States agreed without reservation to abide by the Convention and to submit disputes pertaining to the Vienna Convention to the ICJ.

B. The International Court of Justice

Often referred to as “the World Court,” the ICJ is the principal judicial organ of the United Nations. U.N. CHARTER, art. 92, Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993; STATUTE OF THE COURT, art. 1. The United States led the effort to create the Court and proposed a draft Statute of the Court that was adopted with little change. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, 865 (Brookings 1958). The Court’s Statute was then annexed to the U.N. Charter, and nations that became Members of the United Nations, including the United States, also became parties to the Statute, U.N. CHARTER, arts. 92, 93(1), thereby agreeing “to comply with the decision of the International Court of Justice in any case to which [they are] a party.” *Id.* at art. 94(1). The U.N. Charter and the Court’s Statute do not themselves confer jurisdiction on the Court over any nation or any matter, but these provisions make explicit that, when a nation subjects itself to the Court’s jurisdiction by virtue of its own consent, that nation, like any other party before a court, must obey its orders and decisions.

The ICJ is composed of fifteen judges elected to nine-year terms by the United Nations General Assembly and the Security Council. STATUTE OF THE COURT, art. 4. “Judges are picked in their individual capacity, and are not political appointees of their respective governments.” DAVID J. BEDERMAN, CHRISTOPHER J. BORGAN & DAVID A.

MARTIN, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES, in 35 Studies in Transnat'l Legal Pol'y 76 (2003). No two judges can have the same nationality, and the Court's composition must reflect the "main forms of civilization" and the "principal legal systems of the world." STATUTE OF THE COURT, arts. 3(1), 9. Since the establishment of the Court in 1945, it has customarily included a judge from each of the Permanent Members of the Security Council, including the United States.⁵

The United States has frequently availed itself of the ICJ's jurisdiction, initiating ten cases as a claimant or by special agreement with another nation.⁶ Indeed, the United States was the first nation to invoke the Optional Protocol, when it sued Iran in 1979 on claims, among others, of breach of the Vienna Convention. *See United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24). In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another nation.⁷

C. The Decisions of the Texas Courts

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with two murders in Houston, Texas. Mr. Medellín, a Mexican

⁵ *See* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 370 (1997). Presently, the Judge from the United States is Thomas Buergenthal, formerly Professor of Law at the University of Pennsylvania School of Law, the State University of New York (Buffalo) School of Law, the University of Texas School of Law, the Washington College of Law, The American University, the Emory University School of Law, and The George Washington University Law School. His predecessor was Stephen Schwebel, who spent part of his career at the Department of State, served 19 years on the Court, and completed his tenure by serving as the President of the Court upon the election of the other Members.

⁶ *See* International Court of Justice, *List of Cases brought before the Court since 1946*, at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited July 14, 2005).

⁷ *Id.*

national, told the arresting officers that he was born in Laredo, Mexico, S.F. Vol. 38, State's Ex. 113 at 000076 (Statement), and informed Harris County Pretrial Services that he was not a United States citizen. *See* Harris County Pre-Trial Services Agency, Defendant Interview, Respondent's Original Answer, Ex. C, *Medellín v. State*, No. 675430-A (Tex. 339th Dist. Ct.). It is uncontested that, nevertheless, Mr. Medellín was not advised of his right under Article 36 of the Vienna Convention to contact and receive assistance from the Mexican consulate. *Medellín v. Cockrell*, No. H-01-4078, slip op. at 18 (S.D. Tex. Jun. 26, 2003).

At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and, most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel.⁸ As a result of the Article 36 violation in his case, however, Mr. Medellín had no opportunity to receive the assistance of Mexican consular officers before he was sentenced to death.

The Texas trial court appointed counsel to represent Mr. Medellín, who was indigent. On September 16, 1994, Mr. Medellín was convicted of capital murder and, upon the jury's recommendation, the trial court sentenced Mr. Medellín to death on October 11, 1994. *State v. Medellín*, No. 675430 (Tex. 339th Dist. Ct. Oct. 11, 1994)

⁸ *See* Memorial of Mexico in *Avena*, at 11-38; *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

(judgment).⁹ On March 16, 1997, this Court affirmed Mr. Medellín's conviction and sentence in an unpublished opinion. *State v. Medellín*, No. AP-71,997 (Tex. Crim. App. Mar. 19, 1997) (order).

On April 29, 1997, some six weeks after the affirmance of his death sentence on direct appeal and nearly four years after his arrest, Mexican consular authorities first learned of Mr. Medellín's arrest, detention, trial, conviction, and sentence. *See S.A., Ex. H, Affidavit of Victor Manuel Uribe, Ex Parte Jose Ernesto Medellín*, No. WR-50,191-02. They promptly began rendering assistance. *See id.*

On March 26, 1998, Mr. Medellín filed a state application for habeas corpus, alleging the violation of his rights under Article 36 of the Vienna Convention and requesting, among other relief, an evidentiary hearing and vacatur of his conviction and sentence. Application for Writ of Habeas Corpus at 25-31, 45, *Medellín v. State*, No.

⁹ As laid out in detail in Mr. Medellín's Subsequent Application filed on March 24, 2004, during the course of the investigation and prosecution of Mr. Medellín's case, lead counsel Mr. John A. Millin was under a six month suspension from the practice of law for ethics violations in another case. *See Judgment, State Bar of Texas v. John A. Millin, III*, September 14, 1993, S.A., Appendix H to Exhibit T. He continued to represent Mr. Medellín while suspended, filing numerous motions and making at least five court appearances. *See S.A. Exhibit T.* Prior to trial, he was held in contempt of court and arrested for violating his six-month suspension. He was booked in jail for 7 days and released upon issuance of an appeal bond. *See S.A. Appendices E, I, J, K, L to Exhibit T.* After the Texas State Bar instituted a second disciplinary proceeding against him, he spent much of the time that should have been allotted to representing Mr. Medellín to vigorously defending himself in the District Court and the Court of Appeals. *See S.A. Appendices M, N, O, P, Q, R, S, T, U, V, W, X, Y, and Z to Exhibit T.* In fact, less than three weeks before the beginning of Mr. Medellín's trial, his attorney was forced to file a writ of habeas corpus on his own behalf in order to keep himself out of jail. *See Petition for Writ of Habeas Corpus, Ex parte John A. Millin, III, S.A. Appendix M to Exhibit T.* Billing records indicate that the only investigator for the defense spent a total of eight hours on the investigation prior to the commencement of jury selection, including the time he spent with Mr. Medellín. *See S.A. Appendix 1 to Exhibit Q.* Mr. Millin's co-counsel played a marginal role in Mr. Medellín's defense. Only boilerplate motions were filed during pre-trial proceedings. During jury selection, the defense failed to strike jurors who indicated they would automatically impose the death penalty. *See, e.g., S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.* During the guilt phase of the trial, the defense called no witnesses. During the penalty phase, the defense presented only one expert witness, a psychologist who had never met Mr. Medellín and gave very damaging testimony. At trial, Mr. Medellín's parents testified only briefly. *S.F. Vol. 35 at 279-92.* His mother mentioned his participation in Mexican cultural activities, *id.* at 290-91; his father testified that Mr. Medellín was not a permanent United States resident, *id.* at 283. The entire penalty phase defense lasted less than two hours. Transcript at 343-441 (Trial Docket at 000281).

675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998). In support of this claim, Mr. Medellín submitted an affidavit from Manuel Pérez Cárdenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. The state did not contest that Mr. Medellín was a citizen of Mexico or that state officials had failed to advise Mr. Medellín of his right under Article 36 of the Vienna Convention to contact the Mexican consulate. *See* Original Answer at 21-23, *Ex parte Medellín*, No. 675430-A (Tex. 399th Dist. Ct. Jan. 22, 2001).

On January 22, 2001, the trial court recommended denial of relief on all claims, including those predicated on the violation of Mr. Medellín’s Vienna Convention rights. Order, *Ex parte Medellín*, at *19-20, No. 675430-A (Tex. 339th Dist. Ct. Jan. 22, 2001). It held that the Texas contemporaneous-objection rule barred the Vienna Convention claim because Mr. Medellín had not raised the claim at trial and that Mr. Medellín had no individual right to raise the Article 36 violation. *Id.*¹⁰ The court also denied Mr. Medellín’s request for an evidentiary hearing. *Id.* at *22. On October 3, 2001, by an unpublished order, this Court adopted the trial court’s findings and conclusions. *Ex parte Medellín*, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001) (order).

¹⁰ While not questioning Mr. Medellín’s Mexican nationality, the state’s proposed findings adopted by the court also stated in the alternative that Mr. Medellín “fail[ed] to show foreign nationality which requires notification of a foreign consulate” and could not show that the violation affected the constitutional validity of his conviction and sentence. *Ex parte Medellín*, Order at *19-20, No. 675430-A (339th Dist. Ct. Jan. 22, 2001).

D. The *LaGrand* Case in the ICJ

Following the affirmance of Mr. Medellín 's death sentence on direct appeal, and about a year after he filed his first habeas application in this Court, the ICJ addressed Article 36 of the Vienna Convention in a case between the United States and Germany that arose out of Arizona's execution of two German nationals who had not been notified of their right to consular assistance prior to trial. *LaGrand Case (Germany v. United States of America)*, 2001 I.C.J. 466 (June 27) (No. 104).¹¹ *First*, the Court held that Article 36(1) of the Vienna Convention confers "individual rights" on foreign nationals, not simply the sending and receiving states, and that the United States had violated Article 36(1) by failing to inform the LaGrands of their right to contact their consulate. *LaGrand*, ¶ 77.

Second, the Court held that the United States had violated Article 36(2) of the Vienna Convention by failing to give full effect to the rights accorded under Article 36(1). The Court explained that, while a procedural default rule does not of itself violate Article 36(2), its application would cause a violation where, as in the cases of the LaGrands, the very failure of the competent national authorities to comply with their Article 36(1) obligation to provide consular information "without delay" had prevented the foreign national from raising the violations at the trial level, and thus prevented the

¹¹ The parties' written and oral pleadings and the ICJ's judgment, orders, and press releases in the *LaGrand* case are available at <http://www.icj-cij.org/idocket/imus/imusframe.htm>. Judgments and orders of the ICJ are available both on Westlaw and on the ICJ's website at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

courts “from attaching any legal significance to . . . the violation of the rights set forth in Article 36.” *Id.*, ¶¶ 90-91.

Finally, the Court held that in future cases, if the United States failed to comply with Article 36, and foreign nationals were subjected to “prolonged detention or convicted and sentenced to severe penalties,” the State must “allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.” *Id.*, ¶ 125.

E. The *Avena* Case in the ICJ

On January 9, 2003, the Government of Mexico initiated proceedings in the ICJ against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellín and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Application Instituting Proceedings, 9 January 2003 (No. 128).¹² Seeking relief on its own behalf and, in the exercise of its right of diplomatic protection, on behalf of its nationals, Mexico claimed that the United States had violated Article 36 in each of those cases and requested, among other relief, the annulment of the convictions and sentences of the 54 Mexican nationals and a declaration that procedural default bars may be not be applied to prevent redress of Vienna Convention violations. *Avena*, ¶ 12, S.A. Ex. A.

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3,

¹² The parties’ written and oral pleadings and the judgment, orders and press releases of the ICJ in the *Avena* case are available at [http:// www.icj-cij.org/idocket/imus/imusframe.htm](http://www.icj-cij.org/idocket/imus/imusframe.htm).

2003, the United States filed a 219-page Counter-Memorial and 2500-page Annex of written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively examined the factual predicates for the alleged violations in each of the nationals' cases, including the course of the relevant proceedings to date in the United States courts, and argued all relevant points of law. Memorial at A-50 to -134; Counter-Memorial at A-75 to -358. In Mr. Medellín's case, the parties' submissions included descriptions of his proceedings through the denial of his petition for habeas corpus by the United States District Court for the Southern District of Texas. *See* Memorial at A-103, A-1192 to -1212 (describing and appending Texas trial court's findings of fact and conclusions of law); Counter-Memorial at A-223 (citing and describing District Court's holdings and alternative holdings).

During the week of December 15, 2003, the ICJ held a hearing. *Avena*, ¶ 11, S.A. Ex. A.¹³ On March 31, 2004, it issued its judgment. The *Avena* Judgment built on the ICJ's earlier holdings in *LaGrand*. However, in *Avena*, unlike *LaGrand*, the applicant nation was able to seek relief on the merits for nationals who had not yet been executed. As a result, in *Avena*, the ICJ expressly adjudicated Mr. Medellín's rights, as well as those of the other nationals on whose behalf Mexico had sought relief. *Id.*, ¶¶ 40, 106.

¹³ An 18-lawyer delegation represented the United States at the hearing. The State Department's Legal Adviser, Principal Deputy Legal Adviser, Assistant Legal Adviser for Consular Affairs, and Assistant Legal Adviser for United Nations Affairs, an Associate Deputy Attorney General from the Justice Department, and distinguished professors of international law and comparative criminal procedure, respectively, all argued for the United States, and the Principal Deputy Chief of the Criminal Appellate Section and the Deputy Assistant Attorney General, Office of Legal Counsel, of the Department of Justice also participated. *See Avena* Judgment, preface.

Addressing liability, the ICJ first held that, in the cases of 51 Mexican nationals, the United States had breached its obligation under Article 36(1)(b) “to inform detained Mexican nationals of their rights under that paragraph” and in 49 of those cases, “to notify the Mexican consular post of the[ir] detention.” *Id.*, ¶¶ 106(1)-(2), 153(4)-(5).

In the cases of 49 Mexican nationals, the ICJ also held that the United States had breached its obligation under Article 36(1)(a) “to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals.” *Id.*, ¶¶ 106(3), 153(6). And in 34 of those cases, the ICJ also held that the United States had breached its obligation under Article 36(1)(c) “to enable Mexican consular officers to arrange for legal representation of their nationals.” *Id.* ¶¶ 106(4), 153(7). Mr. Medellín was expressly included in each of those holdings.¹⁴

The ICJ then turned to remedies, or “what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States” by violation of Article 36. *Id.* ¶¶ 128, 115-150. The ICJ rejected Mexico’s request for annulment of the convictions and sentences. *Id.* ¶ 123. Instead, in response to Mexico’s request for alternative relief, the ICJ held that as a remedy for the violations of Article 36(1), the United States must provide “review and reconsideration” of the convictions and

¹⁴ In Mr. Medellín’s federal habeas case, Texas seized upon language in the Preamble to the Vienna Convention to the effect that the parties to the Vienna Convention entered into it: “Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States. . . .” By its own terms, however, this statement refers only to the articles in the Convention that grant “privileges” and “immunities” to consular personnel, *see* Vienna Convention arts. 29, 32-33, 35, 40-41, 43, 49-50, 52, not to Article 36, which confers “rights” on ordinary citizens of the sending state. In any event, the general language of the preamble could not override the specific language of the relevant article.

sentences of Mr. Medellín and the other Mexican nationals in whose cases it found violations. *Id.* ¶¶ 14, 121-22, 153(9).

The ICJ then specified the nature of the review and reconsideration that would need to be provided to Mr. Medellín. The ICJ explained that, *first*, the required review and reconsideration must take place “within the overall judicial proceedings relating to the individual defendant concerned”; *second*, that procedural default doctrines could not bar the required review and reconsideration when the competent authorities of the detaining nation had themselves failed in their obligation of notification; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurs must be capable of “examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.” *Id.* ¶¶ 111-113, 120-122, 133-134, 138-141. In concluding, the ICJ emphasized that the review and reconsideration it had granted as a remedy to Mr. Medellín and the other nationals was one of additional process, not prescribed result:

what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Id. ¶ 139.

The ICJ reached each of its holdings on liability by a vote of fourteen to one and its holding on remedies unanimously. *Id.* ¶¶ 153(4)-(7), (9), (11). Both the United States judge and the Mexican judge voted with the majority on each of these holdings. *Id.*

F. The Federal Habeas Proceedings

On November 28, 2001, after the ICJ's issuance of the judgment in *LaGrand* but before *Avena* was commenced, Mr. Medellín filed a petition for a writ of habeas corpus, and on July 18, 2002, an amended petition, in the United States District Court for the Southern District of Texas. Mr. Medellín raised a claim under Article 36 of the Vienna Convention, again requesting an evidentiary hearing and vacatur of his conviction and sentence. *See* Amended Petition for Writ of Habeas Corpus at 46, *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. July 18, 2002).

In support of his petition, Mr. Medellín relied on the *LaGrand* judgment to argue that “*LaGrand* . . . controls the interpretation of the Vienna Convention” and that the District Court was bound by the ICJ's rulings there regarding individual rights and procedural default. *See* Petitioner's Response to Respondent's Answer and Motion for Summary Judgment, at 14-17, *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003). On June 26, 2003, relying in part on *Breard v. Greene*, 523 U.S. 371, 375-376 (1998), in which the U.S. Supreme Court had denied relief to a Vienna Convention petitioner who did not have the benefit of a final judgment in his favor, the District Court denied relief and a certificate of appealability. *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

On October 24, 2003, at which time *Avena* had been filed but not yet decided, Mr. Medellín sought a certificate of appealability from the Court of Appeals on several grounds, including his Vienna Convention claim. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2003). On May 20, 2004, after the ICJ had rendered its judgment, the Court of Appeals denied Mr. Medellín’s application. *Id.* at 281.

In its discussion of the Vienna Convention claim, the Court of Appeals recognized that Mr. Medellín was among the Mexican nationals whose rights had been directly adjudicated in the *Avena* Judgment. *Id.* at 279-280. It also recognized that the ICJ had held in *LaGrand* and reiterated in *Avena* that, *first*, “procedural default rules cannot bar review of a petitioner’s claim,” and *second*, Article 36 conferred individually enforceable rights. *Id.* It held, however, that the *LaGrand* and *Avena* Judgments were contradicted by the Supreme Court’s per curiam order in *Breard*, and the holding of a prior Fifth Circuit panel in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). *Id.* at 280. It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until the Supreme Court or, in the case of the individual right holding, the Court of Appeals en banc, decided otherwise. *Id.*

G. Proceedings in the United States Supreme Court and the President’s Determination

1. The Grant of Certiorari and Initial Briefing

On December 10, 2004, the United States Supreme Court granted certiorari in Mr. Medellín’s case to review two questions regarding the enforceability of the *Avena* Judgment:

1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in *Avena* that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines?
2. In the alternative, in a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the judgments in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?

Medellín v. Dretke, 544 U.S. ___, 125 S. Ct. 2088 (2004). Mr. Medellín filed his brief on January 24, 2005, requesting that the *Avena* Judgment be applied as the rule of decision in his case by virtue of its direct effect under the Supremacy Clause or, in the alternative, in the interest of international judicial comity and uniform treaty interpretation.

In the respondent's brief filed on February 28, 2004, Texas stated squarely that the United States must comply with the *Avena* Judgment: "It is beyond cavil that, as Mr. Medellín puts it, America should keep her word." Br. for Respondent Texas at 7, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04.5928). Texas expressly acknowledged that "[a]s a duly ratified treaty, the Vienna Convention is undoubtedly the 'supreme Law of the Land.'" *Id.* at 47. Notwithstanding the status of treaties as federal law, however, Texas questioned whether the Supreme Court had authority to order compliance. *Id.* at 41-47. It had no doubt, though, of the President's authority. Because "[t]he President is under a constitutional duty to 'take Care that the Laws be faithfully executed'," the issuance of an Executive Order is one of the "methods of seeking enforcement of

Avena.” *Id.* at 46. Texas further stated that “[a]s the executive of the national government, the President enjoys preeminence in conducting the foreign relations of the United States. . . . Accordingly, working with Mexico and within the Executive Branch to implement *Avena* and enhance compliance with Article 36 is well within the duties and responsibilities of the President,” including by the issuance of an Executive Order. *Id.* at 47; *see id.* at 7. While Texas later suggested that it had contemplated action only “within the Executive Branch,” S.A. Ex. E at 4, n. 1 (internal citations omitted) (Response to Petitioner’s Motion to Stay, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (04-5928)), it provided no reason why a state court would have any lesser obligation to follow federal law than a federal agency or, indeed, a federal court.

2. The President’s Determination

The President took the action Texas sought the very day it filed its brief. On that day, as the United States advised the Supreme Court when it, too, filed in the case, the President decided that the United States would comply with the Judgment and determine the means by which it would do so. S.A. Ex. I (Br. for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928)). In light of the “paramount interest of the United States in prompt compliance with the ICJ’s [*Avena*] decision,” S.A. Ex. I at 41, the President stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], 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.

S.A. Ex. B. (President’s Determination (February 28, 2005), App. 2 of Br. for the United States as Amicus Curiae Supporting Respondent). The President cited two principal foreign policy considerations prompting the decision: “the need for the United States to be able to protect Americans abroad” and the need to “resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government.” S.A. Ex. I at 43, 45.

The President made clear that, just as Mr. Medellín has asked the Supreme Court to rule, the state courts should apply *Avena* as the rule of decision in his case and the case of the other Mexican nationals subject to the Judgment. Accordingly, as the United States explained, Mr. Medellín had the right to “file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President’s determination that the decision should be enforced under general principles of comity.” *Id.* at 42. In the event that prejudice is found, “a new trial or a new sentencing would be ordered.” *Id.* at 47. To the extent that state procedural default rules would prevent giving effect to the President’s Determination, “those rules must give way, because Executive action that is undertaken pursuant to the President’s authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes ‘the supreme Law of the Land.’” *Id.* at 43-44 (citations omitted). Finally,

“a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention.” *Id.* at 46.

3. The Decision of the Supreme Court

On March 8, 2005, Mr. Medellín asked the Supreme Court to stay his case and hold it in abeyance while he proceeded in this Court in accordance with the President’s Determination. S.A. Ex. D (Petitioner’s Motion to Stay, *Medellín v. Dretke*, 125 S. Ct. 2088 (2005) (04-5928)). On March 24, 2005, Mr. Medellín filed his Subsequent Application for Post-Conviction Writ of Habeas Corpus with the District Court of Harris County, and subsequently with this Court.

On May 23, 2005, after hearing oral argument, the United States Supreme Court dismissed Mr. Medellín’s petition as improvidently granted. *Medellín v. Dretke*, 544 U.S. ___, 125 S. Ct. 2088 (2005). The Supreme Court made clear that it took that step because the *Avena* Judgment and the President’s Determination constituted two discrete and independent grounds for relief that the Texas courts had not previously had the opportunity to address, but on the basis of which they might now “provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding.” 125 S. Ct. at 2089; *see id.* at 2091 (per curiam) (claims based upon the *Avena* Judgment and the President’s Determination had not been exhausted in state court); *id.* at 2095 (Ginsburg, J., concurring) (“Petitioner’s recent filing in the Texas Court of Criminal Appeals 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 2107 (Breyer, J., dissenting) (citing Texas Code of Criminal

Procedure Article 11.071 for the proposition that “Texas courts possess jurisdiction to hear Medellín ’s claims”); *id.* at 2106 (Souter, J., dissenting) (“Medellín accordingly has gone back to state court in Texas to seek relief on the basis of the *Avena* judgment and the President’s determination.”).

SUMMARY OF ARGUMENT

The answer to the question that this Court posed in its Order of June 22, 2005, is straightforward: the United States has an international obligation to comply with the *Avena* judgment that is directly enforceable in the courts of this country, the President in any event has determined that the United States will comply with that obligation in proceedings in state courts, and Texas procedure provides a ready means of compliance. Accordingly, Mr. Medellín should be allowed to proceed in the Harris County District Court under § 5 of Article 11.071 of the Texas Code of Criminal Procedure, in order to obtain the review and reconsideration of his conviction and sentence to which he is entitled under the *Avena* judgment and the President’s Determination—both of which were issued after this Court denied his original habeas corpus petition.

Indeed, the United States Government has determined that, in view of the nation’s foreign policy interests, “there is a pressing need for expeditious compliance with [the *Avena*] decision.” Br. of United States at 42, *Medellín v. Dretke*, 125 S. Ct. 2088 (No. 04-5928). The State of Texas has not disputed that need. In its brief to the United States Supreme Court in Mr. Medellín’s case, Texas acknowledged that “the Vienna Convention is binding federal law under the Supremacy Clause,” and that the United

States has “an obligation to respect the ICJ’s judgments” in cases under the Convention. Br. of Respondent Texas at 8, 34, *Medellín v. Dretke*, 125 S. Ct. 2088 (No. 04-5928). In other words, the parties agree that Mr. Medellín should receive review and reconsideration of his conviction and sentence as required by the *Avena* judgment.

The expected disagreement goes to *how* the nation’s unquestioned obligation to comply with the *Avena* judgment should be implemented in the domestic legal system in Mr. Medellín’s case. The answer to that question can be found in the President’s Determination, which makes clear that review and reconsideration under the *Avena* judgment should be provided, in the first instance, by the institutions that are best suited to the task—namely, the courts of the states where the relevant individuals were convicted. Any questions as to the authority of the Texas courts to enforce the President’s Determination and apply the *Avena* judgment are resolved by the United States Constitution, which vests in the President the authority to make treaties and conduct foreign relations, provides that federal treaty obligations are judicially enforceable federal law, and preempts state laws that conflict with a treaty or impede the federal government’s conduct of foreign relations, as well as by § 5(a) of Article 11.071 of the Texas Code of Criminal Procedure, which allows a prisoner under sentence of death to raise claims on a subsequent habeas corpus application that were unavailable at the time a previous application was filed.

Here, Mr. Medellín raises two previously unavailable claims that § 5 permits him to pursue. *First*, he raises a claim under the *Avena* Judgment, which by treaty is binding on the United States. The United States Constitution grants the President power to make

treaties with the advice and consent of the United States Senate. This power is exclusive to the federal government, and the President speaks for the nation as a whole when treaties or other matters of foreign affairs are involved. As a matter of international obligation, treaties agreed to by the United States are binding on all levels of government (federal, state and local) and all branches of government (executive, legislative and judicial). The Supremacy Clause of Article VI of the United States Constitution incorporates these international treaty obligations into United States law by making treaties the supreme law of the land, binding on the judges in each state just like acts of Congress and the Constitution itself.

It is unquestioned that the Vienna Convention is self-executing, meaning that it does not require any implementing legislation to be effective as United States domestic law. Where a matter addressed by a self-executing treaty is involved in a case, the Supreme Court has made clear that state and federal courts in the United States must look to the treaty for the rule of decision just as they would look to an act of Congress. The parties do not dispute that, by treaty, the United States is bound to give effect to the judgments of the ICJ interpreting and applying the Vienna Convention in cases to which it is a party. It follows that the *Avena* judgment, which is a binding interpretation and application of the Vienna Convention to Mr. Medellín's case, would supply the rule of decision in this case even without any further action by the President or any other federal actor. The rule that treaties should be given a uniform interpretation also favors enforcement of the *Avena* Judgment.

Second, Mr. Medellín seeks to pursue a claim under the President’s Determination. The United States Supreme Court cases has repeatedly held that the President has broad, independent foreign affairs authority even apart from the power to make treaties. Even apart from the direct effect of the *Avena* judgment, President Bush has directed, in the exercise of his foreign-policy powers, that

in light of the paramount interest of the United States in prompt compliance with the ICJ’s decision with respect to the 51 named individuals, and the suitability of judicial review as a means of compliance, “. . . the United States will discharge its international obligations under the decision of the [ICJ] in [*Avena*] by having state courts give effect to the decision. . . .”

Br. of United States at 41-42, *Medellín v. Dretke*, 125 S. Ct. 2088 (No. 04-5928) (quoting President’s Determination, *id.* Appx. 2).

The President’s authority to act under his foreign affairs authority is particularly clear where, as here, he has simply determined the manner of United States compliance with an obligation arising under an existing treaty that has been ratified with the advice and consent of the Senate—a determination that is at the core of the President’s constitutional power to take care that the laws are faithfully executed. The President also is able to draw upon his broad statutory powers to protect the interests of Americans abroad, by ensuring that the United States does not adversely affect “its ability to secure [consular] assistance” by noncompliance with *Avena*, and thereby imperil “a vital safeguard for Americans abroad.” *Id.* at 41. The *Avena* Judgment and the President’s Determination entitle Mr. Medellín to judicial review and reconsideration of his

conviction and sentence, taking account of his rights to consular notification and giving a fully effective remedy for any violation of those rights.

Both of these claims easily “meet[] the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5 of the Texas Code of Criminal Procedure, Order of July 22, 2005, and hence that provision supplies the procedural vehicle by which such review and reconsideration should take place. Both the *Avena* Judgment and the President’s Determination are new federal sources of right that did not exist at the time of Mr. Medellín’s previous habeas corpus petition for the simple reason that neither the Judgment nor the Determination had yet issued. Where a factual or legal ground was “unavailable” at the time of a previous petition, § 5(a)(1) allows it to be raised by a subsequent petition. Moreover, the contemporaneous-objection rule is no bar to relief, because these grounds for relief did not exist, and could not have been raised, at the time of trial. Federal claims, having binding force under the Supremacy Clause of the United States Constitution, are fully cognizable in habeas corpus under Texas law.

If § 5 or anything else in Texas law prevented Mr. Medellín from receiving the review and reconsideration to which the *Avena* Judgment and the President’s Determination entitle him, federal law would preempt that provision, rule, or doctrine. The Supremacy Clause of Article VI of the United States Constitution requires state court judges to disregard any state law that is inconsistent with federal law, specifically including federal law arising from treaties. Both the *Avena* judgment, which is binding by treaty, and the President’s Determination, which is binding by virtue of the President’s

foreign-affairs powers, specifically require that Mr. Medellín receive review and reconsideration of his conviction and sentence regardless of any procedural bars in Texas law that would otherwise prevent that review and reconsideration.

Out of respect for the sovereign interests of the United States and the competence of its judicial system, the ICJ held that the courts of the United States should conduct the required judicial review and reconsideration of the convictions and sentences of the 51 Mexican nationals, including Mr. Medellín, whose rights of consular notification had been violated. In turn, the President of the United States showed the same respect to the courts of Texas and its sister states by determining that the review and reconsideration should take place in state courts, which represent the front line of the United States criminal justice system and are the usual courts of first resort for habeas corpus review of state prisoners' convictions and sentences.

Nevertheless, in the Supreme Court, Texas hinted that Texas courts would not be competent to apply the *Avena* Judgment and that the only avenue open to the President would be to set up administrative tribunals in the federal executive branch to conduct the required review and consideration. That suggestion both demeans the authority of the courts of Texas and unduly limits the flexibility of the President of the United States in exercising his power to conduct the nation's foreign affairs, ensure that the United States complies with its international treaty obligations, and guarantee the safety of Americans abroad.

Mr. Medellín respectfully requests that this Court, in accordance with the President's determination, keep the promise that America made by its democratically

elected representatives, and at the same time fulfill the Court's obligation under the Supremacy Clause of the United States Constitution, by directing that the Harris County District Court provide Mr. Medellín the review and reconsideration that the ICJ and the President have ordered.

ARGUMENT

I. IN HIS SUBSEQUENT APPLICATION, MR. MEDELLÍN RAISES CLAIMS BASED ON THE *AVENA* JUDGMENT OF MARCH 31, 2004 AND THE PRESIDENT'S DETERMINATION OF FEBRUARY 28, 2005.

In his subsequent application for habeas corpus, Mr. Medellín seeks to enforce his rights under both the *Avena* Judgment of March 31, 2004, and the Presidential Determination of February 28, 2005. These two events, which occurred after the disposition of Mr. Medellín's first application for habeas corpus, fundamentally altered the legal and factual landscape with regard to claims raised by Mr. Medellín and the other Mexican nationals whose rights were resolved by the final judgment in the *Avena* case. While this Court has previously considered claims raised under the Vienna Convention on Consular Relations, it has never before been presented with an application based on a final judgment of the International Court of Justice and a determination issued by the President of the United States, which constitute two new and distinct bases for relief.

By its Order of July 22, 2005, this Court directed Mr. Medellín "to brief the issue whether he meets the requirements for consideration of a subsequent writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Civil Procedure." In order to do so, this Part I of Mr. Medellín's Brief describes the nature and

basis of these previously unavailable claims; Part II.A below explains that § 5(a) of the section 11.071 of the Code of Criminal Procedure authorizes Mr. Medellín to raise these claims in his subsequent application; and Part II.B below explains that if any restriction in § 5(a) or any other provision of Texas law prevented assertion of these claims, it would be preempted under the Supremacy Clause of the United States Constitution.

A. The U.S. Constitution Places the Treaty Making and Foreign Affairs Powers in the Hands of the Federal Political Branches.

1. The U.S. Constitution Empowers the President to Make Treaties with the Advice and Consent of the Senate.

“[A] treaty is only another name for a bargain.” THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). Consistent with the legal principles underlying all contracts, the consent of the nations that are parties to a treaty invests the treaty with binding legal force. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(1) (1987). A nation that enters into a treaty assumes an international legal obligation to comply with the provisions of the treaty, and it may demand that other parties to the treaty do so as well. *Id.* § 321. The reason is obvious:

[I]t 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.

THE FEDERALIST No. 64, *supra*, at 394 (emphasis in original).

The rule that nations must comply with the treaties into which they enter—known as *pacta sunt servanda*—“lies at the core of the law of international agreements and is perhaps the most important principle of international law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 321 cmt. a. As a matter of international law, the

organization of a nation's governmental institutions, including separation of powers between branches of government and between the central government and the individual states, does not affect a nation's obligation to comply with its treaties. A treaty is binding on all branches of government, executive, legislative and judicial,¹⁵ and, in the case of a federated nation such as the United States, on all branches of government of the individual states as well as the federation.¹⁶

The Framers structured the Constitution in order to ensure that the United States could both act effectively in foreign affairs and fulfill the international commitments it chose to take on. To empower the United States to negotiate treaties with foreign powers as a single nation, the Constitution vests in the federal government the power to make treaties by including that power among the Article II powers of the President, to be exercised with the advice and consent of the United States Senate. U.S. CONST. art. II, § 2, cl. 2. The Constitution makes this power exclusive to the federal government by expressly withdrawing from the states the power to make treaties independently or otherwise conduct foreign affairs. U.S. CONST. art. I, § 10. As the U.S. Supreme Court

¹⁵ See, e.g., ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS, art. 4(1) (Int'l Law Comm'n draft approved 2001) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."), available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf) (last visited July 29, 2005); Counter-Memorial of the United States of America at 127-28, *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (accepting tribunal's ruling that act of state trial court was act of United States for purposes of compliance with treaty obligation), available at <http://www.state.gov/documents/organization/7387.pdf> (last visited July 29, 2005).

¹⁶ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 302 cmt. d & rptr. n. 4; *id.* § 321 cmt. b; ARTICLES ON STATE RESPONSIBILITY, *supra* note 15, art. 4(1); U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 13 (obligations under Vienna Convention on Consular Relations "are binding on federal, state and local government officials to the extent they pertain to matters within such officials' competence"), available at http://travel.state.gov/pdf/CNA_book.pdf (last visited July 29, 2005).

has made clear, the usual division of sovereignty between the federal government and the states has no place where the federal government’s exclusive power to negotiate agreements with foreign nations is involved: “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.” *United States v. Belmont*, 301 U.S. 324, 331 (1937).¹⁷

The scope of the Article II treaty power is not confined to the legislative powers of Congress under Article I. *See United States v. Lara*, 541 U.S. 193, 201 (2004) (“treaties made pursuant to [Article II] can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal’”) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). Rather, the power of the President to make treaties under Article II with the advice and consent of the Senate “extends to all proper subjects of negotiation between our government and the governments of other nations.” *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *see also Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (citing *Missouri v. Holland*, 252 U.S. 416 (1920)).

There can be no room for doubt that protecting Americans who live, work or travel abroad, including by securing their access to American consular officials if they are arrested or detained, is a “proper subject[.]” of international negotiations. *De Geofroy*,

¹⁷ *See also, e.g., United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); THE FEDERALIST NO. 42, *supra*, at 279 (James Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”). Because Texas is a state of the United States, a treaty made by the United States “has the same force and effect in [Texas] that it is entitled to elsewhere.” *Wildenhus’s Case*, 120 U.S. 1, 17 (1887) (in criminal case, New Jersey state court bound by United States treaty with Belgium).

133 U.S. at 266. “One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). Of course, to secure a commitment by a foreign nation to protect United States nationals on its soil, it would be expected that the United States would have to make a reciprocal commitment to protect the foreign country’s nationals in the United States, including by guaranteeing access to their own consular officials. The reciprocal protection of the person and property of nationals abroad has been a frequent subject of treaty-making by the United States and its treaty partners from the nation’s founding through the present day. *See, e.g., Asakura*, 265 U.S. at 341 (quoting *Baldwin v. Franks*, 120 U.S. 678, 682 (1887)) (“Treaties for the protection of citizens in one country residing in the territory of another are numerous and make for good understanding between nations.”).

The submission of disputes between nations for arbitration or adjudication before an international tribunal is also a longstanding use of the treaty power. From the Nation’s infancy, the federal political branches have repeatedly determined that it was within the interests of the United States to submit disputes with other nations to binding adjudication by international tribunals.¹⁸ The United States Supreme Court has made

¹⁸ *See, e.g.,* Treaty of Amity, Commerce and Navigation, art. 6, Nov. 19, 1794, U.S.-Gr. Br., 12 Bevans 13, T.S. No. 105 (submitting British subjects’ claims against the United States to international commission); United States Department of State, *2004 Model Bilateral Investment Treaty*, arts. 24-34, at <http://www.state.gov/documents/organization/38710.pdf> (last visited July 29, 2005) (providing for binding arbitration of foreign investors’ claims against the United States as well as United States investors’ claims against foreign nations). *See generally* Br. *Amicus Curiae* of the United Mexican States, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928).

clear that the federal government may require specific categories of disputes—even disputes affecting individual rights—to be adjudicated by international tribunals. *See Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (upholding international agreement establishing Iran-U.S. Claims Tribunal).¹⁹

Finally, the U.S Constitution also provides that, once the United States enters into a treaty pursuant to the constitutionally prescribed processes, the treaty constitutes supreme federal law: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land[.]” U.S. CONST. art. VI., cl. 2 (emphasis added); *The Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 598-99 (1884) (a ratified treaty “is a law of the land as an act of Congress is”).

2. The U.S. Constitution Empowers the President to Conduct the Nation’s Foreign Affairs.

In addition to his treaty power, the U.S. Constitution accords the President independent authority to formulate and execute foreign policy as part of his foreign

¹⁹ *See generally* Walter Dellinger, U.S. Dep’t of Justice, Ofc. of Legal Counsel, *Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7, 1995) (citing and discussing authorities), available at <http://www.usdoj.gov/olc/arbtrn.fin.htm> (last visited July 29, 2005). The Supreme Court has also made clear in other contexts that there are no constitutional difficulties in the delegation of federal power to persons other than federal officers. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 198-99 (1982) (upholding delegation of federal adjudicative authority to private individual); *United States v. Sharpnack*, 355 U.S. 286, 295-96 (1957) (collecting cases upholding statutes authorizing federal enforcement of subsequently-enacted state laws). In addition, it is long-settled that courts in the United States may give effect to the jurisdiction or judgments of foreign courts. *See, e.g., Neely v. Henkel*, 180 U.S. 109, 122-23 (1901) (upholding extradition treaty requiring United States to deliver individual to foreign country for criminal trial); *Wildenhus’s Case*, 120 U.S. at 17 (indicating that treaty may validly assign criminal jurisdiction to foreign country for crime committed in United States); *Ritchie v. McMullen*, 159 U.S. 235, 242-43 (1895) (enforcing decision of foreign court in civil matter). And in any event, the decision of President Bush—who by the Constitution is charged with the authority to conduct the foreign affairs of the United States—that the *Avena* judgment must be enforced removes any possible concern that a discretionary decision of a United States federal officer to comply with the ICJ judgment might somehow be required before a court in the United States can give it effect. *See* Part I.B.2 below.

affairs power. By vesting “[t]he executive Power . . . in a President of the United States of America,” U.S. CONST. art. II, § 1, and by the powers “inherent” to a national government, the Constitution extends broad authority to the President, who, as the “Head of State,” is “the sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The Supreme Court has recently reiterated that “the historical 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,’” and that as a result, there is no question “that there is executive authority to decide what [foreign relations policy] should be.” *Am. Ins. Ass’n v. Garamendi* 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).²⁰

The constitutional assignment of foreign affairs authority to the President flowed directly from the Framers’ “concern for uniformity in this country’s dealings with foreign nations.” *Garamendi* 539 U.S. at 433 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n. 25 (1964)).²¹

²⁰ See also *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (the President has the “lead role . . . in foreign policy”); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (“The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.”).

²¹ See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381-82, n.16 (2000) (“The peace of the WHOLE ought not to be left at the disposal of a PART” (quoting THE FEDERALIST NO. 80, at 535-36 (Alexander Hamilton) (J. Cooke ed. 1961))); *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) (“In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”).

Thus, in the realm of foreign affairs, the President has a degree of “independent authority” to act even without authorization by statute or treaty. *Garamendi*, 539 U.S. at 414; *see Youngstown*, 343 U.S. at 635-36 (Jackson, J., concurring in judgment and opinion of Court) (the President can “act in external affairs without congressional authority”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (approving executive power to enter into executive agreements requiring no ratification by the Senate or approval by Congress). But his actions carry an even greater presumption of validity when carried out with the “express or implied authorization of Congress.” *Dames & Moore v. Regan*, 453 U.S. at 668 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952)).

The Supreme Court has acknowledged that executive action in any particular instance falls “at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” *Dames & Moore*, 453 U.S. at 669. Where Congress has expressly or implicitly approved or acquiesced, “[the President’s] authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U.S. at 635. Here, the President has acted in accordance with a treaty, which was ratified with supermajority Senate approval as specified in the Constitution. If the President has the authority to issue a binding federal rule where Congress’s acquiescence is only implicit, *see Garamendi*, 539 U.S. at 414-15; *Dames & Moore*, 453 U.S. at 678-79, then he can surely act when the Senate—the House of Congress that the Constitution empowers to act in such matters—has expressly spoken.

Finally, even when the President acts pursuant to his foreign affairs authority, he creates binding federal law subject to the Supremacy Clause. Art. VI., cl. 2; *see, e.g., Garamendi*, 539 U.S. at 414-415 (finding federal policy in the realm of foreign affairs constitutes binding federal law).

B. The *Avena* Judgment and the President’s Determination Constitute Binding Federal Law in This Case.

1. The *Avena* Judgment Constitutes Binding Federal Law.

Because the rights conferred by the Vienna Convention are self-executing, and because the United States agreed to submit to binding resolution by the ICJ of disputes concerning the interpretation and application of the Vienna Convention, the *Avena* judgment provides the “rule of decision” in Mr. Medellín’s case without need for any further executive or legislative action. *The Head Money Cases*, 112 U.S. at 598-99. By treaty, the United States has undertaken not only an obligation to abide by the Vienna Convention but also an obligation to abide by the ICJ’s judgments interpreting and apply the Convention in cases to which the United States is a party. In Mr. Medellín’s case, the latter obligation ripened when the ICJ issued its final judgment adjudicating Mr. Medellín’s rights in the *Avena* case.

a. The Vienna Convention Is Self-Executing.

A “self-executing” treaty is one that contains provisions that are capable by themselves of being given effect as law, as opposed to a treaty that calls for the enactment of implementing legislation by the United States Congress. *See Cook v. United States*, 288 U.S. 102, 119 (1933); *United States v. Perchemann*, 32 U.S. (7 Pet.)

51, 89 (1833). When a self-executing treaty provides rights to an individual “[a]nd when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *The Head Money Cases*, 112 U.S. at 598-99.

In the proceedings before the Supreme Court, both Texas and the United States agreed that the Vienna Convention is self-executing. Br. of Respondent Texas at 25, *Medellín v. Dretke*, 125 S. Ct. 2088 (No. 04-5928); Br. of United States as Amicus Curiae at 26, *Medellín v. Dretke*, 125 S. Ct. 2088 (No. 04-5928). In light of the circumstances of its ratification and the nature of the rights conferred, there can be no question about that conclusion.

First, when presenting the Vienna Convention to the Senate for its advice and consent, the Executive Branch explicitly represented that the obligations imposed by the Convention were “entirely self-executive and do[] not require any implementing or complementing legislation.” *See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations*, S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State) [hereinafter *Vienna Convention Hearing*]. Ordinarily, “if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 111 rptr. n. 5.

Indeed, in a booklet that the State Department currently provides to state and local law-enforcement agencies and displays on its website, it advises:

The obligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR and bilateral agreements are thus “self-executing”) because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.

U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS 44, *available at* http://travel.state.gov/pdf/CNA_book.pdf (last visited July 29, 2005).

Second, Article 36 of the Vienna Convention affords rights to foreign nationals (to receive information and seek consular assistance) and imposes obligations on United States authorities (to provide information and permit consular assistance) that operate in the context of criminal proceedings. These rights are comparable to the treaty rights and obligations that United States courts have long enforced on behalf of foreign nationals as self-executing obligations that do not require the enactment of implementing legislation. *See* Part II.B.1. below; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 111, rptr. n. 5 (United States Supreme Court has generally given effect to “agreements conferring rights on foreign nationals . . . without any implementing legislation, their self-executing character assumed without discussion.”). Article 36 of the Vienna Convention does not call for the enactment of a statute or the performance of any other action, such as the appropriation of money from the United States Treasury, that can only be carried out by act of Congress. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 111(4)(c) & cmt. h.

Finally, the right to review and reconsideration that the *Avena* Judgment confers is not only readily susceptible of judicial enforcement; it can *only* be provided by judicial process. Specifically, as a remedy for the violation of Mr. Medellín’s Article 36 rights, the ICJ held that “the courts of the United States” must provide review and reconsideration of Mr. Medellín’s conviction and sentence by “examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.” *Avena* Judgment ¶ 122; *see id.* ¶¶ 113-114, ¶ 153(9). As the ICJ recognized, that is a quintessentially judicial task. *Id.* ¶ 140.

b. The United States Agreed to Comply with the ICJ’s Interpretation and Application of the Vienna Convention.

In the proceedings before the Supreme Court, both Texas and the United States agreed that, because the United States had expressly agreed by treaty to submit the dispute over the interpretation and application to the ICJ and to abide by its decision in the case, the *Avena* Judgment constitutes an international obligation binding upon the United States. *See* S.A. Ex. I (Br. of the United States) at 44-46; S.A. Ex. C (Br. of Respondent Texas) at 46-47. Again, there can be no question about that conclusion.

The United Nations Charter and the Statute of the ICJ—both of which are treaties ratified by the President with the advice and consent of the Senate—make clear that the United States has an obligation to comply with the *Avena* judgment regardless of whether it agrees with the ICJ’s decision as to how the underlying treaty obligation should be interpreted and applied. The Charter could not be more explicit: “Each Member of the United Nations undertakes to comply with the decision of the International Court of

Justice in any case to which it is a party.” U.N. CHARTER, art. 94(1). The ICJ Statute is to the same effect: “A decision of the Court has no binding force except as between the parties and in respect of that particular case.” STATUTE OF THE ICJ, art. 59. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 903 cmt. g (judgment of ICJ is binding on party that submitted to its jurisdiction); SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill ed. 2003) (same). And the President has expressly acknowledged that the *Avena* Judgment imposes “international obligations” on the United States. *See* S.A. Ex. B (President’s Determination).

That result would follow even in the absence of a treaty. When a party agrees to the jurisdiction of a designated tribunal, it agrees to abide by its decision. *Smith v. Morse*, 76 U.S. (9 Wall.) 76, 82 (1870) (“The law implies an agreement to abide [by] the result of an arbitration from the fact of submission.”). Hence, an agreement to submit to the compulsory jurisdiction of an international tribunal entails a promise to comply with the result. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) (“[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.”).

At bottom, the United States’s obligation to comply rests on no complicated analysis of international law, but on the most basic principles of fairness and integrity. As the State Department explained in connection with then-President Reagan’s decision

to limit the United States's submission to ICJ jurisdiction to those cases covered by the terms of a specific treaty (such as the Optional Protocol to the Vienna Convention):

We are a law-abiding nation, and when we submit ourselves to adjudication of a subject, we regard ourselves as obliged to abide by the result.

See U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, DEP'T OF STATE BULL., Jan. 1986, 68, 70 (statement of Legal Advisor Abraham Sofaer to Senate Foreign Relations Committee) (available on LEXIS).

c. The ICJ's Interpretation and Application of the Vienna Convention Supplies the Rule of Decision in Mr. Medellín's Case.

When the parties to a substantive agreement also agree that disputes arising from that agreement shall be resolved by a specified dispute-resolution procedure, the decision that results from that procedure governs the parties' obligations under the agreement no less than if the terms of the decision had been written into the agreement itself. *See E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61-62 (2000) (when parties "have granted to [an] arbitrator the authority to interpret the meaning of their contract's language . . . the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract[.]"). In other words, if an agreement to substantive rights and obligations is accompanied by an agreement that a particular process must be followed to determine the interpretation and application of those rights and obligations, then the result of that process necessarily defines those rights and obligations with the same force and effect as the original agreement. Giving a treaty's self-executing provisions a meaning and application different from the one that

the parties agreed is controlling would be inconsistent with the treaty itself. It follows that, just as the rights conferred by the Vienna Convention are judicially enforceable, so too are the interpretation and application of those rights in the *Avena* Judgment.

By the direction of the President pursuant to a treaty ratified with the advice and consent of the Senate, the United States was a party to *Avena*, and it fully participated in the case. The ICJ has now issued a decision that is “binding on [the United States and Mexico] in respect of that particular case.” STATUTE OF THE ICJ, art. 59. The Texas state courts are an organ of the State of Texas, which is a political subdivision of the United States, and hence are bound by the treaty commitments of the United States under both international law and the United States Constitution. *See* Part I.A.1. above. And the ICJ’s decision calls for compliance by the courts, not the executive or legislative authorities. By operation of the treaty obligations undertaken by the President and Senate, the courts of the United States and the several states are obliged to comply with the *Avena* judgment by treating the judgment as conclusive of the rights of Mr. Medellín and the other Mexican nationals whose rights were adjudicated in *Avena*.

In short, by virtue of the consent of the United States to submit disputes concerning the “interpretation” and “application” of the Convention to the compulsory jurisdiction of the ICJ, the relief accorded Mr. Medellín in the *Avena* Judgment constitutes an obligation under a treaty that is fully effective as United States law and hence must be enforced in courts as the rule of decision. *The Head Money Cases*, 112 U.S. at 598-99. A failure by this Court to give effect to the *Avena* Judgment would breach the international obligations of the United States. *See* Part I.A.1. above.

Conversely, by directing the trial court to conduct the required review and reconsideration, this Court will confirm that, when the United States gives its word, it keeps its word.

d. The Interest In Uniform Treaty Interpretation Provides An Additional Reason That The *Avena* Judgment Should Be Enforced.

In addition and in the alternative, this Court should also follow the result reached by the ICJ in the interest of uniform treaty interpretation. Where a treaty results from an objective to achieve uniformity in its field of coverage, “it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.” *Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting).²² The regime of consular rights that is so critically important to the security and well-being of United States citizens abroad ought not be compromised by disparate legal constructions and idiosyncratic treaty applications among the various countries that are parties to the Convention. *See Air France v. Saks*, 470 U.S. 392, 399 (1985) (there exists a “responsibility to give the specific words of [a] treaty a meaning consistent with the shared expectations of the contracting parties”) (internal citations omitted). The

²² *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (ensuring consistent interpretation of treaty by surveying foreign adjudications); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305, 305 (2004) (When courts “interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.”); 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, American University School of Law, available at <http://wcl.american.edu/secl/founders/2005/050113.cfm> (last visited July 29, 2005) (Justice Scalia: “the 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”).

interpretation by the ICJ, as the entity entrusted by treaty with the task of interpreting the Vienna Convention, is authoritative.

2. The President’s Determination Constitutes Binding Federal Law.

Exercising his foreign affairs authority, the President has determined that it is in the “paramount interest” of the United States that “expeditious compliance” with the *Avena* Judgment be achieved. As a result, he has directed “that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], 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.” S.A. Ex. B. In making that determination, the President has made a quintessential foreign policy decision. As the United States explained to the Supreme Court, that determination involved

delicate and complex calculations . . . taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

U.S. Br. at 43, *Medellin v. Dretke*, 125 S. Ct. 2088 (No. 04-5928), attached as S.A. Ex. I. As the United States also explained, the President’s decision was driven by two principal considerations: *first*, the need to “resolve a dispute with a foreign government” and “fulfill[] its international obligations,” *id.* at 41, 45, and *second*, the need to preserve the United States’s ability “to protect Americans abroad,” *id.* at 43.

In the circumstances here, the President’s Determination does double duty. *First*, it eliminates any conceivable suggestion that this Court must await the permission of the federal executive before fulfilling its duty under the Supremacy Clause to give direct effect to federal law in the form of the ICJ’s interpretation and application in Mr. Medellín’s case of a self-executing treaty. *See* Part I.B.1. above. Far from giving this Court any reason to pause before enforcing the Judgment, the federal authority responsible for foreign affairs has determined that it is in the “paramount interest” of the United States to comply.

Second, the President’s Determination constitutes a separate and independent rule of federal law that this Court is obligated to apply. There can be no possible doubt that the President’s decision that the United States will comply with the Judgment lies at the core of his foreign affairs authority. After all, the President has done nothing more than confirm that the United States will do what it has already promised to do – abide by the decision of the ICJ in a dispute concerning the interpretation and application of the Vienna Convention. That promise was made by constitutionally prescribed processes when the President, with the advice and consent of the Senate, entered into the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute. In other words, the President has decided nothing more than that, as Texas has urged, “America should keep her word.” S.A. Ex. C at 7 (Br. for Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04.5928)).

In making that decision, the President acted at the maximum of his executive authority in the realm of foreign affairs. Under the Constitution, a duly ratified treaty is

on full parity with an Act of Congress. U.S. CONST. art. VI., cl. 2. Hence, the President acted to give effect to an express commitment made by the joint action of the executive and legislative branches. As a result, the validity of his determination could not be clearer. *See* Part I.A.2 above.

The validity of the President’s Determination is confirmed by its subject matter, because the President acted in pursuit of two objectives that have long been recognized as components of his special competence – the effectiveness of the United States in international affairs and the protection of Americans abroad.

First, the President acted in pursuit of “the foreign policy interests of the United States in meeting its international obligations” and, especially, in resolving international disputes. U.S. Br. at 48; *see id.* at 44-46. The Supreme Court has repeatedly recognized that the President has the authority to peaceably resolve disputes with other nations without congressional participation. *See, e.g., Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 682; *Pink*, 315 U.S. at 223; *Belmont*, 301 U.S. at 330-31.²³ The President has determined that in light of the United States’s obligation to abide by the ICJ’s resolution of Vienna Convention disputes, the United States will comply with the *Avena* Judgment to resolve the dispute with Mexico. Just as the President had the

²³ In the Supreme Court, Texas and the United States suggested that Article 94(2) of the UN Charter, which provides that the UN Security Council may take action against a country that fails to comply with an ICJ judgment, somehow bars courts in the United States from complying with the *Avena* Judgment. *See* Br. of Respondent Texas, *Medellin v. Dretke*, 125 S. Ct. 2088, at 34-35, 37; Br. Amicus Curiae of United States, *Medellin v. Dretke*, 125 S. Ct. 2088, at 35. Like any involuntary enforcement mechanism, however, the procedure set forth in Article 94(2) of the Charter comes into play only when a country, acting within the processes and by the officials authorized by its own constitution, fails or refuses to comply voluntarily. Here, by contrast, the Supremacy Clause gives the *Avena* Judgment direct effect in the U.S. legal system, and the President has in any event determined that the United States will comply.

authority to suspend federal court claims to implement the terms of an executive agreement in order to settle a dispute with a foreign sovereign, *Dames & Moore*, 453 U.S. at 686, the President here can mandate state court compliance to implement an international decision made binding by treaty in order to settle a dispute with Mexico. To hold otherwise would be to impermissibly hamstring the President in his ability to settle disputes with foreign nations by adhering to treaty commitments and would be contrary to a classic and fundamental attribute of sovereignty recognized by the Framers. *See, e.g., Garamendi*, 539 U.S. at 416 (cautioning against construing scope of President’s authority in manner that would impede his ability to settle international controversies); *United States v. Pink*, 315 U.S. 203, 230 (1942) (“No [state law] can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised.”) (internal citations omitted).

Second, the President acted to protect Americans abroad. The President here has determined that “consular assistance is a vital safeguard for Americans abroad,” and that “unless the United States fulfills its international obligation to achieve compliance with ICJ *Avena* decision, its ability to secure such assistance could be adversely affected.” Br. for the United States as Amicus Curiae Supporting Resp’t, *Medellín v. Dretke*, 125 S. Ct. 2088, at 41. As the State Department told the Senate Foreign Relations Committee at the time of ratification, “[t]he United States government has to consider the Vienna Convention both from the viewpoint of the United States as a sending state and from the

viewpoint of the United States as a receiving State.” S. EXEC. REP. No. 91-9, at 8 (1969) (statement of Deputy Legal Adviser J. Edward Lysterly).

No power is more clearly Presidential than the authority to protect U.S. citizens and their interests abroad. The Constitution explicitly vests the President with authority over diplomatic and consular relations. U.S. CONST., art. II, § 2 (power to appoint consuls, ambassadors and other public ministers); *id.*, art. II, § 3 (duty to receive ambassadors and other public ministers from other nations). It is the President and his subordinate executive officials who decide whether to make formal complaints about the treatment of U.S. citizens abroad. It is the President and his subordinate executive officials who receive complaints about the treatment of foreign nationals in the United States. It is the President who must decide whether to recall an Ambassador, or to close down a consular office. Ultimately, it is the President, as the sole organ of the United States in the field of foreign relations, who is in the best position to determine how the relations with consular officials could help or hinder U.S. relations with foreign governments.

Courts have repeatedly recognized that this authority places a duty upon the President to take appropriate action to protect U.S. citizens. As Justice Nelson of the United States Supreme Court stated nearly 150 years ago,

As the executive head of the nation, the President is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the

country is placed in his hands, under the constitution, and the laws passed in pursuance thereof

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186).²⁴ Congress has specifically referenced the President’s duty in the context of protecting U.S. citizens who have been detained or arrested in foreign lands, 22 U.S.C. § 1732,²⁵ and in requiring the President to protect foreign nationals in the United States, 22 U.S.C. § 4802(a)(1)(D).²⁶ See, e.g., *Garamendi*, 539 U.S. at 413-15 (long history of exercise of Presidential power in certain areas and congressional acquiescence makes validity of presidential power “indisputable”); *Dames & Moore*, 453 U.S. at 678-79 (executive action valid where “history of congressional acquiescence in conduct of the sort engaged in by the President”).

²⁴ In an address to the American Society of International Law in 1910, President William Howard Taft said:

We should not be obliged to refer those who complain of a breach of [international] obligations to Governors of States and county prosecutors to take up the procedure of vindicating the rights of aliens which have been violated on American soil. I don’t think that any one . . . however strong his view of the necessity of the preservation of state rights under the Federal constitution will deny the power of the Government to defend and protect and provide procedure for enforcing the rights that are given to aliens under treaties made by the Government of the United States.

Remarks of President Taft to Members of the American Society of International Law at the Executive Office (Apr. 29, 1910), *reprinted in* 18 William H. Taft papers, series 9A, at 206 (Library of Congress microfilm).

²⁵ Section 1732 was first enacted in 1868 as part of a law to protect the rights of American citizens in foreign states and was most recently amended in 1989. It provides as follows:

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.

22 U.S.C. § 1732.

²⁶ By the Omnibus Diplomatic Security Act of 1985, Congress imposed upon the Executive branch the duty to “develop and implement . . . policies and programs . . . [for the] protection of . . . foreign persons in the United States, as authorized by law.” 22 U.S.C. § 4802(a)(1)(D).

At its core, the President’s power is founded in the most fundamental obligation of all—to ensure faithful execution of the law. The President is required, and has the necessary power, to ensure that treaties duly ratified with the consent of the Senate are carried out as the law of the land. Pursuant to Article II § 3, the President “shall take Care that the Laws be faithfully executed,” and under the Supremacy Clause, treaties have the status of the supreme law of the land. Art. VI, cl. 2. The President, then, has both the authority and the duty to enforce the United States’s treaty obligations within the domestic legal system. *See, e.g., Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425 (1925) (executive official could bring suit in the absence of statutory authorization where he was seeking “to carry out treaty obligations to a foreign power”); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (Executive request as to application of legal immunity to foreign vessel “must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations”).²⁷

²⁷ See also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) (same); *Compañía Española de Navegación Marítima v. The Navemar*, 303 U.S. 68, 74 (1938) (same); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”); *Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004) (“A corollary to the executive’s power to enter into treaties is its obligation to ensure that the United States complies with them.”); *Roeder v. Iran*, 333 F.3d 228, 237-38 (D.C. Cir. 2003), *cert denied*, 124 S.Ct. 2836 (2004) (affirming grant of motion to vacate judgment against Iran to comply with the Presidential commitment in Algiers Accords in absence of clear Congressional intent to the contrary); *United States v. County of Arlington*, 669 F.2d 925, 929 (4th Cir. 1982) (United States had standing to initiate action to seek relief from conduct that would, inter alia, cause treaty violation).

C. By the *Avena* Judgment and the President’s Determination, Mr. Medellín Has a Right to Review and Reconsideration of His Conviction and Sentence.

By the *Avena* judgment, the ICJ expressly adjudicated Mexico’s claim that Mr. Medellín’s rights under the Vienna Convention had been violated, and it prescribed a remedy for that violation. By the Presidential Determination, the President of the United States determined that the United States would abide by the ICJ’s *Avena* Judgment in the case of Mr. Medellín and the other 50 Mexican nationals whose rights were adjudicated, regardless of the United States’ disagreement with the ICJ’s interpretation and application of the underlying Vienna Convention provisions.

The application of the *Avena* Judgment to this case is straightforward. The ICJ squarely held that the Vienna Convention confers rights on the detained national as well as the sending state. *Avena* ¶ 40; *LaGrand* ¶ 77, 89; see *Breard*, 523 U.S. at 376 (“[T]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest.”). In addition, the ICJ also held that in the circumstances here, procedural default rules cannot bar review and reconsideration of Mr. Medellín’s conviction and sentence. *Avena* ¶¶ 112-13, 133-34; *LaGrand* ¶¶ 90-91. Because the *Avena* Judgment, which by treaty is binding, supplies the rule of decision for this case, see Part I.B.1. above, Mr. Medellín is entitled to review and reconsideration of his conviction and sentence as a matter of federal law.

The President’s Determination has the same effect. The President has expressly determined that if Mr. Medellín or another Mexican national subject to the *Avena* Judgment “file[s] a petition in state court seeking . . . review and reconsideration, . . . the

state courts are to recognize the *Avena* decision.” *Id.* at 42. In the event that prejudice is found, “a new trial or a new sentencing would be ordered.” *Id.* at 47. To the extent that state procedural default rules would prevent giving effect to the Judgment, “those rules must give way.” *Id.* at 43-44 (citations omitted). And “a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention.” *Id.* at 46. In other words, the *Avena* Judgment controls in this case.

II. TEXAS LAW PERMITS MR. MEDELLÍN TO PURSUE HIS CLAIMS BASED ON THE *AVENA* JUDGMENT AND THE PRESIDENT’S DETERMINATION, BUT IF IT DID NOT IT WOULD BE PREEMPTED.

Texas law easily accommodates Mr. Medellín’s application to enforce his new rights under the *Avena* Judgment and the Presidential Determination, because neither claim could have been presented in Mr. Medellín’s earlier application for the obvious reason that neither the *Avena* Judgment nor the President’s Determination had issued at that time. TEX. CODE CRIM. PROC. ANN art. 11.071, § 5(a) (Vernon 1995). If, however, Texas law did not permit him to pursue these claims, federal law would preempt it.

A. Texas Law Authorizes Mr. Medellín to Pursue the Claims in His Subsequent Application.

1. The *Avena* Judgment and the President’s Determination Constitute New Factual or Legal Developments Authorizing A Subsequent Application Under Section 5 of Article 11.071.

Section 5(a)(1) of Article 11.071 of the Texas Code of Criminal Procedure provides:

- (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article... because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Section 5(d) of that article provides:

For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

Finally, Section 5(e) provides:

For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

TEX. CODE CRIM. PROC. ANN art. 11.071, Section 5.

The adjudication of Mr. Medellín's own rights by the ICJ in the *Avena* Judgment and the President's Determination that this Court must give effect to those rights each constitutes a binding federal rule of decision in Mr. Medellín's case. *See* Part I above. Neither of these instruments had issued on March 26, 1998, when Mr. Medellín first applied for state post-conviction habeas review, or, indeed, on October 3, 2001, when this Court adopted the trial court's recommendation that his application be denied. Neither of these instruments is a mere interpretation of the Vienna Convention; in fact, the President, while directing compliance with the ICJ's judgment, takes issue with the ICJ's interpretation. Both instruments constitute, instead, a binding direction that Mr. Medellín

himself, along with the other 50 Mexican nationals whose rights were adjudicated in the Judgment, be granted review and reconsideration as set forth in the ICJ's judgment.

Hence, Mr. Medellín's rights under those instruments did not arise until their issuance, in each case well after proceedings in this Court on his initial application had ended.

As a result, whether considered as a factual or legal basis of Mr. Medellín's claims, neither the *Avena* Judgment nor the President's Determination was available at the time of his initial application for purposes of Section 5(a). A judgment giving rise to new claims issued after an applicant's habeas application renders the factual basis of the claim "unavailable" under Section 5(a). *See, e.g., Ex parte Madding*, 70 S.W.3d 131 (Tex. Crim. App. 2002) (factual basis unavailable under identical language of Article 11.07, §4, where applicant learned of written judgment forming basis of his claim only after filing initial application). As a *factual* matter, then, Mr. Medellín's claims in reliance on the *Avena* Judgment and the President's Determination were, by definition, "unavailable" until those instruments issued. No amount of diligence would have enabled Mr. Medellín to ascertain rights that were not yet his. *See, e.g., Ex parte McGinn*, 54 S.W.3d 324, 331-332 (Tex. Crim. App. 2000) ("[T]he question . . . is not what has happened . . . since the trial The mandatory question is whether [the] subsequent application contains specific facts establishing that the current claim could not have been presented in the initial application because the factual basis of the claim was unavailable . . .").

As a *legal* matter, too, Mr. Medellín's claims based on these instruments could not "have been reasonably formulated from a final decision of the United States Supreme

Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before” the date Mr. Medellín “filed the previous application” for state habeas relief for the simple reason that they had not yet issued. Sec. 5(d). At the time of that filing, this Court and the trial court did not even have the benefit of the ICJ judgment in *LaGrand*, which was not decided until Mr. Medellín was on federal habeas. Likewise, in *Breard v. Greene*, 523 U.S. 371, 376 (1998), the Supreme Court did not have the benefit of either *LaGrand* or *Avena*, see *Medellín*, 125 S.Ct. at 2091 n. 3 (per curiam) (“At the time of our *Breard* decision, however, we confronted no final ICJ adjudication.”), and, in any event, the *Breard* Court *denied* relief in the posture of *federal* habeas review. As a consequence, there was simply no legal basis at that time for the claims Mr. Medellín seeks to pursue here. See, e.g., *Ex parte Boyd*, 58 S.W.3d 134 (Tex. Crim. App. 2001) (because Supreme Court decision forming the basis of the claim was issued after trial, claim was cognizable on state habeas). In short, as Texas law recognizes, Mr. Medellín could not have asserted claims that he did not yet have.

Even if the claims in the instant application were characterized as the same claim previously raised by Mr. Medellín, this Court has repeatedly held that newly discovered facts or fundamental changes in the law warrant review of claims previously litigated in post-conviction proceedings. See *Ex parte Robertson*, AP-74,720, slip op. at 2 (Tex. Crim. App. Mar. 16, 2005) (not designated for publication) (authorizing subsequent application based on *Tennard v. Dretke*, 124 S. Ct. 2562 (2004)),²⁸ *Ex parte Davis*, WR-

²⁸ All opinions not designated for publication are attached in Applicant’s Appendix.

40,339-05, slip op. at 2 (Tex. Crim. App. Aug. 9, 2002) (not designated for publication) (authorizing subsequent application based on *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000) (authorizing subsequent application presenting claim of ineffective assistance of counsel claim based on newly discovered facts); *Ex parte Stuart*, 653 S.W.2d 13 (Tex. Crim. App. 1983) (reviewing merits of applicant's *eleventh* state post-conviction application in light of intervening change in this Court's caselaw).²⁹ In each of these cases, this Court recognized that when intervening legal developments or newly available facts alter the legal or factual character of the claim, review on the merits must be authorized.³⁰

Applying its virtually identical statutory scheme, the Oklahoma Court of Criminal Appeals recently recognized that the *Avena* Judgment constitutes a previously unavailable legal or factual basis for a claim filed by a Mexican national whose Vienna Convention rights were adjudicated in that Judgment. *See Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (not designated for publication), attached at S.A.,

²⁹ In *Robertson, Davis, Lemke, and Stuart*, the applicants had previously presented the same claim in a state post-conviction application. *See Ex parte Robertson*, Trial Court's Findings of Fact and Conclusions of Law at 3, 42-48, No. W89-85961(5th Dist. Ct., Dallas Co., Tex. Jun. 26, 1998) (not designated for publication) and Order, *Ex parte Robertson*, No. 30,077-01 (Tex. Crim. App. Nov. 18, 1998) (not designated for publication); Application for Postconviction Writ of Habeas Corpus and Motion for Stay of Execution, *Ex parte Davis*, No. 40,339-05 (Tex. Crim. App. Aug. 9, 2002), Order, *Ex parte Davis*, No. 40,339-03 slip op. at 2 (Tex. Crim. App. Apr. 29, 2002) (not designated for publication) (dismissing mental retardation raised in subsequent application prior to *Atkins*); *Lemke*, 13 S.W.3d at 793 (noting that applicant had previously raised claim of ineffective assistance of counsel, but nonetheless reviewing same legal claim on the merits due to newly discovered facts); *Stuart*, 653 S.W.2d at 14 (noting that same claim had been raised in previous application).

³⁰ For the same reasons, even if Mr. Medellin's claims here were considered the same as the Vienna Convention claim as originally submitted, the longstanding "intervening law" exception to the law of the case doctrine would make that doctrine inapplicable here. *See, e.g., Carroll v. State*, 42 S.W. 3d 129, 131 (Tex. Crim. App. 2001) ("One of the circumstances in which an appellate court may reconsider its earlier disposition of a point of law is when there has been a change in the controlling law between the time of the first appellate determination and the time that the case is brought on a second appeal.").

Ex. G.³¹ That court had previously rejected the argument that the ICJ’s decision in *LaGrand* satisfied the requirements of the Oklahoma statute. *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002). Yet in *Torres*, on a subsequent application for post-conviction relief brought on the basis of *Avena* by one of the nationals whose rights were adjudicated there, the court granted the petitioner’s request for a stay of execution and remanded the case for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. *Torres*, slip op. at 2. As Judge Chapel explained in a special concurrence, the effect of the *Avena* judgment was an “issue of first impression for [the] Court” that was not resolved by any prior caselaw relating to the Vienna Convention. *Id.* (Chapel, J. concurring), slip op. at 1.

Indeed, even on the procedural default issue, Texas law recognizes that a defendant need not preserve what he or she does not have. Under the longstanding “right not recognized” doctrine, if a right has not yet been recognized by the Texas courts, a failure to object at trial does not bar raising the claim later for appellate or post-conviction review. *See, e.g., Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (permitting review of unpreserved claims of error under *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Ex parte Chambers*, 688 S.W.2d 483 (Tex. Crim. App. 1984) (same, respecting

³¹ Under the Oklahoma statute, a subsequent application for post-conviction relief can be brought if the application “contains specific facts establishing that the current claims and issues have not been and could not have been presented previously ... because the factual or legal basis was unavailable.” 22 Okl. Stat. § 1089(D)(8) (2004). The legal basis of a claim is “unavailable” if it “was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction this state.” *Id.* § 1089(D)(9)(a). In relevant part, the factual basis for the claim is “unavailable” if “it was not ascertainable through the exercise of reasonable diligence on or before that date.” *Id.* § 1089(D)(8).

claims of Fifth and Sixth Amendment error under *Estelle v. Smith*, 451 U.S. 454 (1981)); *Cuevas v. State*, 641 S.W.2d 558 (Tex. Crim. App. 1982) (same, respecting claim based on *Adams v. Texas*, 448 U.S. 38 (1980)); *Ex parte Turner*, 542 S.W.2d 187, 189 (Tex. Crim. App. 1976) (same, respecting claim based on *Washington v. Texas*, 388 U.S. 14 (1967)). Because the rights at issue in this application had not been recognized at the time of Mr. Medellín’s trial, Texas law, no less than the *Avena* Judgment or the President’s Determination, bars resort to the procedural default doctrine to bar the review and reconsideration to which the ICJ and the President have determined Mr. Medellín is entitled.

2. Mr. Medellín’s *Avena* And President’s Determination Claims Are Fully Cognizable In State Habeas Proceedings.

For two reasons, Mr. Medellín’s claims to enforcement of the *Avena* Judgment and the President’s Determination invoke “fundamental constitutional considerations” and are not subject to any restrictions placed upon claims raised on habeas. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989); *see Ex parte Bravo*, 702 S.W.2d 189 (Tex. Crim. App. 1982) (“[E]rror rising to *the* level of constitutional error may be raised ... in a post-conviction application for writ of habeas corpus even though not raised in the direct appeal.”); *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002) (habeas relief is unavailable for “mere statutory irregularities in criminal proceedings”); *Ex parte Sanchez*, 918 S.W.2d 526 (Tex. Crim. App. 1996) (same).

First, Mr. Medellín seeks to enforce the *Avena* Judgment on its own terms and under the terms of the February 28 President’s Determination, both of which constitute

the supreme law of the land and bind this Court under the Supremacy Clause. U.S. CONST. art. VI, cl. 2; *see* discussion Part I above. When a criminal defendant on state habeas asserts a right to have the court apply a federal rule of law in the form of a treaty or an executive foreign-affairs determination pursuant to the Supremacy Clause, he raises a claim of constitutional dimension. *See, e.g., Ex parte Ponzi*, 290 S.W. 170, 172 (Tex. Crim. App. 1927) (normal scope of habeas review is subject to considerations of federal law where “treaty relations are involved”); *Ex parte Martinez*, 145 S.W. 959 (Tex. Crim. App. 1912) (considering provisions of treaty and international law in reviewing habeas claim); *cf. Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) (on direct review, acknowledging that “[u]nder 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”); *Arteaga v. Texas Dep’t of Protective & Regulatory Servs.*, 924 S.W.2d 756 (Tex. App. 1996) (axiomatic that the state must adhere to United States treaties as the supreme law of the land).

Second, if Mr. Medellín is arbitrarily deprived of a forum in which to litigate his rights under the *Avena* Judgment and the President’s Determination, such a deprivation itself would constitute a denial of a forum in violation of constitutional due process. As interpreted and applied in the *Avena* Judgment, Article 36(2) of the Convention confers on Mr. Medellín an individual right to review and reconsideration of his conviction and sentence in light of the Article 36(1) violation without regard to procedural default rules. *Avena* Judgment, ¶¶ 14, 121-122, 153(9). The President determined that state courts would provide a forum for implementing the *Avena* Judgment by declaring that the

“United States will discharge its international obligations under . . . [*Avena*], by having state courts give effect to the decision.” S.A. Ex. B. Where the substantive law of the land creates an individual right enforceable in judicial proceedings, the Due Process Clause bars a state from denying a litigant “an opportunity to be heard upon [his] claimed [right].” *Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)); *United States v. Kras*, 409 U.S. 434, 445 (1973) (due process right of access to courts exists when fundamental interests are present and the State has exclusive control over “the adjustment of [the] legal [relationships]” involved); *Boddie*, 401 U.S. at 377 (“[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”)³² As such, denial of Mr. Medellín’s right to the merits review and reconsideration guaranteed to him by both the *Avena* Judgment and the President’s Determination would be a denial of constitutional proportions.

³² Depriving Mr. Medellín of a forum to vindicate his rights under *Avena* and the Vienna Convention’s Article 36(2) would also violate a fundamental norm of international law. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”); American Declaration of the Rights and Duties of Man, art. XVIII, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/I.4 (1945) (“Every person may resort to the courts to ensure respect for his legal rights.”). While a court may impose reasonable restrictions on a prisoner’s access to the courts, “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.” *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A) at 24 (1985). See also *Suarez Rosero v. Ecuador*, Inter-Am. Ct. H.R., Nov. 12, 1997, at para. 63 (Article 7(6) of the American Convention on Human Rights, involving right of access to a competent tribunal, is not satisfied “with the mere formal existence” of the remedy), available at http://www.corteidh.or.cr/seriecpdf/seriec_35_eps.pdf; *Henry v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., 47th Sess., Supp. No. 40, at 218, U.N. Doc. A/47/40 (1991) (if a country provides for more than one appeal as part of the appellate process, the convicted person must be given effective access to each stage of appeal).

Even if the constitutional dimension of Mr. Medellín's claims were doubted, habeas review is cognizable where Mr. Medellín's claim of his entitlement of review and reconsideration based on the Vienna Convention violation directly challenges the fairness and the integrity of the proceedings that led to his conviction and sentence. *See Graves*, 70 S.W.3d at 117 (ineffective assistance of habeas counsel claim is not cognizable "in a habeas proceeding [if it] is entirely derivative" and "does not attack the validity, fairness, or constitutionality of the original trial proceeding."). The ICJ held that Mr. Medellín is entitled to review and reconsideration of both his conviction and sentence in light of the Vienna Convention violation in his case. Mr. Medellín's claim that he is entitled to that review and reconsideration differs from non-cognizable state statutory claims because by its very nature, his claim directly challenges the fairness and the integrity of the proceedings that led to his conviction and sentence in the first place. Indeed, the harm alleged by Mr. Medellín implicates such core constitutional provisions as the right to counsel, the right to due process, and the right to equal protection. *See S.A.* at 32-44, Exs. H, J-T. In short, nothing could be more fundamental than a right to reconsideration of one's conviction and sentence, and nothing more unfair than the deprivation of that right. Under these circumstances, Mr. Medellín's subsequent application involves precisely the sort of "fundamental" right that is cognizable in habeas proceedings.

Conversely, Mr. Medellín's claims here do not implicate the concerns that led this Court to define the character of claims cognizable on habeas. As an initial matter, Mr. Medellín does not attempt to invoke habeas relief for "mere statutory irregularities of criminal procedure," *Ex parte Sanchez*, 918 S.W.2d at 527, but to vindicate rights that

Texas courts are *constitutionally required* to enforce. As a consequence, Mr. Medellín’s claims here are easily distinguished from the state statutory procedural claims this Court has found non-cognizable in habeas proceedings. *See Ex parte Graves*, 70 S.W.3d at 116 (rejecting claim based on the alleged violation of a state statutory guarantee of effective assistance of counsel in post-conviction proceedings because effective counsel at habeas stage is not constitutionally required); *Ex parte Banks*, 769 S.W.2d at 540 (rejecting claim based on violation of Texas statute governing voir dire procedures because error was not of constitutional magnitude); *Ex parte Sadberry*, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993) (same for failure to execute a written waiver of jury trial under a Texas statute). Mr. Medellín’s claims also do not implicate the rationale for this Court’s rejection of state statutory claims on habeas, i.e., because such violations can be properly addressed on appeal, doing so on habeas constitutes an abuse of the writ, *see, e.g., Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991). Mr. Medellín could not have raised these claim on direct appeal, because he did not have them then.³³

³³ Indeed, this Court has often said that “because of the unique nature of the remedy, habeas corpus relief is underscored by elements of fairness and equity.” *Ex parte Drake*, 883 S.W.2d at 215; *see also* TEX. CODE CRIM. PROC. CODE ANN art. 11.04 (Vernon 1995) (“Every provision relating to the wit of habeas corpus should be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it.”).

B. If Texas Law Barred Review and Reconsideration as Required by the *Avena* Judgment and the President’s Determination, It Would Be Preempted by Federal Law.

1. As a Binding Federal Treaty Obligation, the Requirement of Compliance with the *Avena* Judgment Preempts Any Inconsistent State Law.

The Supremacy Clause of Article VI of the United States Constitution incorporates into United States domestic law the international law obligation to abide by a treaty to the extent that the treaty is at issue in a case before the courts. Specifically, once a treaty is ratified in accordance with the United States Constitution, the Supremacy Clause gives it the status of federal law, preempting the laws of the individual States in the same manner as acts of Congress and the Constitution itself: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land[.]” U.S. CONST. art. VI, cl. 2 (emphasis added).³⁴ In other words, the Constitution makes explicit that treaties bind the nation as a whole and are not left to the possibly inconsistent policies of the individual States: “A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way.” *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (opinion of Chase, J.); 3 ELLIOT’S DEBATES 515 (James Madison at the Virginia Convention) (“To

³⁴ This case therefore does not implicate the recent controversy over the consideration of foreign law or the views of the international community in interpreting the Constitution’s guarantees of fundamental rights. See, e.g., *Roper v. Simmons*, 543 U.S. ___, 125 S. Ct. 1183 (2005). Rather, this case involves international law in the strict sense, and in a form that is expressly incorporated as binding federal law by the Supremacy Clause of the United States Constitution—that is, the obligation to abide by treaties that have been made by the President and ratified with the advice and consent of the Senate. See *id.* at 1226 (Scalia, J., dissenting) (reaffirming constitutionally mandated supremacy of treaties ratified by President and Senate, while disputing majority’s comparative-law analysis of constitutional rights).

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.”). Under the Constitution, a treaty is equal in rank with a federal statute, and either a treaty or a federal statute will preempt any contrary state law. *See, e.g., Asakura v. Seattle*, 265 U.S. 332, 341 (1924); Part I.A.1 above.

In addition, the Supremacy Clause of the United States Constitution makes explicit that state courts must apply treaties concluded by the federal government when those treaties bear on a matter in dispute in state courts: “*the Judges in every State shall be bound*” by “all Treaties made, or which shall be made, under the Authority of the United States.” U.S. Const. art. VI (emphasis added). Consistent with the constitutional design, the United States Supreme Court has long held that when a treaty confers “rights . . . of a nature to be enforced in a court of justice, . . . [a] court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *The Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 598-99 (1884).

Accordingly, as the United States Supreme Court has repeatedly held, the states must give effect to treaties conferring rights on foreign nationals, even though they affect local matters traditionally regarded as within the purview of state or local law.³⁵ The

³⁵ *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslav citizens’ right under treaty to inherit personal property located in Oregon); *Santovincenzo v. Egan*, 284 U.S. 30 (1931) (invalidating general New York statute concerning intestate distribution of the estates of decedents as applied to Italian nationals to extent it was inconsistent with U.S.-Italy treaty); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (restraining City of Seattle, Washington, from applying to Japanese citizens local law that aliens could not work as pawnbrokers because it would violate treaty); *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (enforcing Swiss citizens’ right under treaty to inherit real property located in Virginia); *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825) (enforcing treaty protecting French citizens title to land located in Kentucky); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824) (enforcing treaty protecting British property owners’ rights in land located in Kentucky); *Orr v. Hodgson*, 17 U.S. (4 (footnote continued)

result is the same in the criminal context as in the civil context: Congress has routinely entered into treaties limiting the authority of the state and federal governments to prosecute crimes, and courts have routinely given effect to those treaties.³⁶ For example, state and federal courts in the United States have regularly applied the consular-immunity provisions of the Vienna Convention on Consular Relations to decide consular officials' and employees' claims of immunity from criminal prosecution. *See, e.g., Commonwealth v. Jerez*, 457 N.E.2d 1105 (Mass. 1983) (affirming dismissal of state criminal complaint against foreign consular officer pursuant to Article 43 of the Vienna Convention, which provides consular officers and employees with limited immunity from judicial jurisdiction).³⁷ Indeed, the United States Supreme Court has made clear that a state court would even have to turn over an accused murderer to a foreign consul for trial if a consular-relations treaty required it. *Wildenhus's Case*, 120 U.S. 1, 17 (1887) (applying provisions of Belgian-U.S. consular convention to determine whether individual should

Wheat.) 453, 453 (1819) (same); *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (invalidating, on ground of inconsistency with treaty, Maryland statute barring French citizens from holding real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) (enforcing treaty protecting British property owners against Virginia forfeiture); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia); *see also, e.g., Bennett v. Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998) (wholly-owned subsidiary of French company entitled to assert parent company's right under U.S.-France treaty to discriminate in favor of French citizens on basis of their citizenship in filling certain professional positions).

³⁶ *See, e.g., United States v. Rauscher*, 119 U.S. 407, 433 (1886) (ordering dismissal of indictment where prosecution in United States was barred by extradition treaty with Great Britain); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (reversing Georgia state conviction that was barred by treaty with Cherokee Nation); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (noting that state courts were obligated to dismiss criminal cases under treaty with Great Britain) (citing *Respublica v. Gordon*, 1 Dall. 233 (Pa. 1788)); *see also, e.g., United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992) (discussing application of *Rauscher*); *United States v. Lindh*, 212 F.Supp.2d 541, 553 (E.D. Va. 2002) (noting that Geneva Convention Relative to the Treatment of Prisoners of War bars prosecution of prisoners of war for lawful acts of war).

³⁷ *See also United States v. Cole*, 717 F. Supp. 309, 321-25 (E.D. Pa. 1989) (Vienna Convention controls claim of consular immunity from criminal prosecution); *State v. Doering-Sachs*, 652 So. 2d 420, 422-24 (Fla. Dist. Ct. App. 1995) (same); *Illinois Commerce Comm'n v. Salamie*, 369 N.E.2d 235, 238-42 (Ill. App. Ct. 1977) (same); *Silva v. Superior Court*, 125 Cal. Rptr. 78, 85-87 (Cal. Ct. App. 1975) (same).

be tried before New Jersey state court or Belgian consul for homicide committed on Belgian ship in New Jersey port).

The *Avena* Judgment calls for review and reconsideration, in the Texas state courts, of Mr. Medellín's conviction and sentence to determine if prejudice resulted from the violation of his rights under the Vienna Convention and afford a fully effective remedy for such violation, without regard to any procedural defaults that would prevent adjudication of the merits. Applying procedural default rules, doctrines of standing, or other procedural impediments to deny Mr. Medellín the review and reconsideration to which he is entitled would be flatly inconsistent with the *Avena* judgment:

In terms of result, the ICJ made clear that it would be improper to dismiss Medellín's claim, for once the United States had committed "internationally wrongful acts," the necessary "remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of [the 51 Mexican] nationals' cases by the United States courts." *Avena*, 2004 I.C.J. No. 128, ¶ 121. . . . The ICJ specified that the Convention confers rights on individual defendants, and that applying state procedural default rules to prevent them from vindicating their rights violates the treaty, for the treaty requires that its purposes be given "full effect." *Id.*, ¶¶ 106, 113.

Medellín, 125 S. Ct. at 2101 (O'Connor, J., dissenting).

As the federal Executive Branch made clear when it presented the Vienna Convention to Congress for ratification, "[t]o the extent that there are conflicts with Federal legislation or State laws, the Vienna Convention, after ratification, would govern." *Vienna Convention Hearing, supra*, S. EXEC. REP. No. 91-9, at 18. Federal statutes, like the ones cited in the United States Supreme Court opinion in *Medellín*, 125 S. Ct. at 2090-92, are of equal rank with treaties under the United States Constitution, but

state laws are preempted to the extent they conflict with either a federal statute or a treaty. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) (“Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.”). As Justice Ginsburg pointed out, in casting the deciding vote in *Medellín*, allowing Mr. Medellín’s petition to proceed in this Court will allow the Supreme Court “ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ’s *Avena* judgment, *shorn of procedural hindrances* that pervade[d] the [federal habeas] action” then before the Supreme Court. *Medellín*, 125 S. Ct. at 2093 (Ginsburg, J., concurring) (emphasis added).³⁸ Because the Vienna Convention, as interpreted and applied by the *Avena* judgment, preempts the application of the contemporaneous-objection rule or other state-law procedural bars to relief in this case, those procedural bars cannot be adequate and independent grounds for denying relief.³⁹

³⁸ *See also id.* at 2092 (per curiam) (noting “potential for review in this Court once the Texas courts have heard and decided Medellín’s pending action”).

³⁹ The suggestion of the United States Supreme Court in *Breard v. Greene*, 523 U.S. 371, 375-76 (1998), that procedural default rules could bar a Vienna Convention claim is inapplicable here, because (among other reasons) at the time of *Breard*, there was no final ICJ adjudication that the application of procedural default rules violated the Convention. As at least six justices of the United States Supreme Court have recognized, *Breard* differs from Mr. Medellín’s case in this important respect. *Medellín*, 125 S. Ct. at 2091 (per curiam) (noting that there was no final ICJ adjudication when *Breard* was decided); *id.* at 2106 (Souter, J., dissenting) (noting, for the same reason, that *Breard* does not control Mr. Medellín’s case). If, for any reason, *Breard* were thought to be controlling in this case, the United States Supreme Court should overrule it, as it was a hastily considered decision denying discretionary relief, it is inconsistent with established Supreme Court doctrine, it threatens to put the United States into noncompliance with its international legal obligations and undermine the President’s efforts to comply, subsequent developments have undermined its application, and no parties have significantly relied on it in such a way that overruling it would be inequitable.

2. As Binding Federal Law, The President's Determination Preempts Any Inconsistent State Law.

Similarly, by virtue of the Supremacy Clause, which makes the “Laws of the United States” the supreme law of the land, art. VI, cl.2, “complete 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.” *United States v. Belmont*, 301 U.S. 324, 331 (1937). Indeed,

[w]ithin the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

Belmont, 301 U.S. at 331-32. In short, since the earliest days of the Republic it has been clear that state “regulations must give way if they impair the effective exercise of the Nation’s foreign policy.” *Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *see also Garamendi*, 539 U.S. at 413 (“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy.”); *United States v. Pink*, 315 U.S. 203, 230-31 (1942) (“[S]tate law must yield when it is inconsistent with, or impairs ... the superior Federal policy evidenced by a treaty or international compact or agreement”).⁴⁰

⁴⁰ *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 278-80 (1876) (noting that if California “should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government?”)

Indeed, state law may be preempted even in cases in which the law does not facially interfere with the exercise of foreign policy. It is of no consequence that the state statute was not expressly designed to impinge on foreign affairs as long as there is “the likelihood that state legislation will produce something more than *incidental effect* in conflict with express foreign policy of the National Government,” which “would require preemption of the state law.” *See Garamendi*, 539 U.S. at 420 (emphasis added). The conflict between any provision of Texas state law that would preclude providing Mr. Medellín with the requisite review and reconsideration in his case and the foreign policy evinced in the President’s Determination is more than “incidental”: it is a direct conflict. As such, any inconsistent Texas law must yield in Mr. Medellín’s case.

Nor would giving effect to the President’s Determination here be an unusual incursion on state affairs by operation of the treaty and foreign affairs powers. Treaties and other foreign policy decisions trump inconsistent state law even where they concern matters typically regulated by the states, including criminal laws of general applicability. *See* discussion in Part II.B.1 above. This is particularly clear where the applicable federal rule does not regulate the relationship between states and their own citizens, but only the treatment of foreign nationals, in return for similar treatment of U.S. citizens abroad. *See id.*

In *Garamendi*, the Supreme Court invalidated a California insurance law on the grounds that it was in conflict with federal policy evinced in various statements from

Executive Branch officials. 539 U.S. at 421-23.⁴¹ Here, the federal policy is even more unmistakable, being contained in an explicit written determination signed by the President himself.⁴² Hence, the “express federal policy [reflected in the President’s Determination] and the clear conflict raised by [a] state statute are alone enough to require state law to yield.” *Garamendi*, 539 U.S. at 425.⁴³

The President is constitutionally empowered to bind the United States, including the organs of state government, with his determination that Mr. Medellín is entitled to the review and reconsideration required by the *Avena* Judgment in state courts, notwithstanding any contrary state law. To permit the states to frustrate the President’s efforts to carry out the nation’s treaty obligations would undermine the President’s authority and credibility in the eyes of the rest of the world, making the world a much more precarious place for U.S. citizens abroad and at home. The world’s most powerful

⁴¹ Similarly, in *Belmont*, the executive foreign policy at issue was “effected by an exchange of diplomatic correspondence between the Soviet government and the United States.” *Belmont*, 301 U.S. at 326. The Supreme Court held this executive act to preempt inconsistent state law, finding “[t]hat the negotiations, acceptance of the assignment and understandings in respect thereof were within the competence of the President may not be doubted.” *Id.* at 330.

⁴² When exercising his executive authority, the President need not follow any prescribed form. *See Wolsey v. Chapman*, 101 U.S. 755, 770 (1880) (legal effect not dependent on whether Presidential document was entitled “proclamation” or “order”). “A presidential directive has the same substantive legal effect as an executive order. It is the substance of the presidential action that is determinative, not the form of the document conveying that action.” Dep’t of Justice, Ofc. Of Legal Counsel, Mem. for Counsel to President, *Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order* (Jan. 20, 2000), available at <http://www.usdoj.gov/olc/predirective.htm> (last visited July 28, 2005). Over the years, Presidents have given a variety of different designations to their official directives, including “Executive Order,” “Proclamation,” “Determination,” and many others, often with little or no distinction between them. *See generally* Library of Congress, Congressional Research Serv., Report for Congress, *Presidential Directives: Background and Overview* (Feb. 10, 2003), available at <http://www.llsdc.org/sourcebook/docs/CRS-98-611.pdf> (last visited July 28, 2005).

⁴³ Distinguishing *Barclays Bank PLC v Franchise Tax Board*, 512 U.S. 298 (1994), the *Garamendi* Court noted that Presidential policy is not conclusive when it directly conflicts with Congressional policy in an area that “the Constitution expressly grants Congress, not the President, the power to ‘regulate...’” 539 U.S. at 422 n.12. Here, there is no such textual commitment to Congress, and in any event, no conflict between Presidential and Congressional policy.

nation needs to speak with a single voice on issues pertaining to its relations with foreign nations. This is precisely the goal the Framers had in mind when they vested in the President the exclusive power to bind the nation as a whole in the context of foreign relations.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Medellín respectfully requests that this Court issue an order pursuant to Article 11.071, § 5(c) of the Code of Criminal Procedure, finding that the requirements of § 5(a) of that Article are satisfied (or in the alternative, to the extent not satisfied, are preempted by federal law), and refer the case to the Harris County District Court for further proceedings consistent with the *Avena* Judgment and the President's Determination.

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Respectfully submitted,

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