

DOES THE ICJ'S DECISION IN AVENA MEAN ANYTHING TO MEXICANS ON DEATH ROW?

I. INTRODUCTION

Texas officials are diligent in their pursuit of death sentences and in their efforts to carry them out. Prosecutors, for instance, have engaged in blatant misconduct by withholding important evidence from defendants.¹ They have used racially discriminatory tactics to keep African-Americans off juries.² Law enforcement officers have coerced confessions out of defendants and have engaged in other types of misconduct.³ Furthermore, the state has shown a willingness to execute even those defendants whose culpability may have been diminished by their age or mental infirmities. For instance, Texas led the nation in executing juveniles until the Supreme Court banned this practice⁴ and the State has executed defendants with serious mental impairments.⁵ Prosecutors have argued that a defendant was retarded in order to secure a death sentence and then, after the Supreme Court prohibited the execution of mentally retarded individuals, argued on appeal that this same defendant was not retarded.⁶

¹ See *Banks v. Dretke*, 540 U.S. 668 (2003).

² See *Miller-El v. Dretke*, 73 U.S.L.W. 4479 (2005).

³ See *Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005); Kenneth Williams, Texas: Tough on Murderers or on Fairness? 53 Drake L. Rev. 631, 635-643 (2005).

⁴ According to the Death Penalty Information Center, Texas executed 13 juvenile offenders between 1976 and January 1, 2005. No other state executed more than 3 juvenile offenders during this period.

Information on juvenile executions available at

<http://www.deathpenaltyinfo.org/article.php?scid=27&did=882>.

⁵ Kelsey Patterson consistently expressed the delusions that he killed the victims only because devices implanted in his body by conspirators made him do it, and that he has received a permanent stay of execution based upon his innocence. He believed that the state of Texas was his only friend. In addition, a psychologist found that Patterson suffered from bizarre delusions that impaired his rational understanding of his conviction and pending execution and that there was no credible evidence that he was malingering his delusions or their effect on his functioning. See *Patterson v. Dretke*, 370 F.3d 480, 481-483 (5th Cir. 2004). As a result of Patterson's mental illness, the Texas Board of Pardons and Paroles recommended to the Governor that his sentence be reduced to life imprisonment. The Governor, however, refused to follow the Board's recommendation and Patterson was subsequently executed. See Gov. Rick Perry Denies Commutation, Stay for Kelsey Patterson, available at

<http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2004-05-18.3521>.

⁶ See Dean of Death Row, Austin American-Statesman, November 24, 2003.

Now that the International Court of Justice (“ICJ”) has decided that the state violated the rights of Mexican nationals⁷ on its death row by not informing them of their rights under the Vienna Convention on Consular Relations and the President has ordered state officials to comply with this decision,⁸ Texas officials have challenged the President’s authority to issue such an order.⁹ This article will begin with background information on the Vienna Convention and the dispute between the U.S. and foreign governments over the failure of the U.S. to comply with the treaty’s consular notification provisions. Because Texas officials have challenged the President’s authority to order them to comply with the ICJ’s decision, there will be an analysis of the legality of the President’s order. Next, there will be a discussion as to how the litigation is likely to proceed in state and federal court and a proposal as to how the inmates’ consular notification claims ought to be resolved. Finally, the article will conclude with a discussion of why it is important to the U.S. that the ICJ decision is fully complied with and that there be a credible review of the inmates’ cases.

II. VIENNA CONVENTION AND INTERNATIONAL LAW

⁷ Case Concerning Avena and other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31).

⁸ George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005) (on file with author).

⁹ During the oral arguments in *Medellin v. Dretke*, the assistant attorney general arguing for the state of Texas stated:

We would respectfully submit, as would any responsible state attorney general, that there are significant constitutional problems with a unilateral Executive determination displacing generally applicable criminal laws.

See *Medellin v. Dretke*, 2005 U.S. TRANS LEXIS 25 (March 28, 2005). In response to the President’s order, the Texas Attorney General stated “the state of Texas believes no international court supersedes the laws of Texas or the laws of the United States.” Tolson and Ruiz, *Mexicans on Death Row May Get New Hearings*, *Houston Chronicle*, March 9, 2005 at A1.

The United States Senate ratified the Vienna Convention on Consular Relations in 1969.¹⁰ Currently, 167 nations are party to the Convention.¹¹ Article 36 of the Convention is most pertinent to this discussion.¹² Article 36 is designed to “facilitat[e] the exercise of consular functions relating to nationals of the sending state.”¹³ It provides that “consular officers shall be free to communicate with nationals of the sending State and to have access to them.”¹⁴ Article 36 further provides that “[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State, if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.”¹⁵ Furthermore, [a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.”¹⁶ State authorities are required to “inform the person concerned without delay of his rights under [Article 36].”¹⁷

Under Article 36, consular officers “have the right to visit a national of the sending State who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation.”¹⁸ According to Article 36 rights contained therein “shall be exercised in conformity with the laws and regulation of the receiving State.”¹⁹ This requirement, however, is subject to the proviso “that the said

¹⁰ Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter “Vienna Convention”].

¹¹ See Multilateral Treaties Deposited with the Secretary-General United Nations, N.Y., available at <http://untreaty.un.org>.

¹² 21 U.S.T. 100-101, 596 U.N.T.S. 292-293.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”²⁰

Until recently, the United States was also a party to the Optional Protocol to the Vienna Convention that mandates “disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice.”²¹ Any party to the Optional Protocol may bring such disputes before the ICJ.²²

Under the U.S. Constitution, treaties are “the supreme Law of the Land.”²³ As such, they are enforceable in court as long as they are self-executing²⁴ and federal courts have subject matter jurisdiction over any cases and controversies arising under them.²⁵ Although treaties cannot violate the U.S. Constitution,²⁶ they are equivalent to a statute enacted by Congress and are binding on the states.²⁷ Thus, the Vienna Convention and the Optional Protocol are the law of the land.

III. U.S. LITIGATION

²⁰ Id.

²¹ Optional Protocol Concerning the Compulsory Settlement of Disputes Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488 [hereinafter “Optional Protocol”]. On March 7, 2005, the United States announced that it will no longer be a party to the Optional Protocol:

This letter constitutes notification by the United States of America that it hereby withdraws from the [Consular Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes]. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.

See Frederic L. Kirgis, Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights, March 2005, available at <http://www.asil.org/insights/2005/03/insights050309a.html>.

²² Id. The United States was the first state party to invoke the optional protocol in the Tehran Hostages Case. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

²³ See U.S. CONST. art. VI.

²⁴ The State Department has regarded the Vienna Convention as self-executing since its ratification. See S. Exec. Rep. No. 91-9, app. At 2, 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser to the Department of State).

²⁵ See U.S. CONST. art. III, § 2, cl. 1.

²⁶ See Reid v. Covert, 354 U.S. 1 (1957).

²⁷ See Whitney v. Robertson, 124 U.S. 190, 194 (1888).

Although the Vienna Convention is the law of the land, non-compliance with the Article 36 notification requirements has been a persistent problem. This problem will only intensify as the number of non-citizens in U.S. prisons increase.²⁸ Voluminous litigation has resulted from state officials' failure to provide foreign nationals with the notification required by Article 36.²⁹ In most instances, state officials do not deny that they failed to provide notification. Jose Medellin's experience is fairly typical. After he was apprehended by Houston officials for the murder of two Texas teenagers, Medellin told the arresting officers in Texas that he was born in Laredo, Mexico.³⁰ He also told the booking authorities that he was not a U.S. citizen.³¹ Medellin, however, was arrested, detained, tried, convicted, and sentenced to death without ever being informed that he could contact the Mexican consul.³² Rather, most of the litigation has centered on four issues: 1) whether the Convention creates individually enforceable rights; 2) whether the non-citizen must object at trial to preserve the issue for appeal; 3) whether the foreign national must prove prejudice; and 4) the appropriate remedy for an Article 36 violation.

Although the Supreme Court has left the issue of individual enforceability of the Vienna Convention open,³³ many lower courts have not. There is a presumption that international treaties do not create rights that are privately enforceable in court.³⁴ The Supreme Court explained the rationale for this presumption as follows:

²⁸ In 2003, for instance, over 56,000 foreign nationals were held in U.S. prisons and as of February 2005, 119 noncitizens from 31 nations were on state death row. See *Medellin v. Dretke*, 544 U.S. ____ (2005).

²⁹ See *United States v. Emuegbunam*, 268 F.3d 377 391 (6th cir. 2001) (discussing cases about Vienna Convention violations).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *Breard v. Greene* 523 U.S. 371, 376 (1998).

³⁴ See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 907, cmt. a (1987) ("International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . .").

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give not redress.³⁵

The courts are also reluctant to allow individual enforcement of treaties for fear of interfering in the nation's foreign affairs.³⁶ The Supreme Court has, however, recognized that a treaty can create individually enforceable rights in some circumstances.³⁷ Lower courts have based their conclusion that the Vienna Convention is not judicially enforceable primarily on the language in its Preamble: "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."³⁸ In addition, courts have given deference to the view of the State Department that the Convention is not judicially enforceable but rather, that the remedies for violations of the convention are diplomatic, political, or exist between states under international law.³⁹

There is also a general rule requiring that criminal defendants raise objections at trial before an appellate court will consider any assertions of error.⁴⁰ Many defendants, including Jose Medellin, did not object to the Article 36 violation until after they were convicted.⁴¹ As a result of the defendants' failure to object, appellate courts have often applied the procedural default doctrine and have refused to consider the merits of the

³⁵ *Head Money Cases*, 112 U.S. 580, 598 (1984).

³⁶ See *U.S. v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001) ("A contrary conclusion risks aggrandizing the power of the judiciary and interfering in the nation's foreign affairs, the conduct of which the Constitution reserves for the political branches.").

³⁷ See, e.g., *U.S. v. Alvarez-Machain*, 504 U.S. 655, 667-68 (1992).

³⁸ *Id.* at 392, quoting preamble of Vienna Convention, 21 U.S.T. at 79, 596 U.N.T.S. at 262 (emphasis added).

³⁹ See *Emuegbunam*, *supra* note 35 at 392.

⁴⁰ See, e.g., *U.S. v. Olano*, 507 U.S. 725, 731 (1993).

⁴¹ See *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5th Cir. 2004).

inmates' Vienna Convention claim.⁴² Furthermore, the Supreme Court has intimated⁴³ - and numerous courts have held - that a defendant must show prejudice to establish a violation of the Convention.⁴⁴ Courts have also disagreed with the inmates that the remedy for a Vienna Convention violation should be the dismissal of an indictment⁴⁵ or the exclusion of evidence obtained from the defendant.⁴⁶ Finally, civil suits seeking to enforce the Convention have also been unsuccessful.⁴⁷

IV. ICJ LITIGATION

Unable to obtain a satisfactory resolution in U.S. courts, a few nations exercised their option under the Optional Protocol to seek redress in the ICJ.⁴⁸ The ICJ rendered two significant decisions regarding the United State's obligations under the Vienna Convention:

1. Paraguay v. U.S.

Angel Francisco Breard was under suspicion for murder and attempted rape.⁴⁹ During a search of Breard's apartment, the Arlington, Virginia police found his Paraguayan passport and as a result were aware that he was a Paraguayan national.⁵⁰ The Arlington police, however, did not inform Breard that he was entitled to contact the Paraguayan consulate nor did they notify Paraguayan consulate officials of Breard's

⁴² Id.

⁴³ See *Breard v. Greene*, 523 U.S. 371, 377 (1998).

⁴⁴ See, e.g., *U.S. v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001).

⁴⁵ See *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1281 (11th Cir. 2002).

⁴⁶ See *U.S. v. Lombera-Camorlinga*, 206 F.3d 882, 883 (9th Cir. 2000).

⁴⁷ See *Breard*, supra note 43; *Federal Republic of Germany v. U.S.*, 526 U.S. 111, 111-12 (1999).

⁴⁸ Paraguay, Germany and Mexico sued the United States in the World Court. Paraguay withdrew its case after its national was executed. See *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.)*, 1998 I.C.J. 426 (Discontinuance Order of Nov. 10). Decisions were rendered on behalf of both Germany and Mexico in the other two cases, discussed *infra*.

⁴⁹ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, (Memorial of the Republic of Paraguay, 9 October 1998), para. 2.1.

⁵⁰ Id.

arrest.⁵¹ After he was indicted, Virginia officials offered Breard a life sentence if he would agree to plead guilty.⁵² Because Paraguay does not permit plea bargaining and in fact makes such deals null and void, Breard rejected the offer.⁵³ He decided instead to testify and to confess his crime to the jury.⁵⁴ In Paraguay, the principal means to obtain leniency would be to confess and denounce the criminal acts charged and appeal to the mercy of the court.⁵⁵ The jury convicted Breard and sentenced him to death.⁵⁶

Approximately three years later, Paraguayan officials learned of Breard's imprisonment and pending execution.⁵⁷ They informed Breard of his rights to consular notification under the Vienna Convention and explained to him the differences between the U.S. and Paraguayan legal systems.⁵⁸ By this time Breard was well into the appellate process.⁵⁹ He raised for the first time, in his federal habeas petition, a claim based upon the failure of Virginia officials to notify him of his rights to consular access.⁶⁰ The federal courts held that because the claim had not been raised in state court, it was procedurally defaulted.⁶¹

Paraguay sought to prevent his execution, both in U.S. courts⁶² and in the ICJ. They were successful in convincing the ICJ to issue an order that the U.S. "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the

⁵¹ Id. at para. 2.1-2.2.

⁵² Id. at para. 2.3.

⁵³ Id. at para. 2.6-2.7.

⁵⁴ Id. at para. 2.8.

⁵⁵ Id. at para. 2.6.

⁵⁶ Id. at para. 2.2.8-2.10.

⁵⁷ Id. at para. 2.16.

⁵⁸ Id. at para 2.17.

⁵⁹ Id. at para. 2.16.

⁶⁰ Id. at para. 2.19.

⁶¹ Id. at para. 2.19.

⁶² See *Breard v. Greene*, 523 U.S. 371 (1998).

final decision in these proceedings . . .”⁶³ The U.S. Supreme Court affirmed the lower court’s application of the procedural default doctrine and held that the ICJ’s order was not legally binding.⁶⁴ The Supreme Court suggested that the only means of recourse for Breard was a reprieve from the Governor of Virginia.⁶⁵ The Secretary of State wrote to the Governor of Virginia advising him that the ICJ’s order was non-binding but she requested a delay of Breard’s execution.⁶⁶ The Governor refused to do so and Breard was executed. Paraguay subsequently withdrew its complaint from the ICJ as a result.

2. Germany v. U.S.⁶⁷

Walter and Karl LaGrand were German nationals who lived most of their lives in the United States.⁶⁸ They were both convicted and sentenced to death for their roles in an Arizona bank robbery.⁶⁹ Arizona authorities conceded that the LaGrands were convicted and sentenced to death without receiving the consular notification required by Article 36 and that the German consulate had not been notified of their arrests.⁷⁰ Arizona authorities further conceded that no notification was given even after its officials became aware that the LaGrands were German nationals and not U.S. citizens.⁷¹ Neither LaGrand brother objected to the Vienna Convention violation until their cases were on appeal and thus the U.S. Courts applied the procedural default doctrine and refused to

⁶³ Supra note 49 at para. 2.32.

⁶⁴ Breard supra note 62.

⁶⁵ The Court wrote: “If the Governor [of Virginia] wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.” Breard v. Greene, 523 U.S. 371, 378 (1998).

⁶⁶ Supra note 49 at para. 2.41.

⁶⁷ LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (hereinafter “LaGrand”).

⁶⁸ Id. at 475.

⁶⁹ Id. at 475.

⁷⁰ Id. at 475-76.

⁷¹ Id. at 475.

consider the merits of their claims.⁷² Both LaGrand brothers were subsequently executed despite diplomatic interventions by the German government and despite a provisional order from the ICJ that Walter LaGrand not be executed pending the disposition of the ICJ proceedings.⁷³

Germany complained that as a result of the Vienna Convention violations, it was deprived of the opportunity to provide assistance to its nationals.⁷⁴ Even though both LaGrand brothers were executed during the proceedings, Germany, unlike Paraguay, sought redress for the violations. Specifically, it sought to prevent the U.S from raising the procedural default doctrine in the future with respect to Vienna Convention violations and an assurance from the U.S. that it would not repeat its actions in the future.⁷⁵ The main contention of the U.S. was that rights of consular notification and access under the Vienna Convention are rights of States and not of individuals even though individuals may benefit from these rights.⁷⁶

The ICJ held that “it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”⁷⁷ In addition, the court rejected the U.S. claim that the Convention does not confer individual rights.⁷⁸

2. Mexico v. U.S.

Mexico has long sought to provide consular assistance to its nationals residing in the United States. In 1942, Mexico and the U.S. entered into a bilateral consular

⁷² Id. at 477-78.

⁷³ Id. at 473.

⁷⁴ Id. at 473-74.

⁷⁵ Id. at 473.

⁷⁶ Id. at 493-94.

⁷⁷ Id. at 514.

⁷⁸ Id. at 494.

agreement as a result of the “frequent inter-state travel of their respective citizens.”⁷⁹ In 1965, Mexico ratified the Vienna Convention in order to supplement its bilateral agreements. In 1986, Mexico developed the Program of Legal Consultation and Defense for Mexicans Abroad in order to improve the work of its consular officials in representing the interests of Mexican nationals.⁸⁰ In 2000, Mexico established the Mexican Capital Legal Assistance Program in the U.S. in order to provide legal assistance to its nationals charged with capital offenses.⁸¹ Despite these efforts, Mexico’s efforts to assist its nationals and to ensure compliance with the Vienna Convention have met with limited success. As a result, Mexico sought the assistance of the ICJ.⁸²

In 2003, Mexico commenced proceedings against the United States on behalf of 54 of its nationals sentenced to death in the U.S.⁸³ Mexico complained that these individuals were arrested, detained, tried, convicted, and sentenced to death without being allowed to exercise their rights under Article 36.⁸⁴ The ICJ agreed with Mexico that the U.S. breached its obligations to Mexico under the Vienna Convention.

Specifically, the Court found the following violations of the Convention:

⁷⁹ Application Instituting Proceedings Submitted by the Government of the United Mexican States (Jan. 9, 2003), *Avena (Mex. V. U.S.)* (Int’l Ct. Justice), at para. 20 (“Avena application”).

⁸⁰ *Id.*, para. 22.

⁸¹ *Id.*, para. 25.

⁸² Mexico also sought the assistance of the Inter-American Court of Human Rights. In an advisory opinion, the court declared the failure to inform foreign nationals at the time of arrest of the right to consult with a consular official was a violation of obligations under the Consular Convention and that inmates who had been convicted and sentenced to death without having been notified of their right to consult their consul had not been afforded due process of law. See *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Adv. Op. OC-16/1999, Inter-Am. Ct. H.R., ser. A, No. 16 (1999).

⁸³ *Id.*, para. 2. On January 20, 2003, Mexico withdrew its request for provisional measures on behalf of three of its nationals because their death sentences had been commuted.

⁸⁴ See *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31), (hereinafter *Avena*) para. 12.

- 1) the failure to inform, without delay,⁸⁵ the Mexican nationals of their rights under the Convention;
- 2) the failure to inform, without delay, the Mexican consulate of the detention of their nationals, thereby denying Mexico the opportunity to render assistance to its nationals;
- 3) depriving Mexico of its rights to communicate with, and have access to, its nationals in a timely manner;
- 4) depriving Mexico of the right to obtain legal representation for its citizens in a timely fashion;
- 5) the failure to review and reconsider the convictions and sentences of three Mexican nationals awaiting execution.⁸⁶

Mexico sought to have these convictions and sentences overturned and any statements or other evidence obtained from its nationals prior to receiving consular notification excluded from any criminal proceedings subsequently brought against them.⁸⁷ The court rejected Mexico's request that their conviction and sentence be vacated.⁸⁸ It agreed with the U.S. that there had to be a determination whether the Vienna Convention violation prejudiced the defendants.⁸⁹ Most significantly, however, it agreed with Mexico that the inmates were entitled to a reconsideration of their Vienna Convention claims. Although it left the choice of means to the United States, the ICJ rejected the U.S. position that the executive clemency process would provide sufficient review.⁹⁰ Furthermore, the court held that U.S. courts should be precluded from applying the procedural default doctrine to these claims.⁹¹

V. REACTIONS

⁸⁵ The Court held that without delay doesn't necessarily mean immediately upon arrest, but it does mean "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Id.*, para. 88.

⁸⁶ *Id.*, para. 106.

⁸⁷ *Id.*, para. 13.

⁸⁸ *Id.*, para. 123.

⁸⁹ *Id.*, para. 127.

⁹⁰ *Id.* para. 143.

⁹¹ "In this regard, the Court would point out that 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.*, para. 139. The Court also stressed that the clemency process would not provided adequate review. *Id.*, para. 143.

The two top law enforcement officials in Texas reacted negatively to the ICJ's decision in Avena. Governor Rick Perry's spokesman stated, "Obviously the governor respects the world court's right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas."⁹² A spokesman for the Texas Attorney General proclaimed, "We do not believe the World Court has jurisdiction in these matters."⁹³

Most of the reaction outside of Texas has not been nearly as negative. In fact, there has been a grudging acknowledgement that the decision demands compliance. For example, in a case involving a Mexican national sentenced to death in Oklahoma without receiving the consular notification required by the Vienna Convention, the Oklahoma Court of Criminal Appeals held that it was bound by the ICJ's decision. The court granted a stay of execution and ordered an evidentiary hearing to determine whether the inmate was prejudiced by the denial of his rights.⁹⁴ The Governor of Oklahoma subsequently commuted his sentence to life imprisonment without the possibility of parole as a result of the Avena decision.⁹⁵ The Arkansas Attorney General dropped its effort to execute a Mexican national and the Avena decision providing the primary motivation for doing so.⁹⁶ Furthermore, California enacted a law requiring obligatory

⁹² Polly Ross Hughes, U.S. Told To Review Cases of Mexicans Sentenced to Death; Texas Unmoved by World Court Ruling, *Houston Chron.*, Apr. 1, 2004, at A1 (quoting spokesman Robert Black).

⁹³ Dane Schiller & Maro Robbins, Mexico Wins in World Court, *San Antonio Express-News*, Apr. 1, 2004, at 1A.

⁹⁴ See *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004).

⁹⁵ See Triple Play in Oklahoma: Foreign National Gets Stay, New Hearing And Clemency, May 14, 2004, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

⁹⁶ See ICJ Decision Prompts Settlement in Arkansas Case, August 2004, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

advisement of consular rights upon incarceration and the provision of lists of imprisoned nationals to consulates upon request.⁹⁷

The most significant reaction was that of the President of the United States. Recognizing the nation's obligation to comply with the ICJ's judgment,⁹⁸ President George Bush issued the following directive:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.⁹⁹

In the next section, I will discuss the legality of the President's order.

VI. LEGALITY

The primary objection that Texas is likely to raise is that the President's order intrudes upon its sovereignty. Under our federal system, it is an essential attribute of the States retained sovereignty that they remain independent and autonomous within their proper sphere of authority. As Justice Scalia has correctly stated:

The great innovation of this design was that 'our citizens would have two political capacities, one state and one federal, each protected from incursion by the other' -- a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.¹⁰⁰

⁹⁷ See New California Law Enhances Prisoners' Consular Rights, October 2004, available at <http://www.deathpenaltyinfo.org/article.php?scid&did=579>.

⁹⁸ U.N. Charter art. 94(1). This Article provides:

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.

⁹⁹ Quoted in Brief for the United States as Amicus Curiae Supporting Respondent in *Medellin v. Dretke*, U.S. Supreme Court Docket no. 04-5928. The brief is available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.html>.

¹⁰⁰ *Printz v. U.S.*, 521 U.S. 898, 920 (1997).

The State's autonomy is greatest when it is defining and enforcing its criminal laws.¹⁰¹

Texas officials will likely argue that the President's directive, ordering reconsideration of cases previously reviewed by Texas courts, requires its judges to violate state law and is therefore an unconstitutional encroachment on Texas' sovereignty. Furthermore, they will argue that even if the Avena decision is binding as federal law, the Supreme Court has resisted federal attempts to conscript state officials into enforcing federal law.¹⁰²

There is one major flaw in this argument. While it is true that the courts have held that federal efforts to compel state executive officers to execute federal law is unconstitutional, the Constitution actually compels state judges to enforce federal proscriptions, insofar as those proscriptions are related to matters appropriate to judicial power.¹⁰³ State judges, for instance, have been required in the past to enforce the fugitive slave laws, conduct naturalization proceedings, resolve controversies between a captain and the crew of his ship and enforce laws requiring the deportation of alien enemies in times of war.¹⁰⁴ Thus, there is historical and legal support for President Bush's order.

¹⁰¹ See, e.g., Gonzales v. Raich, 545 U.S. ____ (2005) (O'Connor, J., dissenting) ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.").

¹⁰² See Printz, supra note 80. (holding that state officials cannot be required to enforce federal law)

¹⁰³ See Printz supra note 80 at 907:

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress – even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States . . . And the Supremacy Clause, Art. VI, cl. 2, announced that “the Laws of the Land; and the Judges in every State shall be bound thereby.” It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called “transitory” causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce.

(emphasis in original)

¹⁰⁴ Id. at 905-06.

Another related objection is likely to be that “by invoking foreign authority to trump state law, the [President] has explicitly ceded American sovereignty to foreign institutions that are not accountable to the American people.”¹⁰⁵ This argument can be countered by the fact that the President and the Senate have the constitutional authority to bind the states to decisions of the ICJ, which they did by ratifying the Vienna Convention and the Optional Protocol.

President Bush has several additional arguments that he can advance in support of his actions. The President will cite his constitutional duty to “take Care that the Laws be faithfully executed.”¹⁰⁶ As a result, he is obligated to enforce the Avena decision since it is federal law under our constitutional system. In addition, the courts have recognized the plenary power of the President to conduct foreign affairs.¹⁰⁷ Pursuant to this power, the courts have been willing to allow Presidents to settle disputes with foreign nations as long as Congress has not taken any action specifically prohibiting the executive from doing so. For instance, in *U.S. v. Belmont*,¹⁰⁸ the President negotiated an agreement with the Soviet government to settle the claims of U.S. citizens whose property in Russia had been nationalized. A lower court held that the part of the agreement requiring a New York banker to release Soviet assets violated the public policy of the State of New York.¹⁰⁹ The Supreme Court held, however, that New York’s public policy had been superseded by the Presidential agreement:

In respect to all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of

¹⁰⁵ Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 1 *Widener L. Rev.* 59, 71 (2004).

¹⁰⁶ U.S. CONST. art. II, § 3.

¹⁰⁷ See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

¹⁰⁸ 301 U.S. 324 (1937).

¹⁰⁹ *Id.* at 327.

New York does not exist. Within 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.¹¹⁰

In *Dames & Moore v. Regan*,¹¹¹ President Carter was allowed to “terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachment and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration,”¹¹² pursuant to an agreement with Iran to obtain the release of U.S. hostages being held by Iranian militants with the support of the Iranian government. After his inauguration, President Reagan reaffirmed President Carter’s order and suspended all legal claims pending in “any court of the United States.”¹¹³ *Dames & Moore* had previously sued Iran to recover money owed to its subsidiary under a service contract and brought an action challenging the validity of the Presidential authority to suspend claims pending in U.S. courts.¹¹⁴ The President’s action was upheld because “the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.”¹¹⁵

¹¹⁰ *Id.* at 331-32.

¹¹¹ 453 U.S. 654 (1981).

¹¹² *Id.* at 665.

¹¹³ *Id.* at 666.

¹¹⁴ *Id.* at 664-65.

¹¹⁵ *Id.* at 688.

In light of the fact that Congress seems to have acquiesced in the President's action by adopting the Optional Protocol, the fact that state courts are obligated to enforce federal law and the deference that courts have traditionally given Presidents in conducting foreign relations, the President's directive ordering the state courts in Texas and elsewhere to review the inmates' convictions appears to be lawful and therefore must be complied with and trumps any state laws which may conflict with the order.

VII. COURT PROCEEDINGS

A. State Court

The 51 Mexican nationals who were the subject of the Avena litigation are at different stages of their appellate proceedings. Some are currently in direct appeal; others are seeking either state or federal habeas relief.¹¹⁶ At least 3 had exhausted their appeals when the Avena decision was handed down.¹¹⁷ Normally, those on direct appeal can raise the Vienna Convention claim in their state habeas proceedings as long as they objected either at pre-trial or at trial. Those who were in state habeas can probably amend their petitions to include the Vienna Convention claim, again, as long as they objected earlier. Those inmates, like Jose Medellin, who have exhausted their state habeas proceedings are precluded from having new claims considered in most instances.¹¹⁸ The President's order, however, directs the state courts in Texas to consider each inmate's Vienna Convention claim irrespective of state law.

It is not clear how Texas and other state courts will respond to the President's order. They could (1) accept that the ICJ's judgment and the President's directive legally

¹¹⁶See Avena, 2004 I.C.J. para. 20.

¹¹⁷ *Id.*

¹¹⁸ See supra note 81.

obligate them to consider each inmate's Vienna Convention claim anew; (2) reject the President's directive and decline to consider the claims of those inmates who have exhausted the state habeas process on the grounds suggested by state officials that neither the ICJ's judgment nor the President's directive is binding on a state court; (3) consider the claims as a matter of comity but dismiss the inmates' claims on procedural grounds, for instance, that the convention does not confer individual rights or that the claim was procedurally defaulted by those inmates who failed to object earlier; (4) accept the ICJ's judgment as a matter of comity and accept the ICJ's conclusion that the convention confers individual rights and that the convention precludes the procedural default doctrine from being invoked to deny consideration of the merits of the inmates' claims.

The Texas courts should consider the cases on the merits in light of the President's order. Once they accept the cases, the courts will have to decide how to resolve the cases. They may take the same position that the Convention does not confer individual rights. By ordering the Texas courts to consider the inmates' claims, the President has obviously taken the opposite position and under the Supremacy clause, his position must prevail. The ICJ also indicated that the procedural default doctrine should not preclude relief and this position should also prevail as a result of the President's order. The ICJ did, however, indicate that the inmates would have to prove that they were prejudiced by the violation of their rights under the Convention in order to prevail. Thus, the Texas courts must determine whether the inmates suffered any prejudice.

The Texas courts should find that any inmate who was offered and rejected a life sentence was prejudiced by the failure to receive consular notification. Angel Francisco Breard's case is a perfect illustration why such inmates were harmed by not having

consular assistance. Breard did not fully understand the differences between the US and Paraguayan systems.¹¹⁹ He was under the impression that a plea bargain would be rejected as they are in Paraguay and that the wiser course of action would be to confess and plead for mercy before the jury because confessions are the preferred course of action in Paraguay.¹²⁰ Had the Paraguayan consulate been notified in a timely manner, they would have explained to him the differences between the two legal systems and would have advised him to accept the offer.¹²¹ Any inmate who rejected a plea offer from state officials would have been adversely affected by the failure to discuss such an offer with consulate officials and should be entitled to relief.

The U.S. Supreme Court has held that it is essential that capital defendants be allowed to present mitigating evidence.¹²² The bulk of a foreign national's mitigating evidence would be in his home country. The Mexican consulate would have been able to assist trial counsel in securing mitigating evidence in Mexico. Therefore, an inmate who secured mitigating evidence after he was sentenced to death with the assistance of the Mexican government should be entitled to relief.

Finally, the courts should treat a confession obtained in violation of the Vienna Convention the same as it would a confession obtained in violation of Miranda.¹²³ The rationale for excluding confessions without providing Miranda warnings is that the interrogation process is often so intimidating to a suspect that the confession may not be reliable.¹²⁴ A confession which is obtained from a foreign national, who is often

¹¹⁹ Supra note 49 at para. 2.11.

¹²⁰ Id. at para. 4.30.

¹²¹ Id. at para. 2.12.

¹²² See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹²³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²⁴ Id. at 467.

unfamiliar with the American legal system is also unreliable. Therefore, any inmate from whom a confession was extracted without providing consular access should have his conviction and sentence reevaluated in the same manner that a Miranda-defective confession would be. Thus, if the admission of the confession harmed the defendant, he should be entitled to a new trial.

Because Texas courts are notorious for not granting relief to death row inmates, it is likely that most, if not all, of these cases will end up in federal court.

B. Federal Court

Once the inmates' Vienna Convention claim has been considered by the state courts, they are allowed to seek relief in federal court. Their federal court proceedings will be governed by the Antiterrorism and Effective Death Penalty Act (AEDPA).¹²⁵

The AEDPA controls the process by which a state prisoner may obtain federal habeas relief. This statute was enacted in 1996 for the purpose of streamlining death penalty and other inmate appeals. Those inmates who are not successful in state court in obtaining relief will have to overcome AEDPA's many hurdles in order to obtain relief in federal court.

The first issue the federal courts will have to resolve is whether the AEDPA is even applicable in these cases in light of the President's order. In *Avena*, the court held that the inmates' Vienna Convention claim had to receive a review and reconsideration "which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."¹²⁶ An argument can be made that, given this holding, the AEDPA

¹²⁵ Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 et seq. (hereinafter "AEDPA")

¹²⁶ *Avena*, 2004 I.C.J. para. 139.

is not applicable since it would not permit full review and reconsideration of the inmates' claim.

As discussed earlier, federal statutes and treaties are both the supreme law of the land and are on equal footing in our constitutional system. In the event of a conflict between the two, the courts have long applied the rule that the one last in date will control the other.¹²⁷ Since the AEDPA was enacted well after the Convention was ratified, the Supreme Court has held that the AEDPA should take precedence in these cases.¹²⁸ The “latest in time” rule has usually been applied, however, where it is clear that Congress intended to overrule the previous enactment. In this case, there is no evidence that Congress even considered and certainly never intended by the enactment of the AEDPA to override the nation’s obligations under the Vienna Convention.¹²⁹ Nevertheless, the federal courts are likely to continue to hold that the AEDPA takes precedence over the Convention and apply it in assessing the inmates’ claim.¹³⁰

Each inmate will have to overcome the provision of the AEDPA that requires that tremendous deference be given to both the factual and legal determinations of state courts. A state court’s factual determinations can be overcome by clear and convincing

¹²⁷ See, e.g., Breard v. Greene, 523 U.S. 371, 376 (1998) (citing Reid v. Covert, 354 U.S. 1, 18 (1957) (“that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, “the one last in date will control the other.”)).

¹²⁸ See Breard v. Greene, 523 U.S. 371, 376 (1998); Medellin v. Dretke, 125 S.Ct. 2088, 2098 (2005).

¹²⁹ In Murray v. Charming Betsey, 6 U.S. (2Cranch) 64 (1804), the Supreme Court announced that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” There is no indication that Congress sought to impede U.S. compliance with the Vienna Convention or any other international obligation when it enacted the AEDPA. See United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988) (antiterrorism statute construed by court to avoid placing U.S. in violation of international law, upon finding that Congress did not know that the statute would be incompatible with U.S. obligations.).

¹³⁰ *Supra* note 127.

evidence to the contrary.¹³¹ A state court's legal conclusions can be overturned only if unreasonable or contrary to clearly established federal law.¹³² A decision that conflicts with federal law is not entitled to deference. Should the state courts take the position some state courts have taken,¹³³ that the Convention does not confer individual rights, such a decision would be contrary to the President's order and not entitled to any deference. If the state courts determine that the inmates were not prejudiced by the failure to receive notification, they would have the difficult task of proving not only that the decision was incorrect but also unreasonable.¹³⁴

As a result of the AEDPA, it is going to be a challenge for the Mexican inmates to obtain federal habeas relief in the event that their claims are denied by the state courts.

VIII. CONCLUSION

The United States has several interests at stake in these cases. First, and most obviously, every nation, especially the U.S., has an interest in nations complying with international law. More specifically, given the frequency with which Americans travel abroad, full compliance with the Vienna Convention is in the U.S. interest.¹³⁵ Second, as

¹³¹ See AEDPA, 28 U.S.C. § 2254(d)(2).

¹³²¹³² See AEDPA, 28 U.S.C. § 2254(d)(1).

¹³³ See *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998), cert. denied, 527 U.S. 1038 (1999); *Cauthern v. State*, 145 S.W.3d 571, 626 (Tenn. Crim. App. 2004).

¹³⁴ See *Id.* at 411-13. (. . . an unreasonable application of federal law is different from an incorrect or erroneous application of federal law.).

¹³⁵ Stephen M. Schwebel, a judge on the World Court from 1981-200 and its president from 1997-2000 and an American, has declared:

No country has more at stake in performance under the [Vienna] treaty than does the U.S., many thousands of whose citizens travel the world. When Americans abroad are arrested, the importance of assuring that they can contact a U.S. consul in order to communicate with their families and benefit by the assistance of legal counsel is obvious. But it is reciprocal. If police and courts in the U.S. routinely ignore their obligations under the convention, how can it be expected that U.S. nationals will enjoy its protection?

Stephen M. Schwebel, Letter to the Editor, *Why We Need the International Court of Justice*, *Wall St. J.*, Apr. 14, 2004, at A15.

the most frequent litigator before the ICJ,¹³⁶ high level and uniform compliance with ICJ decisions is essential and this case provides the U.S. with an opportunity to stress the importance of compliance.¹³⁷ Finally, the United States has an interest in a strong relationship with Mexico.¹³⁸ The two nations share a border, there is a strong economic relationship between the two nations, as evidenced by the North American Free Trade Agreement, and Mexico's cooperation is essential to U.S. efforts to fight terrorism, curtail illegal immigration and combat drug trafficking. Therefore, the failure to fully comply with the Avena decision could severely damage U.S.-Mexican relations.

President Bush responded appropriately to the Avena decision. This article has demonstrated that he had the authority to issue the directive that he issued. Given the importance of this case to the U.S. and Mexico, should the state courts refuse to comply with his order, he should seek to force their compliance. Compliance, however, does not mean that the inmates' long journey through the U.S. and international court systems will ultimately be successful.

¹³⁶ The United States has been involved in more ICJ cases than any other state. For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

¹³⁷ About 80% of the ICJ's decisions have been complied with. See Colter Paulson, Compliance with Final Judgments of the International Court of Justice, Since 1987, 98 Am. J. Int'l. L. 434 (2004).

¹³⁸ For a discussion of U.S. relations with Mexico, see Valencia, et al., Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas' Independence from the World, 23 Yale L. & Pol'y Rev. 455 (2005).