Santa Clara University School of Law

Santa Clara Law Review

Volume 45 | Number 4 Article 8

1-1-2005

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THE VIENNA CONVENTION ON CONSULAR RELATIONS: QUO VADIS, AMERICA?

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I. INTRODUCTION

The application of international law, and specifically of International Court of Justice ("ICJ")[1] decisions, in U.S. domestic courts is a contentious issue in the United States. More than thirty-five years after the ratification of the Vienna Convention on Consular Relations ("Vienna Convention" or "Convention"),[2] a multilateral treaty enacted to protect foreign nationals who have been detained by law enforcement officials in a signatory nation,[3] and the Optional Protocol on Disputes, a treaty accompanying the Convention that gives the ICJ compulsory jurisdiction over "disputes arising out of the interpretation or application of the Convention,"[4] the United States government remains irresolute about the applicability of these treaties in the U.S. domestic court system.

The uncertainty persists despite two ICJ decisions finding that the ICJ has jurisdiction over Vienna Convention claims, as proscribed by the Optional Protocol, and that the

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1. The International Court of Justice ("ICJ") is the principal judiciary organ for the United Nations. The ICJ, which replaced the Permanent Court of International Justice in 1946, serves two functions: (1) to settle legal disputes submitted to it by States by applying international law; and (2) to provide advisory opinions on legal questions presented by approved international organs and agencies. INTERNATIONAL COURT OF JUSTICE, GENERAL INFORMATION: THE COURT AT A GLANCE, *at* http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html (last visited Aug. 7, 2005).

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

3. *Id.*

4. Vienna Convention, 21 U.S.T. at 326, 596 U.N.T.S. at 428.

United States violated its duties under the Convention.[5] These ICJ decisions held that the U.S. habeas corpus procedure violates the Vienna Convention when it prevents foreign nationals from having their U.S. convictions and sentences reviewed and reconsidered in light of alleged Convention violations.[6] The U.S. Supreme Court's current position on this issue, based on its latest case ruling, is that banning such review, through the application of state procedural defaults, is appropriate. Thus, the ICJ decisions conflict with the law of the United States.

Recent developments in Vienna Convention law[7] necessitated a response and a clarification of the law by the U.S. government. The U.S. Supreme Court responded by granting certiorari in *Medellin v. Dretke*,[8] in which the issue was the applicability, in U.S. domestic courts, of the ICJ's decision in *Case Concerning Avena and Other Mexican Nationals* ("*Avena*").[9] The Court heard oral arguments on March 28, 2005.

On May 23, 2005, the U.S. Supreme Court, in a 5-4 decision, dismissed as improvidently granted the writ of certiorari in *Medellin*.[10] The Court's ruling was based on the fact that Medellin had filed a successive state application for a writ of habeas corpus and that the state court "may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ required" and which was sought by Medellin on his writ to the U.S. Supreme Court.[11] An insightful footnote included by the Court is that:

> Medellin, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court

5. *See* LaGrand (FRG v. U.S.), 2001 I.C.J. 466 (June 27) *at* http://www.icj-cij.org (last visited Aug. 7, 2005); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

6. *See LaGrand*, 2001 I.C.J. 466; *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 128.

7. *See* discussion *infra* Part II.D.

8. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

9. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 128. *Avena* held that the United States violated its obligations under the Vienna Convention. *See id. See also* discussion *infra* Part II.D.

10. Medellin v. Dretke, 125 S. Ct. 2088, 2089 (2005).

11. *Id.*

> would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U.S.*), 2004 I.C.J. No. 128 (Judgment of Mar. 31), unencumbered by the issues that arise from the procedural posture of this action.[12]

While a future response by the U.S. Supreme Court in *Medellin* may aid in clarifying the issues, this recent dismissal does not address the problems regarding Vienna Convention law that face the United States.[13] This comment examines the issues confronting the United States,and proposes a plan of action to clarify and resolve them.

Part II of this comment provides a background of Article 36 of the Vienna Convention,[14] the writ of habeas corpus,[15] U.S. and ICJ cases presenting Vienna Convention claims,[16] and recent developments in Vienna Convention law, including an overview of *Medellin* and governmental reactions to this case.[17] Part III identifies the problems related to (1) non-compliance with the Vienna Convention and ICJ decisions, (2) allowing the conflict between ICJ and U.S. Supreme Court holdings to continue, and (3) recent U.S. governmental actions.[18] Part IV analyzes the non-compliance of the United States and the conflict that has consequently arisen.[19] Part IV also evaluates the measures the government has implemented.[20] Part V establishes a plan of action for the United States to undertake with respect to clarifying its domestic policies and regaining the confidence and respect of the international legal community.[21]

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12. *Id.* at 2090 n.1.

13. As of the time this comment was submitted to publication, this was the latest development. However, since the area of law is ever-changing, there may be further advancements in the law by the time the article is published.

14. *See* discussion *infra* Part II.A.

15. *See* discussion *infra* Part II.B.

16. *See* discussion *infra* Part II.C.

17. *See* discussion *infra* Part II.D.

18. *See* discussion *infra* Part III.

19. *See* discussion *infra* Part IV.

20. *See* discussion *infra* Part IV.

21. *See* discussion *infra* Part V.

II. BACKGROUND

A. *The Vienna Convention on Consular Relations*

The Vienna Convention on Consular Relations is a self-executing treaty[22] drafted in 1963 in Vienna and entered into force in 1969.[23] The U.S. Senate ratified both this treaty and the accompanying Optional Protocol on Disputes.[24] The Optional Protocol, also a treaty, expands the rights and obligations of Vienna Convention signatory parties by giving the ICJ compulsory jurisdiction to handle claims that require interpretation or application of the Convention.[25] Since the Optional Protocol is a treaty, it is binding upon all signatory parties, including the United States.[26]

Article 36, paragraph one, of the Vienna Convention outlines the treaty obligations for treatment of detained foreign nationals. These obligations include: (1) the detaining authority must notify the detained foreign national of his right to consular assistance, and if he requests it, the authorities must inform, without delay, the consular of the foreign national's state; (2) consular officers must be permitted to communicate with and have access to their nationals, and the nationals must have the same privilege with respect to communication and access to their consular officers; and (3)

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22. A self-executing treaty does not require domestic action in order for it to become domestically enforceable. Becoming a party initiates the treaty and its accompanying obligations. WIKIPEDIA: THE FREE ENCYCLOPEDIA, TREATY *at* http://en.wikipedia.org/wiki/Treaty#Execution_and_implementation (last modified May 15, 2005).

23. *See* Vienna Convention, *supra* note 2, art. 36(1), 21 U.S.T. at 100, 596 U.N.T.S. at 293.

24. Vienna Convention, 21 U.S.T. at 326, 596 U.N.T.S. at 428.

25. *See* Vienna Convention, 21 U.S.T. at 326-27, 596 U.N.T.S. at 428-29. Since it is an optional protocol, signatories to the Vienna Convention treaty may elect whether to ratify it in addition to the principal treaty.

26. Treaties are the "supreme Law of the Land" in the United States and, therefore, are superceded in authority only by the U.S. Constitution and federal statutes. U.S. CONST. art. VI., cl. 2. The Supremacy Clause in the U.S. Constitution states the following:

> 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

the detaining authority must allow the consulate to visit and provide counsel for the detained foreign national.[27] Paragraph two of Article 36 requires that the domestic laws of member states give full effect, without hindrance, to paragraph one of the Article.[28] In other words, domestic laws and procedures may not preclude application of the foreign nationals' rights and remedies as afforded by the treaty.

B. The Writ of Habeas Corpus and the Procedural Default Doctrine

A petition for a writ of habeas corpus is a civil action requiring the respondent, usually the detaining official, to justify withholding the petitioner's liberty.[29] The petitioner must file the federal habeas petition within one year of exhausting direct appeals, and the claim must allege a violation of constitutional, federal, or treaty law.[30] The petitioner must also exhaust all state remedies, including state habeas actions, before a federal habeas petition can be granted.[31]

A federal district court's review of a state prisoner's habeas petition is a review of the lawfulness of the petitioner's custody, and not a review of the state court's judgment.[32] The independent and adequate state ground doctrine[33] may bar

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27. *See id.*

28. *See id.* Paragraph two states:

> [t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id.

29. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 198 (Lexis Nexis 2004).

30. *Id.* at 200-01.

31. 28 U.S.C. § 2254(b)(1) (2000); *see also* CARTER & KREITZBERG, *supra* note 29, at 201-02. The requirement that the petitioner exhaust state remedies is obligatory so that the role of state courts in the enforcement of federal law is protected. Additionally, it avoids any disruption of state judicial proceedings that might occur if the federal court intervenes, preventing the state court from correcting any potential errors. *See* Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973).

32. *See* Fay v. Noia, 372 U.S. 391, 430-31 (1963) (deciding the relationship between state procedural default rules and federal habeas reviews).

33. Coleman v. Thompson, 501 U.S. 722, 729 (1991). The independent and adequate state ground doctrine states that federal courts will not review questions of federal law that have been decided by a state court when the court's decision rests on state law, procedural or substantive, which is independent from

federal habeas review of a prisoner's habeas claim if a state court's decision not to address a prisoner's federal claims is based on the prisoner's failure to satisfy a state procedural requirement.[34] The purpose of the independent and adequate state ground doctrine is "grounded in concerns of comity[35] and federalism" and serves to prevent federal courts from taking action in a matter when the state court has not had such an opportunity on direct appeal.[36] A petitioner, therefore, may have exhausted all direct appeals and habeas review in state court and still have the claim denied consideration in a federal habeas proceeding if the petitioner procedurally defaults in state court. Procedural default may occur if the petitioner fails to raise a constitutional, federal, or treaty law claim in state court; and it may bar the petitioner from raising the claim in federal court.[37] Federal habeas review will be barred unless the petitioner can prove cause and actual prejudice arising from the alleged violation of federal law, or demonstrate that a fundamental miscarriage of justice will result if the claim is barred.[38]

A petitioner who has met the statute of limitations, exhausted state remedies, and avoided procedural default may ask for an evidentiary hearing, as opposed to having the fed-

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the federal question presented adequate to support the court's judgment. *Id.*

34. *See id.* at 729-31.

35. *Id.* at 730. In this instance, comity refers to the federal courts giving full effect to state judgments without reexamination of the merits of the decision, as long as the court was impartial and satisfied due process requirements. This comment also refers to comity of foreign judgments, specifically ICJ decisions. These comity references follow the definition that a foreign judgment is given effect without reexamination of the merits of the decision, provided that the court rendering the judgment had jurisdiction, the court was impartial, its procedures satisfied due process, and there is no "special reason why the comity of this nation should not allow it full effect." Hilton v. Guyot, 159 U.S. 113, 202 (1895).

36. *Coleman*, 501 U.S. at 730-31.

37. *See* CARTER & KREITZBERG, *supra* note 29, at 202.

38. *Coleman*, 501 U.S. at 750. Cause is a high standard to meet and often premised on ineffectiveness of counsel. Vienna Convention allegations not presented on direct review are often missed because of the attorney's failure to recognize the existence of the treaty right. However, this ignorance does not constitute cause because the existence of the treaty right is readily accessible through research. *See* Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997). If cause is not met, it is irrelevant whether there is prejudice. The second exception, fundamental miscarriage of justice, also has a high standard because it requires the petitioner to show "innocence of the crime" by preponderance of the evidence. *See* CARTER & KREITZBERG, *supra* note 29, at 203-04.

eral courts decide the merits based on the record.[39] Hearings are either mandatory because of a failure to receive a "full and fair" hearing, subject to the discretion of the federal court, or forbidden.[40] A petitioner is barred from receiving an evidentiary hearing in certain cases, such as:

> [i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (A) the claim relies on—(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[41]

Therefore, if a petitioner fails to develop a factual basis for a Vienna Convention claim during state proceedings, the petitioner will be denied the evidentiary hearing. Neither of the two exceptions to the bar of an evidentiary hearing can be satisfied in the Vienna Convention context. First, Vienna Convention rights are not constitutional law (and thus not new constitutional law) and due diligence would lead to the discovery of the factual predicate.[42] Failure by counsel to discover the right or to develop the factual record does not remove the bar.[43] Second, even if the petitioner could satisfy one of the factors, it would be very difficult to prove that if the petitioner had been afforded his Convention rights, he would have been found innocent.

If the federal district court denies a petition for a writ of habeas corpus, the petitioner must receive a certificate of appealability ("COA") from the circuit court in order for the court of appeals to hear the case.[44] A COA will only be granted if the "applicant has made a substantial showing of the denial of a constitutional right."[45] This standard can be

39. *Id.* at 204.
40. *See id.*
41. *See* 28 U.S.C. § 2254(e)(2) (2000).
42. *See* CARTER & KREITZBERG, *supra* note 29, at 205.
43. *See id.*
44. *See* 28 U.S.C. § 2253(c)(2).
45. *Id.*

met if it is shown that "jurists of reason" could disagree with the resolution of the constitutional claims, by the district court, or that jurists could decide that the issues presented are worthy of further review.[46]

Following the federal habeas doctrine, the U.S. Supreme Court, in three cases alleging Vienna Convention violations, denied review of or affirmed lower courts' decisions, in which petitions for writs of habeas corpus were denied based on the application procedural default doctrine.[47] Recently, the Court heard oral arguments in *Medellin* about whether the Fifth Circuit's denial of a COA was appropriate in light of the ICJ decision, *Avena*.

C. History of Vienna Convention Cases: Domestic and International

The United States has repeatedly violated its Vienna Convention obligations, causing significant conflict between itself and other treaty members. Since 1998, Paraguay, Germany, and Mexico brought cases to the ICJ alleging U.S. violations of Article 36 of the Vienna Convention.[48] The allegations include the United States' failure to inform foreign nationals, without delay, of their right to consular assistance, failure to provide adequate review and reconsideration of Vienna Convention violation claims, and defiance of ICJ provisional orders to stay executions in pending ICJ cases.[49] *Vi-*

46. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

47. *See* Breard v. Greene, 523 U.S. 371 (1998); LaGrand v. Arizona, 526 U.S. 1001 (1999); Torres v. Mullin, 540 U.S. 1035 (2003).

48. *See* Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) *at* http://www.icj-cij.org (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany (FRG v. U.S.) (Mar. 2, 1999) *at* http://www.icj-cij.org (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of Mexico, (Mex. v. U.S.), (Jan. 9, 2003) *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited Aug. 7, 2005).

49. *See* Application Instituting Proceedings Submitted by the Government of Mexico, (Mex. v. U.S.), (Jan. 9, 2003) *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) *at* http://www.icj-cij.org (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany (FRG v. U.S.) (Mar. 2, 1999) *at* http://www.icj-cij.org (last visited Aug. 7, 2005). Other violations include: fail-

enna Convention on Consular Relations ("Paraguay Case");[50] *The LaGrand Case ("La Grand")*;[51] and *Avena*[52] are the three ICJ cases that parallel the U.S. domestic case law in which Vienna Convention violations have been raised, some of which include *Breard v. Greene*;[53] *LaGrand v. Arizona*;[54] *Torres v. Mullin*;[55] and *Medellin v. Dretke*.[56]

1. Breard v. Greene *and* Paraguay Case

The U.S. Supreme Court, in *Breard*, established that the procedural default doctrine is applicable to claims of Vienna Convention violations.[57] *Breard* concerns Paraguayan national Angel Francisco Breard who was sentenced to death for attempted rape and capital murder.[58] The conviction and sentence were affirmed by the Supreme Court of Virginia[59] and the U.S. Supreme Court denied the writ for a petition of certiorari to review the conviction.[60]

Following all conviction appeals, Breard filed a motion for habeas relief,[61] contending that because his Vienna Convention rights were violated—law enforcement failed to inform him of his right to consular assistance upon his arrest—

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ure to inform consular authorities about the detention of their nationals and denial to the consular authorities of the right for them to provide counsel for their nationals. *See* Application Instituting Proceedings Submitted by the Government of Mexico, (Mex. v. U.S.), (Jan. 9, 2003) *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) *at* http://www.icj-cij.org (last visited Aug. 7, 2005); Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany (FRG v. U.S.) (Mar. 2, 1999) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

50. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 246 (Apr. 9) *available at* http://www.icj-cij.org (last visited Aug. 7, 2005), *dismissed* 1999 I.C.J. 221 (Nov. 10, 1998) *available at* http://www.icj-cij.org (last visited Aug. 7, 2005).

51. LaGrand (FRG v. U.S.), 2001 I.C.J. 466 (June 27) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

52. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

53. 523 U.S. 371 (1998).

54. 526 U.S. 1001 (1999).

55. 540 U.S. 1035 (2003).

56. 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

57. *See Breard*, 523 U.S. at 375-77.

58. *See id.* at 372-73.

59. *See id.* at 373.

60. *Id.*

61. *See id.*

the conviction and sentence should be overturned.[62] The Federal District Court denied relief, holding that Breard procedurally defaulted by not raising the violation in state court.[63] The Fourth Circuit affirmed.[64]

Breard petitioned the U.S. Supreme Court for an original writ of habeas corpus and for a stay application, again claiming Vienna Convention violations.[65] The Court upheld the lower courts' decisions that Breard procedurally defaulted and it denied the petition,[66] thereby establishing the applicability of the procedural default doctrine to ban a habeas corpus review when the alleged Convention violation is presented for the first time in federal court, after state appeals had been exhausted.[67]

Before Breard applied for the writ of certiorari to the U.S. Supreme Court, the Republic of Paraguay initiated proceedings with the ICJ against the United States.[68] The claim alleged that the United States failed to notify Breard of his right to consular assistance upon his arrest.[69] Six days after the case was filed, the ICJ ordered that provisional measures be taken by the United States to ensure a stay of Breard's execution until a final decision by the ICJ.[70] After the provisional measures order and before oral arguments in the ICJ

62. *See id.* at 373-74.

63. *See Breard*, 523 U.S. at 374. Even if there had been no procedural default, the District Court ruled that "Breard could not demonstrate cause and prejudice for this default," the requirement to procedural default rule exception. *Id.* at 373.

64. *See id.* at 374.

65. *Id.*

66. *See id.* at 375.

67. *See id.* at 373.

68. *See* Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

69. *See Breard*, 523 U.S. at 374; Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

70. *See Vienna Convention on Consular Relations*, 1998 I.C.J. 246. The Court unanimously ruled that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." *Id.* at 258. Article 41 of the ICJ Statute gives the ICJ the authority to issue such provisional measures. Statute of the International Court of Justice, Article 41, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Aug. 7, 2005).

case began, the U.S. Supreme Court denied Breard's application for a writ.[71] Then, on April 14, 1998, before the ICJ could render a decision and in violation of the ICJ provisional measures, the Commonwealth of Virginia executed Breard.[72]

Following a U.S. apology for the Vienna Convention violation,[73] Paraguay requested a discontinuance of the case, which was granted by the ICJ.[74] Since the case was dismissed, the ICJ was unable to address whether the United States' application of the procedural default rule that bans review and reconsideration of Vienna Convention violations is valid. Additionally, because the case was dismissed, the United States' defiance of the provisional measures order was not brought to the ICJ.

2. LaGrand v. Arizona *and* Federal Republic of Germany v. United States *("LaGrand")*

German nationals Walter and Karl LaGrand were convicted and sentenced to death for armed robbery resulting in death.[75] Only after their convictions did they discover, through sources other than law enforcement, their right to consular assistance.[76] After contacting the German consulate, the brothers appealed their sentences and convictions based on the failure of the detaining officials to inform them of their rights under the Vienna Convention, which they claimed resulted in a weaker defense than if they would have received assistance from the German consulate.[77] U.S. federal courts again applied the procedural default doctrine and rejected their appeals.[78]

Karl LaGrand, who was scheduled to be executed first,

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71. *See Breard*, 523 U.S. at 378.

72. *See* AMNESTY INTERNATIONAL, THE EXECUTION OF ANGEL BREARD: APOLOGIES ARE NOT ENOUGH, May 1, 1998, *at* http://web.amnesty.org/library/Index/engAMR510271998 (last visited Aug. 7, 2005).

73. *See* William J. Aceves, *Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 927 (1999).

74. *See Vienna Convention on Consular Relations*, 1998 I.C.J. 246.

75. *See* WIKIPEDIA: THE FREE ENCYCLOPEDIA, LAGRAND CASE, *at* http://en.wikipedia.org/wiki/LaGrand_case (last modified May 2, 2003).

76. *See id.*

77. *See id.*

78. *See id.*

was executed in February 1999.[79] Only hours before Walter's scheduled execution date, the Federal Republic of Germany ("FRG") filed the second Vienna Convention case with the ICJ against the United States on Walter's behalf.[80] A request for provisional measures to stay the execution of Walter LaGrand accompanied FRG's claim; the ICJ unanimously granted this request.[81]

FRG attempted to enforce the ICJ's stay of execution, but the U.S. government did not agree with the ICJ's issuance of provisional measures. After the measures were granted, the FRG and LaGrand filed applications with the U.S. Supreme Court.[82] The first application, filed by FRG, requested a temporary restraining order or preliminary injunction against the United States and the governor of the State of Arizona to not execute LaGrand.[83] The Court denied this application, ruling that in the claim against Arizona the Court did not have jurisdiction because of the Eleventh Amendment's prohibition on federal courts from hearing lawsuits against a U.S. state when filed by a foreign state.[84] With regard to the claim against the United States, the Court ruled that the United States had not given up its sovereign immunity and that Article III, section 2, clause 2 did not conclusively allow for an action to prevent the execution of an individual who is neither an ambassador nor counsel.[85] Thus, the FRG exhausted its options. Simultaneously, LaGrand filed an application against Arizona for a stay of execution and for a writ of cer-

79. *See id.*

80. *See* Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany (FRG v. U.S.) (Mar. 2, 1999) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

81. *See* LaGrand (FRG v. U.S.), 1999 I.C.J. 9, 16 (June 27). The ICJ unanimously indicated the following provisional measures:

> *(a)* The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> *(b)* The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

Id.

82. *See* Federal Republic of Germany v. United States, 526 U.S. 111 (1999); LaGrand v. Arizona, 526 U.S. 1001 (1999).

83. *See Federal Republic of Germany*, 526 U.S. at 111.

84. *See id.* at 112; *see also* WIKIPEDIA, *supra* note 75.

85. *See Federal Republic of Germany*, 526 U.S. at 112.

tiorari, but this was also denied.[86]

The U.S. Supreme Court was not the only government entity that refused to acknowledge the validity of provisional measures issued by the ICJ. The U.S. Solicitor-General, in response to the ICJ's order, informed the Court that the ICJ's ruling was not legally binding,[87] and the U.S. Department of State notified the governor of Arizona of the provisional measures, but did not provide any comment on them.[88] The Arizona clemency board, however, recommended a stay of LaGrand's execution pending a resolution of the ICJ case, but this recommendation was disregarded and Walter LaGrand was executed.[89] After LaGrand's execution, Germany adjusted its complaint with the ICJ by adding the claim of U.S. non-observance of the provisional order.[90]

Unlike in *Paraguay Case*, *LaGrand* was fully adjudicated and resulted in an important ICJ ruling. On June 27, 2001, the ICJ held: (1) the ICJ had jurisdiction to hear the case based on Article 1 of the Optional Protocol;[91] (2) the United States breached LaGrand's Vienna Convention rights;[92] (3) the United States breached its obligation to abide by the provisional measures, therefore, declaring the ICJ provisional measures binding;[93] and (4) the United States' application of the procedural default doctrine, which barred review and reconsideration of LaGrand's claim, was a violation of Article 36, paragraph two of the Vienna Convention.[94]

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86. *See LaGrand*, 526 U.S. at 1001.

87. *See* WIKIPEDIA, *supra* note 75.

88. *Id.*

89. *Id.* Walter LaGrand was executed on on March 3, 1999. *Id.*

90. *See* Memorial of the Federal Republic of Germany (FRG v. U.S.) (Sept. 16, 1999) *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

91. *See LaGrand*, 2001 I.C.J. at 514.

92. *Id.* at 515.

93. *Id.* at 516. The vote was thirteen to two. The judges ruling in favor of this holding were President Guilaume, Vice-President Shi, and Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, and Buergenthal. The judges ruling against this holding were Judges Oda and Parra-Aranguren. *Id.*

94. *Id.* The judges ruling in favor of this holding were President Guilaume, Vice-President Shi, and Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, and Parra-Aranguren. The only judge ruling against this holding was Judge Oda. *Id.*

> [T]he I.C.J. ruling conclusively determine[d] that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts . . . have left open . . . . It also suggests

Although the ICJ found that the procedural default doctrine, as applied, frustrated the purpose of Article 36,[95] and therefore was a violation of the Vienna Convention, it did not find the doctrine inherently contradictory to the Convention. Instead, the Court stated that the violation "was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such."[96] In essence, the application of the procedural default doctrine may be permissibly applied to Vienna Convention cases as long as it does not prevent the full effect of the purpose of the treaty.[97] Since the procedural default doctrine as applied by the United States was not giving full effect to the Article, the ICJ required the United States, through a method of its own selection, to implement measures to ensure that the rights of foreign nationals are protected and that review and reconsideration of convictions and sentences takes into account alleged Vienna Convention violations.[98] Since the ICJ does not operate under the principles of *stare decisis*,[99] *LaGrand* is only applicable to

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that courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits.

Contemporary Practice of the United States Relating to International Law: U.S. Implementation of ICJ's LaGrand Decision, 97 AM. J. INT'L L. 180, 181 (Sean D. Murphy ed., 2003) (2003).

95. The purpose of Article 36 is frustrated if a process does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State.

Press Release, International Court of Justice, LaGrand Case (Germany v. United States of America): Summary of the Judgment of 27 June 2001 (June 27, 2001), *at* http://www.icj-cij.org (last visited Aug. 7, 2005).

96. *LaGrand*, 2001 I.C.J. at 513.

97. *See* Vienna Convention, *supra* note 2, art. 36(2).

98. *See LaGrand*, 2001 I.C.J. at 516. The judges ruling in favor of this holding were President Guilaume, Vice-President Shi, and Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal and Parra-Aranguren. The only judge ruling against this holding was Judge Oda. *See id.* The specific language of the ruling is as follows:

In the case of such a conviction and sentence, 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. This obligation can be carried out in various ways. The choice of means must be left to the United States.

Id. at 514.

99. Stare decisis is a "doctrine of precedent" in which a court must follow its

the specific facts of that case and not transferable to any other alleged cases of Vienna Convention violations.[100]

3. Torres v. Mullin *and Mexico's Petition to the ICJ in* Case Concerning Avena and Other Mexican Nationals *("Avena")*

Osvaldo Torres is a Mexican national convicted of murder and sentenced to death.[101] After Torres exhausted his post-conviction remedies, he petitioned for habeas corpus relief in federal court.[102] The Federal District Court applied the procedural default doctrine to deny Torres's writ for a COA because Torres did not raise his Vienna Convention claim in state court.[103] The court also found that even if there was no procedural default, Torres did not show that he had been prejudiced, as required to remove the bar to an evidentiary hearing.[104] The Tenth Circuit affirmed this decision.[105]

Torres next petitioned the U.S. Supreme Court for a writ of certiorari,[106] requesting that the Court review the case in light of the conflict between the U.S. Supreme Court's ruling in *Breard* and the ICJ's ruling in *LaGrand*.[107] As discussed above, *Breard* held that the procedural default doctrine is applicable in Vienna Convention cases, and *LaGrand* stated that the United States' process of review and reconsideration

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earlier judicial decision when the same issues again are presented to the court. BLACK'S LAW DICTIONARY 1143 (8th ed. 2004). The ICJ Statute states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, Article 59, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Aug. 7, 2005).

100. *See* Statute of the International Court of Justice, Article 59, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Aug. 7, 2005). Therefore, future cases brought against the United States claiming that the procedural default doctrine as applied violated a foreign national's Convention rights will not be automatically decided in the petitioner's favor. The ICJ must again look at the facts and issue presented and make a new decision.

101. *See* Torres v. United States, 540 U.S. 1035, 1037 (Stevens, J., dissenting).

102. *Id.* at 1037-38.

103. *Id.* at 1038.

104. *Id.*

105. *See id.*

106. *See id.*

107. *See Torres*, 540 U.S. at 1038 (Stevens, J., dissenting).

was insufficient when the procedural default doctrine did not give the petitioner full opportunity to have his Vienna Convention claims heard.[108] Torres's petition gave the Court the opportunity to reconcile this conflict.

Before the U.S. Supreme Court ruled on the petition for a writ of certiorari, Mexico filed the latest of the Vienna Convention ICJ cases, *Avena*, against the United States for alleged violations of Article 36 of the Convention.[109] The allegations concerned the rights of fifty-four Mexican nationals, which included Torres and another U.S. Supreme Court petitioner, Medellin.[110] Mexico submitted a request to the U.S. Supreme Court asking the Court to defer its decision on whether to grant certiorari in Torres's case until the ICJ had ruled on the ICJ case.[111] However, before oral arguments began at the ICJ, the U.S. Supreme Court denied Torres's application for a writ of certiorari.[112]

Justice Breyer strongly dissented in the denial of certiorari.[113] Breyer's argument, like Mexico's, was that the decision to grant or deny certiorari should be made only after the ICJ ruled in the case.[114] Additionally, before deciding to deny certiorari, Breyer wanted further briefing on the precise international legal issues of the case.[115]

Despite the denial of certiorari, the case before the ICJ continued. Mexico's petition included a request for provisional measures to stay the executions of all the Mexican nationals represented in the claim; the ICJ, however, only granted measures with respect to the three Mexican nationals

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108. *Breard*, 523 U.S. at 375-77; *LaGrand*, 2001 I.C.J. at 466.

109. *See* Application Instituting Proceedings Submitted by the Government of Mexico, (Mex. v. U.S.), (Jan. 9, 2003) *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited Aug. 7, 2005).

110. *See id.*; Press Release, International Court of Justice, Mexico Brings a Case Against the Unites States of America and Requests the Indication of Provisional Measures (Jan. 10, 2003), *at* http://www.ICJ-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-01_20030110.htm (last visited Aug. 7, 2005). The number of Mexican nationals was later dropped to fifty-two after the State of Illinois pardoned all death row prisoners. *See id.*

111. *Torres*, 540 U.S. at 1038 (Stevens, J., dissenting).

112. *See id.*

113. *See id.* at 1037 (Breyer, J., dissenting).

114. *See id.* at 1041 (Breyer, J., dissenting). Justice Breyer wanted to wait for an ICJ decision, because depending on how the ICJ ruled on the case, he might have decided to grant certiorari. *Id.*

115. *See id.*

that faced execution in the imminent future, including Torres.[116] Unlike Breard and LaGrand, none of the three protected nationals, or any of the nationals listed in the *Avena* case, were executed pending the ICJ's decision. Oklahoma agreed to a temporary stay of execution for the protected foreign national on its death row, Torres.[117] Texas, however, announced that it would execute the protected nationals on its death row at the appropriate time, despite the provisional measures.[118] Thus, the two Mexican nationals on death row in Texas, Fierro and Moreno, survived only because it was not the appropriate execution time, and not because Texas believed the measures to be binding or subject to comity to the ICJ. In briefs written in opposition to other Vienna Convention cases, the federal government also expressly denied the authority of the ICJ to issue binding measures on member parties.[119] In these opposition briefs, the United States argued that "the ICJ does not exercise any judicial power of the United States, which is vested exclusively by the Constitution of the United States federal courts."[120] The United States' expressed concern was with "interfere[ing] with [the states']

116. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Order, Request For the Indication of Provisional Measures, Feb. 5, 2003, 42 I.L.M. 309 *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF, ¶ 59 (last visited Aug. 7, 2005). The Court, in a unanimous decision,

> *[i]ndicate[d]* the following provisional measures: (a) The United States of America shall take all measures necessary to ensure that Mr. Cesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings; (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

Id.

117. INTERNATIONAL JUSTICE PROJECT, OKLAHOMA DELAYS DECISION ON WORLD COURT STAY, *at* http://www.internationaljusticeproject.org/briefsWorldNews.cfm#oklaWorld (last visited Aug. 7, 2005).

118. *See* C. Bryson Hull, *Texas Snubs World Court on Execution Stays*, REUTERS, Feb. 6, 2004, http://www.cjcj.org/press/texas_snubs.html (last visited Aug. 7, 2005).

119. *See Torres*, 540 U.S. at 1041 (Stevens, J., dissenting). Opposition briefs were filed in two Vienna Convention cases, *Ortiz v. United States*, No. 02-11188 and *Sinesterra v. United States*, No. 03-5286.

120. Justice Breyer, in his dissenting opinion in *Torres*, noted that this statement fails to look at the possible authority granted to the ICJ by the United States by the ratification of the Optional Protocol. *See Torres*, 540 U.S. at 1041 (Breyer, J., dissenting).

sovereign right to administer . . . criminal justice system."[121] The *Avena* case continued to a resolution.

D. Recent Developments

1. ICJ's Holding in Avena

In March 2004, the ICJ, for the second time, ruled against the United States, finding that it violated its obligations under the Vienna Convention with respect to the fifty-one Mexican nationals referred to in *Avena* by not informing them of their right to consular assistance, among other violations.[122] The appropriate reparation for these violations requires the United States, by means of its own choosing, to review and reconsider the convictions and sentences of the Mexican nationals named in *Avena*,[123] and ascertain whether the Article 36 violation actually prejudiced the defendant in the criminal justice proceedings.[124] According to the ICJ, an adequate review and reconsideration process must guarantee

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121. *See* Hull, *supra* note 118.

122. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 128, ¶ 153(4). In a vote of fourteen to one, the ICJ found

> that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106(1) above of their rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of American breached the obligation incumbent upon it under that sub-paragraph.

Id.

For other violations, see *id.* at ¶ 153(5)-(8). In another vote of fourteen to one, the court held that

> by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred in paragraph 106(2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of American breached the obligation incumbent upon it under Article 36, paragraph 1 (b).

Id. at ¶ 153(5). The ICJ also

> [found] that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. Cesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligation incumbent upon it under Article 36, paragraph 2, of the Convention.

Id. at ¶ 153(8).

123. *Id.* at ¶ 153(9).

124. *Id.* at ¶ 121.

that the violation and any resulting prejudice be fully examined and considered[125] and that full weight be given to the Vienna Convention violations regardless of the actual outcome of such review and reconsideration, because the treaty rights should be undertaken "irrespective of the due process rights under the United States constitutional law."[126] The ICJ stated that the U.S. judicial process is a suitable mechanism to provide the required review and reconsideration,[127] but it specified that the procedure should occur within the greater judicial proceedings and not only at the clemency stage.[128]

The United States had claimed that the clemency process was its selected means of review and reconsideration; however, in *Avena*, the ICJ found that as practiced, the clemency process did not appear to guarantee full examination and consideration of Vienna Convention violations, and therefore, is an insufficient and inappropriate means of review and reconsideration.[129] The ICJ found that clemency procedures, if appropriate, could supplement judicial review and reconsideration in circumstances where the judicial system failed to address the violation of claimant's rights under the Vienna Convention.[130] The *Avena* holding was very similar to the *LaGrand* holding, but the impact of *Avena* was greater, because it sparked a series of U.S. government reactions.

2. *Oklahoma Grants Torres Clemency after the* Avena *Holding*

Despite being denied certiorari before the U.S. Supreme Court on his habeas petition, Osvaldo Torres was granted

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125. *Id.* at ¶ 138.

126. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶ 153(9) (Mar. 31) *at* http://www.icj-cij.org (last visited Aug. 7, 2005) (for the language stating the requirements); *see also id.* at ¶ 139 (for the requirement that full weight be given to the violation). The U.S. amicus brief fails to mention this paragraph, although it mentions others more advantageous to its position. *See* Amici Curiae Brief Supporting Respondent of the United States, Medellin v. Dretke, No. 04-5928, On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (U.S. filed Feb, 28, 2005). It appears that the United States is unwilling to agree with such a statement, even if it does cite the paragraph that requires the review and reconsideration process to take this paragraph into account.

127. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 128, ¶ 140.

128. *See id.* at ¶ 141.

129. *Id.* at ¶ 143.

130. *Id.*

clemency by Oklahoma Governor Brad Henry.[131] Oklahoma agreed to honor the ICJ's stay of Torres's execution pending a decision in the *Avena* case,[132] and less than two months after that decision, Governor Henry commuted Torres's death sentence to life in prison without the possibility of parole.[133] The clemency was granted days after the Oklahoma Pardon and Parole Board voted to recommend clemency for Torres and hours after the Oklahoma Court of Criminal Appeals ordered an indefinite stay of Torres's execution and an evidentiary hearing,[134] responding to a concern for a possible "miscarriage of justice."[135]

3. *Fifth Circuit Refuses to Adopt the Avena Decision in* Medellin v. Dretke

a. *History*

Jose Ernesto Medellin is a Mexican foreign national convicted and sentenced to death for the rape and murder of two teenage girls.[136] On direct appeal, the Texas Court of Criminal Appeals affirmed his conviction and sentence.[137] Medellin did not petition for a writ of certiorari to the U.S. Supreme

131. EUROPEAN UNION DELEGATION OF THE EUROPEAN UNION TO THE USA, EU POLICY ON THE DEATH PENALTY, May 13, 2004, *at* http://www.eurunion.org/legislat/DeathPenalty/TorresVOklaGovMess.htm (last visited Aug. 7, 2005); DEATH PENALTY INFORMATION CENTER, OKLAHOMA GOVERNOR GRANTS CLEMENCY TO MEXICAN FOREIGN NATIONAL, *at* http://www.deathpenaltyinfo.org/article.php?did=996&scid=64 (last visited May 18, 2005).

132. INTERNATIONAL JUSTICE PROJECT, *supra* note 117.

133. *Id.*

134. *Id.*; Torres v. State of Oklahoma, PCD-2004-442 (Court of Criminal Appeals of the State of Oklahoma) May 13, 2004, *available at* http://www.oscn.net/applications/oscn/getcaseinformation.asp?submitted=true&number=PCD-2004-442&db=Appellate&viewtype=caseGeneral (last visited May 18, 2005). On the evidentiary hearing, the district court found that Torres had been prejudiced by the Vienna Convention violation. Torres v. The State of Oklahoma, PCD-2004-442, District Court of Oklahoma County, Mar. 18, 2005.

135. DEATH PENALTY INFORMATION CENTER, *supra* note 127. In granting the stay of execution, Judge Chapel wrote, "I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres' claims, specifically that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and the results of the trial is unreliable." *Id.*

136. Medellin v. Dretke, 371 F.3d 270, 273-74 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

137. *Id.* at 274.

Court.[138] He did, however, petition for a writ of habeas corpus, but the state trial court recommended that the application be denied.[139] Only days after the Oklahoma Court of Criminal Appeals granted a temporary stay of Torres's execution and Oklahoma Governor Henry granted Torres clemency based on the treaty rights raised by the petition, the Fifth Circuit followed the state level recommendation, interpreting the correct course of action to be different from that which Oklahoma pursued.[140] The Fifth Circuit denied Medellin's petition for a COA.[141]

The Fifth Circuit acknowledged the ICJ's decisions in *LaGrand* and *Avena*, but ultimately decided that even though those cases contradict *Breard*, "[they, the Fifth Circuit] may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention Claims."[142] Essentially, the Fifth Circuit left the issue for the U.S. Supreme Court to decide, inviting Medellin to petition for a writ of certiorari on this issue. The Fifth Circuit also held that even if the claim was not procedurally defaulted, the Vienna Convention creates no personal rights for which the petitioner can rely upon for a remedy, disregarding the ICJ's determination in *LaGrand* and *Avena* that these are individually enforceable rights.[143] The court based this determination on the fact that a prior panel of that court had already determined that there were no individually enforceable rights;[144] thus, only if the court sits *en banc* or the Supreme Court rules otherwise could this decision be overturned.[145]

The Fifth Circuit's denial of a COA for Medellin demonstrated a division among lower courts in how to apply the ICJ decision. Oklahoma Court of Criminal Appeals granted an evidentiary hearing and an indefinite stay of execution in Torres's case, respecting the ICJ decision, and the Texas state court and the Fifth Circuit continued to follow domestic law and not the ICJ decision. After the denial of a COA, Medellin

138. *Id.*
139. *Id.*
140. *Id.* at 280.
141. *Id.* at 274.
142. Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004).
143. *Id.*
144. United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001).
145. *Medellin*, 371 F.3d at 280.

petitioned for writ of certiorari to the U.S. Supreme Court.[146] This petition was granted and oral arguments were heard on March 28, 2005.[147] Medellin sought to enforce his right, under the Vienna Convention and the ICJ decision in *Avena*, to have the court review and reconsider his conviction and death sentence, without the application of the procedural default doctrine as imposed by Texas law.[148] The issues as presented by the petitioner are: (1) whether a U.S. domestic court must apply the ICJ's *Avena* ruling, which held that U.S. courts must review and reconsider the foreign national's conviction and sentence, taking into account the violation of his Vienna Convention rights and without resorting to procedural default doctrines;[149] and (2) alternatively, whether, in a case presented to the court by a foreign national of a Vienna Convention signatory state, a U.S. court should follow the *Avena* and *LaGrand* judgments as a matter of judicial comity and in the interest of uniform treaty interpretation.[150]

b. Amici Briefs in Medellin

As of January 2005, fifty-nine nations and approximately seventy-five organizations and prominent individuals had signed amici briefs supporting the petitioner, Medellin, in his case before the U.S. Supreme Court.[151] One brief supporting the respondent, Texas, was from the Washington Legal Foundation,[152] which argued for the Court not to "invoke in-

146. Response to Petitioner's Motion to Stay, at 1, Medellin v. Dretke, No. 04-5928, On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (U.S. filed Mar. 15, 2005).

147. Medellin v. Dretke, 125 S. Ct. 686 (2004). For a transcript of the oral arguments, see Medellin v. Dretke, No. 04-5928, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-5928.pdf (last visited Aug. 7, 2005). On May 23, 2005, the Court dismissed the writ of certiorari as improvidently granted. Medellin v. Dretke, 125 S. Ct. 2088, 2089 (2005).

148. Response to Petitioner's Motion to Stay, at 1-2, *Medellin* (No. 04-5928).

149. *Id.* at i.

150. *Id.*

151. DEATH PENALTY INFORMATION CENTER, MARK WARREN, FOREIGN NATIONALS: CURRENT ISSUES AND NEWS: U.S. SUPREME COURT AGREES TO HEAR CONSULAR RIGHTS CASE, *at* http://www.deathpenaltyinfo.org/article.php?scid=31&did=579 (last visited Aug. 7, 2005). For a listing of amici briefs filed in the case, see also, U.S. Supreme Court Docket, (Medellin v. Dretke, No. 04-5928) *at* http://www.supremecourtus.gov/docket/04-5928.htm (last visited Aug. 7, 2005).

152. U.S. Supreme Court Docket, (Medellin v. Dretke, No. 04-5928) *at* http://www.supremecourtus.gov/docket/04-5928.htm (last visited Aug. 7, 2005).

ternational law as a basis for overturning [Medellin's] conviction,"[153] because international law should not trump U.S. domestic laws. The United States shared this view in its amicus brief in support of Texas.[154]

In its amicus brief, the United States contended that the Court should not hear the case, but it argued that if the Court did hear the case, it should dismiss the petitioner's claims.[155] As noted earlier, the petitioner asked the Court to hold that the *Avena* decision is the result of a binding treaty obligation, giving him a judicially enforceable right to review and reconsideration of his conviction and sentence. Alternatively, Medellin asks the Court to enforce the *Avena* decision as a matter of comity.[156] In response to the petitioner's claims, the United States reasoned that they do not entitle him to relief[157] because: (1) the Fifth Circuit Court of Appeals correctly denied the petition for a certificate of appealability;[158] (2) under Article 36 of the Vienna Convention, there is no basis for the petitioner to challenge his conviction or sentence;[159] (3) the *Avena* decision cannot be privately enforced;[160] and (4) the President determined that, with respect to the fifty-one individuals referred to in *Avena*, the *Avena* decision should be enforced in state courts as a matter of comity.[161] The first three arguments by the United States were shared by Texas, the respondent,[162] but the United States' fourth argument was unique.

The amicus brief stated that "the [p]resident is 'the sole

153. Press Release, Washington Legal Foundation, Court Urged Not to Allow International Law to Trump U.S. Criminal Laws (Medellin v. Dretke, No. 04-5928), Mar. 2, 2005, http://wlf.org/upload/030205RS.pdf (last visited Aug. 7, 2005).

154. *See* U.S. Supreme Court Docket, (Medellin v. Dretke, No. 04-5928) *at* http://www.supremecourtus.gov/docket/04-5928.htm (last visited Aug. 7, 2005); Amici Curiae Brief Supporting Respondent of the United States, at 10-11, Medellin v. Dretke, No. 04-5928, On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (U.S. filed Feb, 28, 2005).

155. Amici Curiae Brief, at 10-11, *Medellin* (No. 04-5928).

156. Respondent's Brief, at 4-7, Medellin v. Dretke, No. 04-5928, On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (U.S. filed Feb, 28, 2005).

157. Amici Curiae Brief, at 12, *Medellin* (No. 04-5928).

158. *Id.*

159. *Id.* at 23.

160. *Id.* at 41.

161. *Id.* at 48.

162. *Id.* at 10.

organ of the federal government in the field of international relations'"[163] and that in his role as the president, he "enjoys 'a degree of independent authority to act' in 'foreign affairs.'"[164] The argument further explained that the president has discretion whether to comply with an ICJ decision, and, in this case, the U.S. foreign policy interests justify such compliance.[165] Once the President determined that it was in the best interest of the United States to comply with the ICJ decision, it was necessary to determine whether the executive branch should seek legislation to effect this determination or whether to unilaterally act.[166] Given the "paramount interest" in "prompt compliance," the Executive pursued unilateral action and issued a presidential order.[167]

c. Presidential Order

On February 28, 2005, President George W. Bush signed an order declaring,

> 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 discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and other Mexican Nationals* . . . 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.[168]

The executive branch interpreted the *Avena* decision such that the United States must provide a means of review and

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163. Amici Curiae Brief, at 50, *Medellin* (No. 04-5928).

164. *Id.*

165. *Id.* at 51. The foreign policy interest in this case is the security of the United States' own citizens abroad. The lawyers for President Bush recognized that consular assistance is "a vital safeguard for Americans abroad," and thus, the United States must fulfill its own obligations in order to ensure this protection for its own citizens. *Id.*

166. *Id.*

167. *Id.* at 51-52. The President exercised his power according to his authority under Article 94 of the U.N. Charter, which allows the president to establish a binding federal rule without utilizing the legislative process. *Id.* at 52-53.

168. *Id.* at 52 (internal citation omitted). *See also,* Staff Writer, *Bush Orders Hearings for Mexicans on Death Row: The action, Triggered by a World Court Ruling, May Pit the President against State Officials*, L.A. TIMES, Mar. 9, 2005, at A21, *available at* http://www.latimes.com/news/nationworld/nation/la-na-death9mar09,1,6145815.story?ctrack=3&cset=true [hereinafter *Bush Orders Hearings*].

reconsideration of the convictions and sentences of the fifty-one Mexican nationals, referred to in *Avena*, to determine whether the Vienna Convention violations actually prejudiced the defendants at trail or at sentencing.[169] This Order was issued under general principles of comity and not out of a sense of obligation.[170] In the brief, President Bush's lawyers also argued that the Order is supreme over state laws and thus, state procedural default rules that would prevent full effect of this Order are preempted.[171] Although the United States filed this brief on behalf of Texas, Texas disputes the validity of the order recited in the brief.[172] The Texas Attorney General stated that "[they] believe the executive determination . . . exceeds the constitutional bounds for federal authority."[173]

d. Motion to Stay Proceedings

The Presidential Order affords Medellin the right to review and reconsideration of his claim at the state court level in Texas. Consequently, a little less than three weeks before the U.S. Supreme Court was to hear the case, Medellin moved for a stay of the hearing before the Court[174] while he pursued

169. *Id.* at 49-50; *see* Amici Curiae Brief, at 50, *Medellin* (No. 04-5928); *see also Bush Orders Hearings*, *supra* note 164. An issue beyond the scope of this comment is what the state court review will entail. The burden is likely on the defendant, but the level of burden is unknown. The courts might analyze the prejudice similarly to that of an ineffectiveness of counsel claim. If that is so, it is highly improbable that any petitioner will be able to show actual prejudice. In contrast, however, after the Oklahoma Court of Criminals remanded the Torres case for a hearing, the district court of Oklahoma found that Torres was prejudiced through the application of a three-prong test stated in a special concurring opinion by the Okalahoma Court of Criminal Appeals: "(1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of that right had he known of it; and (3) it was likely that the consulate would have assisted the defendant." Torres v. The State of Oklahoma, PCD-2004-442, District Court of Oklahoma County, Mar. 18, 2005. Whether this standard would be the same standard applied by state courts on review and reconsideration is an option, but this discussion is also beyond the scope of this comment.

170. Amici Curiae Brief, at 52, *Medellin* (No. 04-5928). As mentioned before, comity is a type of judicial grace. The President is following the ICJ decision, not out of an obligation, but instead, out of grace.

171. *Id.* at 54.

172. *See id.* at 50. This comment will not explore the constitutional issues of the Executive Branch's exercise of authority in the issuance of the order.

173. *See id.*

174. Motion to Stay, at 1, Medellin v. Dretke, No. 04-5928, On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (U.S. filed Feb, 28, 2005).

his remedies before the Texas court.[175] Texas responded to this motion with three reasons why the Court should continue to hear this case: (1) the issue before the Court is whether the Fifth Circuit properly denied the COA, and this issue is unrelated to any state habeas proceeding that Medellin might seek; (2) Petitioner's motion to stay is based on "a not-yet-filed successive state habeas application"[176] that the Petitioner plans to file based on the President's Order; however, the validity of that Presidential Order is not before the Court, and again, this is not the issue before the Court; and (3) even if the Petitioner pursues his claim in state court, the result of such a hearing does not affect the federal question before the Court.[177] In summary, the argument is that it is irrelevant whether the Petitioner is granted his remedy of "review and reconsideration" because the issue before the court is whether the COA was properly denied at the Fifth Circuit.[178] The Court took no action on the Petitioner's request for a stay, and the Court heard oral arguments anyway.[179] During arguments, several Justices questioned the necessity of hearing the case now that the Petitioner was granted his remedy of review and reconsideration in state court.[180] Dismissal of the writ as improvidently granted would allow the Court to avoid deciding very difficult issues of law, and the Court took this course of action on May 23, 2005, in a 5-4 decision to dismiss

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. Absence of action by the Court is sufficient evidence that the request for a stay was denied. Additionally, the Court heard the case on March 28, 2005.
180. For a transcript of the oral arguments, *see* Medellin v. Dretke, No. 04-5928, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-5928.pdf (last visited Aug. 7, 2005). Justice Stevens questioned whether the Texas proceeding, now required by the President's order, would make the issue before the Court moot, and eliminating the need to address "very difficult questions." *Id.* at 35. For other commentary on the Court's response during arguments, *see* James Vicini, *Supreme Court May Not Decide Case of Death-Row Mexican*, REUTERS, Mar. 28, 2005, *at* http://www.boston.com/news/nation/washington/articles/2005/03/28/supreme_court_may_not_decide_case_of_death_row_mexican/ (last visited Aug. 7, 2005); Staff Writer, *U.S. Death Penalty and Foreigners*, CBSNEWS.COM, Mar. 28, 2005, *at* http://www.cbsnews.com/stories/2005/03/28/supremecourt/main683532.shtml (last visited Aug. 7, 2005).

the writ.[181]

4. *United States' Withdrawal from the Optional Protocol to the Vienna Convention*

Less than two weeks after the President issued the Order requiring the state courts to give effect to the *Avena* decision, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, which gives the ICJ jurisdiction over Vienna Convention claims.[182] According to State Department spokeswoman Darla Jordan, the U.S. withdrawal from the protocol was necessary for "protecting against future International Court of Justice judgments that might similarly interpret the consular convention or disrupt [the U.S.] domestic criminal system in ways [the U.S.] did not anticipate when [it] joined the convention."' [183] It is noteworthy that the United States did not withdraw from the Vienna Convention, but only the Optional Protocol; therefore, the United States is still bound by its obligations under the Convention. The effect of the withdrawal from the Optional Protocol, therefore, is that the United States no longer avails itself of the ICJ's jurisdiction to interpret and apply the Vienna Convention.[184]

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181. *Medellin*t., at 2089). These difficult questions include:

> Is the Supreme Court the sole organ to decide what a treaty means as it apples to a case in American court? Must the Court accept an interpretation of a treaty that the President has spelled out? Can an international court confer on individuals private rights that are enforceable in U.S. courts? Must the Supreme Court act to carry out a decision of the World Court? What constitutional principle would support the Presidents' view that an international treaty imposes binding obligations on the Supreme Court? Can the President dictate to state courts that they must follow a decision of the World Court in their own state criminal proceedings?

Lyle Denniston, *Medellin case: the Court Hesitates*, SCOTUSBLOG, Mar. 28, 2005, *at* http://www.scotusblog.com/movabletype/archives/2005/03/medellin_case_t.html (last visited Aug. 7, 2005).

182. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASHINGTON POST, Mar. 10, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html (last visited Sept. 13, 2005).

183. *Id.*

184. It is debatable whether the United States' withdrawal from the Optional Protocol is valid. According to the Vienna Convention on Treaties, a country may not unilaterally terminate its membership of a treaty. The United States, however, has not ratified this treaty. The debate arises at this level because

III. IDENTIFICATION OF THE PROBLEMS

The Vienna Convention cases presented to the U.S. Supreme Court and the ICJ involved both domestic and international law; therefore, there are both domestic and international issues. The first issue is the United States' continuous violation of Article 36, paragraph one, of the Vienna Convention by failure to inform the detained foreign nationals of their consular rights. The second issue is the United States' failure to provide adequate review and reconsideration to foreign nationals alleging Vienna Convention violations, as required by paragraph two of the Convention.

The conflict within the U.S. government, specifically between the executive branch and the judicial branch, and between the state and federal government, is a third issue created by recent development in the Vienna Convention law. The conflict between the executive branch and the judicial branch exists because the Presidential Order requires the judiciary to review and reconsider the Mexican foreign nationals' claims, a decision typically within the realm of the courts. Also, because the order originates in the federal government and imposes requirements on the state courts, it infringes upon state sovereignty.

Lastly, the United States' withdrawal from the Optional Protocol to the Vienna Convention poses potential problems in the international community and may ultimately put U.S. citizens arrested abroad at a heightened risk. Other governments may follow the precedent of the United States and not inform U.S. nationals of their rights to consular assistance because there is no tribunal from which the United States can seek assistance. Worse yet, these governments may follow the United States' conduct and try U.S. nationals, convict them, and sentence them to death without ever allowing the U.S. consulate to intervene.

IV. ANALYSIS

Despite two ICJ decisions finding the United States in

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some academics would argue that the Vienna Convention on Treaties is customary international law, and therefore, binding on all states. The United States would likely contest this assertion. This comment will not address these issues further, as it is best suited for discussion in a separate article.

violation of its obligations under the Vienna Convention,[185] the United States remains inconsistent in how it treats foreign nationals upon arrest, how it conducts the required review and reconsideration, and how it views the authority of the ICJ. The U.S. government has been inconsistent in its response to the issues, thus compounding the problems faced by the courts. The granting of certiorari in *Medellin* was a substantial step in addressing the conflict between international and U.S. domestic law. Nevertheless, as evidenced by the Justices' responses during oral arguments and its dismissal of the writ, the conflict has been allowed to remain. Even if the Court does resolve the case on subsequent review, it may be insufficient given the narrowness of the issue before the Court. The Presidential Order, which made its own determination, created a short-term solution for the foreign nationals referred to in *Avena*, but it did not resolve the problem of violations of paragraph one or two more generally, and it did create serious questions of Executive authority.

A. Initial Violations of the Vienna Convention by the United States

The United States' continuous defiance of Article 36, paragraph one, requiring law enforcement officials of member states to notify detained foreign nationals of their right to consular assistance,[186] resulted in two ICJ decisions finding the United States in breach of its obligations. The violations display arresting officials' failure to protect the rights of foreign nationals upon arrest.[187] Despite the recurring viola-

185. *See* LaGrand Case (FRG v. U.S.), 2001 I.C.J. 260 (June 27) *available at* http://www.icj-cij.org (last visited Aug. 7, 2005).

186. *See* Vienna Convention, *supra* note 2, art. 36(2).

187. *See* NOAH LEAVITT, HOW THE U.S. SUPREME COURT RECENTLY REFUSED TO ENFORCE U.S. LAW, Nov. 20, 2003 *at* http://writ.corporate.findlaw.com/commentary/20031120_leavitt.html (last visited Aug. 7, 2005). According to the Death Penalty Information Center, the United States has executed twenty-one foreign nationals since 1976. MARK WARREN, DEATH PENALTY INFORMATION CENTER, FOREIGN NATIONALS, PART II: CONFIRMED FOREIGN NATIONALS EXECUTED SINCE 1976, (May 15, 2004) *at* http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed (last visited Aug. 21, 2005). As of May 2005, there were 118 foreign nationals on death row. MARK WARREN, DEATH PENALTY INFORMATION CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE UNITED STATES: REPORTED FOREIGN NATIONALS UNDER SENTENCE OF DEATH IN THE U.S. (May 28, 2005) *at* http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (last visited Aug. 21, 2005). Many of these executed foreign nationals and those on death row

tions, the United States asserted that it is doing its best to abide by its obligations through educational programs aimed at the country's law enforcement.[188] In the *Avena* filings, counsel for the United States presented statistics to show the United States' effort to comply with the Vienna Convention.[189] In explaining why not all law enforcement officers have been educated or been following their duties, a lawyer for the State Department stated that the United States' attempts should be sufficient given the size of the country.[190] She declared that "[a]s a practical matter, a country the size of the United States would never have accepted an obligation that would have put the ordinary conduct of criminal investigations and public safety at jeopardy."[191]

The United States' position may be a logical explanation for the occurrence of violations, but the United States signed and ratified this treaty, so it had the responsibility to evaluate its obligations under the treaty, as well as its ability to satisfy them, before agreeing to be a member. Criminal investigations and public safety are only put in jeopardy if the United States fails to afford the foreign nationals their rights. This is no different from other due process protections afforded to individuals in the criminal justice system. Moreover, it is unfair for the United States to selectively abide by the Vienna Convention,[192] while expecting full compliance from other nations. The frequency of violations and the negligence in ensuring compliance of the treaty show that the

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were deprived of their right to advisement of consular notification. *See* LEAVITT, *supra.*

188. *See* Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on U.S. Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1. There have been 100,000 copies of compliance manuals and 600,000 pocket cards delivered to local law enforcement. However, there are 700,000 law enforcement officials. *See id.*

189. *See id.*

190. *Id.*

191. *Id.*

192. *See* MARK WARREN, DEATH PENALTY INFORMATION CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE UNITED STATES: CONSULAR RIGHTS, FOREIGN NATIONALS AND THE DEATH PENALTY, May 28, 2005 *at* http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#background (last visited Aug. 25, 2005). In capital cases, in only seven cases out of 160 reported death sentences did officials completely comply with Article 36 of the Convention. In New York City, in 1997, there were only four cases in which consulates were notified out of 53,000 foreign nationals arrested. Even if a majority of detained foreign nationals declined assistance, the failure rate is still over ninety-nine percent. *Id.*

problem is perhaps complacency or a disinterest in resolving the problem, rather than an inherent complication due to the size of the United States.

B. Conflict between International Law and Domestic Law—Can the Procedural Default Doctrine Be Applied?

The United States has a strong tradition of a separation of state and federal power. As noted earlier, the procedural default doctrine serves to preserve this division, so that a petitioner does not seek a decision in federal court when the state court had no opportunity to act on it. In *Breard*, the U.S. Supreme Court established that the procedural default rule applied to cases alleging Vienna Convention violations.[193] However, the ICJ, in *LaGrand* and *Avena*, held otherwise, because the doctrine does not allow claimants to have their claims of violations adequately reviewed and reconsidered.[194] These holdings provided greater instruction as to the requirements of paragraph two of Article 36, which expressly requires only that full effect be given to the purpose of paragraph one.

The *LaGrand* and *Avena* rulings allowed the United States to choose its own method of review and reconsideration, but U.S. compliance has been slow and inconsistent. After the decision in *LaGrand*, the United States did not change its procedure or address the conflict of law that this holding created. The denial of certiorari in *Torres*,[195] in which Torres claimed that the procedural default doctrine was applied in violation of *LaGrand*, was an indication that the Court did not find it necessary to resolve the conflict of law. Moreover, the denial illustrated the view that the ICJ does not have authority over the United States, and so no action was necessary.[196]

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193. *See* Breard v. Greene, 523 U.S. 371, 375 (1998).

194. *See LaGrand*, 2001 I.C.J. at 279.

195. *See* Torres v. Mullin, 540 U.S. 1035 (2003).

196. The view that the ICJ does not have jurisdiction over the United States helps explain why the United States did not take necessary action to ensure that stays of execution were honored. The ICJ has ordered provisional measures in all three ICJ Vienna Convention cases, and every time, the United States chose not to take action to enforce these orders. Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 246 (Apr. 9) *available at* http://www.icj-cij.org (last visited Aug. 7, 2005); LaGrand (FRG v. U.S.), 2000 I.C.J. 236 (Mar. 3, 1999) *available at* http://www.icj-cij.org (last visited Aug. 7,

Failure to take action and provide an effective review and reconsideration process resulted in a paragraph two, in addition to paragraph one, violation being alleged in *Avena*. When the United States responded to the allegation of a paragraph two violation, knowing the ICJ had already held in *LaGrand* that the United States' procedures were inadequate, the United States did not claim that the ICJ lacked jurisdiction or that its rulings were not binding.[197] Instead, the United States made two other arguments.

First, the United States recognized and recited, in its written counter-memorial, the rule stated in *LaGrand* regarding the use of the procedural default doctrine.[198] However, the United States proposed a different interpretation of the *LaGrand* ruling than that suggested by Mexico.[199] The United States argued that the review and reconsideration process did not have to be through the court system, but instead, through any means of the United States' choosing.[200] Accordingly, the United States argued that the fifty-one Mexican nationals were given access to review and reconsideration both through the judicial and the clemency process.[201] In response to the United States' argument, a lawyer and director for the Mexican Capital Legal Assistance Program responded: "[t]he United States says the only remedy a defendant is entitled to is an opportunity to beg for mercy . . . . But we're talking about a legal right. It requires a legal remedy."[202] Thus, Mexico claimed that the clemency process was insufficient to provide review and reconsideration.

The United States' argument appeared to be a weak attempt at explaining its violations. Since the *LaGrand* holding, the United States did not take any major steps to ensure

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2005); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Order, Request For the Indication of Provisional Measures, Feb. 5, 2003, 42 I.L.M. 309 *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF, ¶ 59 (last visited Aug. 7, 2005); *see* Hull, *supra* note 118.

197. *See* Counter-Memorial of the United States of America (Mex. v. U.S.), (Avena and other Mexican Nationals) (Nov. 3, 2003) *at* http://www.ICJ-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20031103_c-mem_06.pdf (last visited Aug. 7, 2005).

198. *See id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See* Liptak, *supra* note 188.

compliance with the ICJ's findings, so, when it had to respond in *Avena*, the government simply claimed that the current procedures were adequate, when the ICJ had already ruled that they were not. The United States simply argued that clemency was an adequate remedy (the same remedy as used when the ICJ found against the United States in *LaGrand*), thus requiring the ICJ to be even more precise and proclaim specifically that the clemency proceedings, as conducted in the United States, are insufficient. The effect of this ruling is that it is necessary for the United States to provide, to these petitioners, a remedy different from clemency. The manner of creating such a process has created conflict.

The United States' second defense was that although the ICJ has jurisdiction to decide questions arising under the Vienna Convention, it does not have jurisdiction to determine by "highly specific means" what nations must do to comply.[203] The United States claimed that the ICJ directives with regard to these specific issues are not binding.[204] Instead, it finds only that there is jurisdiction to decide general issues.[205] The United States may not like the ICJ decisions, but the ICJ did go through a process to interpret and apply the treaty, and it rendered a decision accordingly. Also, the ICJ was very deferential to the United States by allowing the United States to determine its own method of compliance; the ICJ only stated that the current U.S. system was inadequate. Therefore, this defense was also a very weak explanation for its actions.

The *Avena* holding, unlike the *LaGrand* holding, seemed to have a greater impact on the U.S. legal system. The Oklahoma Court of Criminal Appeals and Governor's issuance of a stay of Torres's execution, in light of the *Avena* decision, was an exception to U.S. inaction. Governor Henry's decision is a victory because he recognized that the detaining official violated Torres's rights under the Convention.[206] Additionally, Henry noted that compliance with the treaty is important for the protection of U.S. citizens arrested abroad.[207] Granting clemency showed that the ICJ's holding did have an impact

203. *See id.*
204. *See id.*
205. *See id.*
206. *Id.*
207. *Id.*

on the U.S. judicial system. Still, not all states agreed with the authority of the ICJ. Only days after Torres was granted clemency, the Fifth Circuit Court of Appeals denied Medellin's habeas claim and petition for a COA in which the same Vienna Convention violations, as in Oklahoma, were raised. This difference of opinion showed a split in lower court interpretation of ICJ authority.

The U.S. Supreme Court in *Medellin* directed its attention to this conflict of international and domestic law that had created confusion among the lower courts. The Court's interest appeared to be domestic, as opposed to international or humanitarian, because the Court allowed the conflict to remain unresolved long after *LaGrand* first created it. Granting certiorari in *Medellin*, for whatever reason, presented a good opportunity for the Court to address these issues. However, during oral arguments, the Court expressed concern about yielding to the ICJ. Justice Scalia questioned the petitioner's counsel as to whether the Court has ever been "bound by a judgment of a foreign court or an international court concerning the meaning of United States Law."[208] Then Justice O'Connor asked whether the Court must apply *Avena* as a "rule of decision" or whether the Court was open to interpret the treaty itself; the petitioner hesitantly replied in the affirmative that the Court may in fact intrepret the treaty itself.[209] The Court has also expressed a strong desire to avoid answering the difficult questions that would accompany a decision in *Medellin*. Thus, despite lower court confusion and ongoing conflict between the ICJ's rulings and U.S. law, the Court contended that because the difficulty of the issues is so high and because there is a remedy for the petitioner, it may not decide the issues, even if clearly important. The Court ruled to dismiss the writ and, thus, avoided any resolution of these issues.

The February 2005 Presidential Order provides a means of review and reconsideration for the Mexican nationals mentioned in the *Avena* case, but the narrowness of the Order does not allow review and reconsideration for other foreign

208. For a transcript of the oral arguments, see Medellin v. Dretke, No. 04-5928, at 13, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-5928.pdf (last visited Aug. 7, 2005).

209. *Id.* at 13-15.

nationals, current or future, with the same Vienna Convention claims. The Order does completely comply with the ICJ decision in that the remedy is given to the named Mexican nationals, but its narrowness is indicative of the Executive's intent to comply only as a matter of grace in this one instance, but not to follow what the ICJ has determined to be a requirement under the Vienna Convention. However, since the Court's decisions are only applicable to the named parties, the United States is not obligated to provide further protection under the ICJ reparations order in *Avena*. The United States' intent to comply only in this specific instance is evident from the Order's language that the ICJ was being followed as a matter of comity, and not as a matter of international obligation. Although the ICJ decision is only applicable to the named parties, the interpretation of the treaty obligations was consistent in both cases brought before the ICJ. Therefore, the United States should know its treaty obligations under paragraph two of Article 36 and should implement a permanent review and reconsideration process that will comply with this interpretation.

A remedy, at least for now,[210] has been granted to the Mexican nationals, but its narrowness will not protect others. A future Supreme Court decision in *Medellin* also will do little to solve the problem. As with the Presidential Order, the issues that could, again, be presented to the Court in *Medellin* are narrowly tailored to cover the *Avena* holding, which applies only to the named parties. Therefore, following the Presidential Order and even if the Court holds in favor of the petitioner, lower courts are still left without guidance on how to address future cases. If the situation remains the same, it is likely that courts will continue to be divided on whether to apply the procedural default doctrine to these cases.[211]

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210. There is no indication what may happen if a state court refuses to comply with the Presidential Order. The refusal to hear the case would likely go to the U.S. Supreme Court to determine whether a president, in the first place, had the authority to require state courts to undertake this review and reconsideration.

211. Even though the United States withdrew from the Optional Protocol, which means that there will be no more ICJ decisions against the United States, violations will still likely continue, and there is no framework setup to determine how these cases should be handled.

C. *Authority of the Presidential Order*

The Executive's issuance of the Presidential Order commanding state courts to review and reconsider, as a matter of comity, the cases of the fifty-one Mexican nationals will likely create serious conflict. In some instances, all appeals and habeas hearings have been conducted and the petitioner is awaiting execution. Thus, the judicial proceedings will be reopened, slowing down the state's process of criminal justice. As Texas stated, the executive branch's issuance of such an order may be beyond the limits of its authority.[212] Mr. Cruz, on behalf of Texas, told the Court during oral arguments that "there are significant constitutional problems with a unilateral Executive determination displacing generally applicable criminal laws."[213] If a state court, like Texas, does not agree with the validity of this Order, it is likely that it may refuse to grant the review and reconsideration to the Mexican nationals, or it may litigate the validity of the Presidential Order before granting such review.[214] If the state courts do refuse to grant new hearings to these petitioners, the case will likely go up on appeal to the U.S. Supreme Court to verify the validity of the Order.

An order such as this has serious implications for states. Given the United States' concern not to "interfere with [the states'] sovereign right to administer . . . criminal justice system,"[215] the Order is perplexing. The Court had previously reinforced the separation of state and federal powers, at least within the courts, when it ruled in the FRG petition that the Court did not have jurisdiction to allow a case against Arizona, because of the Eleventh Amendment's prohibition of federal courts from taking lawsuits against a U.S. state when filed by a foreign state.[216] The Executive either appears less concerned with the implications of making such a requirement, or it believes this Order to be the simplest and most effective way to achieve its goals, whatever they might be. Ei-

212. Amici Curiae Brief, at 50, *Medellin* (No. 04-5928).

213. Medellin v. Dretke, No. 04-5928, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-5928.pdf, at 33.

214. *See id.*

215. *See* Hull, *supra* note 118.

216. *See* Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999); *see also* WIKIPEDIA, *supra* note 75.

ther way, it is likely that a battle will ensue, at least in Texas.

Not only is there concern with the federal government impeding on the rights of states, but the Presidential Order also interferes with the rights of the judiciary. The Order, as noted in a brief to the U.S. Supreme Court, stated that since the President had determined to apply the *Avena* decision as a matter of comity, granting the Mexican nationals a remedy, there was no longer a need for the Court to address the issue. Justice Kennedy, in oral arguments for the *Medellin* case, asked whether the President had the authority to unilaterally interpret the treaty to be binding on the Court.[217] The Court was expressing a dislike for the determination that the Court had its hands tied by the Order, as opposed to being able to make its own determination.

D. United States' Withdrawal from the Optional Protocol for the Vienna Convention

By withdrawing from the Optional Protocol to the Vienna Convention, the United States sent the unequivocal message that it no longer accepts the ICJ's jurisdiction to adjudicate allegations of violations under the treaty.[218] This shows the world that the United States wants the protections of the treaty, but that because of its consistent violations of the Convention and its unwillingness to create a long-lasting remedy for all claimants, it does not want to be under the jurisdiction of a court that can find such a violation. The effect of the U.S. withdrawal may be serious, because we can no longer avail ourselves of the ICJ's protections. The United States was the first party to avail itself of the ICJ's jurisdiction under the Optional Protocol when Iran took U.S. nation-

217. *Federal Republic of Germany*, 526 U.S. at 115. This is likely to be a highly contentious question. The U.S. Supreme Court expressed its concern about the assertion of the President's power. However, according to the American Law Institute, "[t]he President of the United States, or an appropriate official acting under this authority, has the authority to determine the interpretation of an international agreement to be asserted by the United States in the conduct of its foreign relations." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 149 (1965), cited in JOHN NORTON MOORE, THE NATIONAL LAW OF TREATY IMPLEMENTATION 117-18 (Carolina Academic Press 2001). The validity of the Presidential Order is likely to be litigated in the future.

218. As stated before, the validity of the United States' withdrawal is still uncertain, and such a discussion is beyond the scope of this comment.

als hostage.[219] Now, withdrawal from the Optional Protocol will not allow the United States to have such a privilege, and, particularly in a time when the administration is concerned with national security, it seems incongruous to reject the one tribunal that can render a decision in Vienna Convention cases.[220]

E. Reason behind the United States' Non-Compliance

Article 59 of the ICJ statute and Article 94(1) of the United Nations Charter reiterate that ICJ decisions are binding on all member parties.[221] Despite this reality, the penalty for not abiding by the rulings is virtually non-existent.

The United States has articulated several reasons behind its past non-compliance with its obligations under the Vienna Convention: the size of the country makes it prohibitive to inform all law enforcement officers; it believes that the clemency process is sufficient for review and reconsideration; and federalism prevents the federal government from enforcing certain ICJ decisions, such as provisional measures, on state courts.[222] Even though these are likely some of the reasons behind non-compliance, another likely reason is that there is no authoritative force to require compliance. There is a sentiment among nations that the United Nations is not an authoritative body, resulting in the view that ICJ decisions are not binding.[223] There is no penalty besides international scrutiny, and perhaps reciprocation,[224] for non-compliance.

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219. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), http://www.icj-cij.org/icjwww/icases/iusir/iusir_ijudgment/iusir_iJudgment_19800524.pdf (last visited Aug. 7, 2005).

220. In all reality, the United States probably does not feel that it needs the ICJ to protect its citizens. All member states are still obligated to abide by the treaty, and if one State was to violate the treaty, the United States may chose to use its own methods of dealing with the problem.

221. *See* Stephanie Baker, *Germany v. United States in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations and Provisional Measures Orders*, 30 GA. J. INT'L & COMP. L. 277, 281 (2002).

222. The federalism concern seems to have been negated by the Executive's decision to issue the Presidential Order.

223. *See* Baker, *supra* note 222, at 281.

224. It seems unlikely that less-developed nations will reciprocate against the United States, because of the United States' ability to provide economic assistance to some of these countries. For example, Paraguay dropped its case in the ICJ after only an apology. *See* Aceves, *supra* note 73, at 927. The request

This view is further supported by the fact that nations have historically not been held accountable for breaches of international obligations.[225] The primary mechanism for enforcing international conduct is through the U.N. Security Council. Given this, and the fact that the United States is a permanent member on the Council with veto power,[226] this mechanism to enforce compliance with ICJ judgments will fail.[227] Even though it is unlikely that official penalties will follow non-compliance, the United States and any non-complying nation may face international pressure to comply with its obligations.[228]

F. ICJ's Response to the United States' Non-Compliance

The consistency in the ICJ's findings against the United States, expresses the ICJ's disapproval of U.S. tactics. All of the ICJ orders have been general in that they do not specifically tell the United States what is necessary for the review and reconsideration process to be in compliance with the Convention. This is most likely a product of three things: (1) uncertainty about exactly what standard must be met; (2) the level of familiarity with the U.S. criminal justice system; and (3) respect for the sovereignty of the nations before the ICJ. Although it is clear the ICJ finds the current U.S. review and reconsideration procedure inadequate, there appears to be uncertainty about what exactly the ICJ justices expect from the United States and hesitancy to provide more specific guidelines. This is not necessarily negative because if the ICJ gave specific means by which the United States had to comply, the ICJ would be intruding on the United States' right to administer justice in its own system. However, the burden should be on the United States to take action to meet its obli-

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for dismissal perhaps points to a greater concern of Paraguay than that which was satisfied by a public apology. As long as the United States is in a superior position, it remains difficult to influence its politics through international courts.

225. *See* Baker, *supra* note 222, at 281.

226. DR. DANESH D. SAROOSHI, SECURITY COUNCIL, http://www.globalpolicy.org/security/gensc.htm (last visited Aug. 21, 2005). If any country on the Security Council uses its veto power, the resolution will not pass. *See id.* Therefore, if the United States vetos a proposal to take action against the United States for its noncompliance with the ICJ decisions, such an initiative will fail.

227. *See id.*

228. *See id.*

gations, even if not specifically known; it knows that what it is doing now is insufficient, so it should amend its procedure to attempt to meet compliance.

In both *LaGrand* and *Avena*, the ICJ issued three sets of provisional orders requiring stays of executions and twice found the United State's actions in violation of the Vienna Convention, Article 36, paragraphs one and two. Given the United States' continued defiance of ICJ orders, the ICJ reacted with linguistic changes. For example, in the first two orders of provisional measures to protect Breard and LaGrand, the ICJ indicated that the United States "*should* take all measures at its disposal" to prevent the executions of these individuals until the ICJ heard the case.[229] The language "should take" was not a command, but more passive. After two failed attempts to stay executions, the ICJ not only ruled that this defiance was a breach of an obligation, but it also made the language in the *Avena* provisional measures more forceful: the United States "*shall* take all measures necessary" to prevent the executions of the protected individuals.[230] "*Shall take*," unlike "*should take*," is a command, and the ICJ's intent is clear. This provision was effective with respect to Torres in that Oklahoma granted the temporary stay as requested by the United States. It was less effective with respect to Texas which refused to take the ICJ's request into consideration. Additionally, the United States did not act to prevent an execution, likely because of its concern not to "interfere with [the states'] sovereign right to administer . . . criminal justice system."[231]

The ICJ clearly found the United States in violation of its treaty obligations, and this is evident through consistent judgments against the United States and the linguistic changes made to try to better articulate its expectations. Regardless of the ICJ's attempts, as mentioned before, there is no means of enforcing compliance with the judgments, so the attempts may be overall ineffective.

229. *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249; *LaGrand*, 2000 I.C.J. at 236.

230. *Case Concerning Avena and Other Mexican Nationals*, 42 I.L.M. 309, ¶ 59.

231. *See* Hull, *supra* note 118.

V. PROPOSAL

A. *Ending Non-Compliance*

The best approach to avoid further Vienna Convention problems is to prevent the initial violation under paragraph one of Article 36. This must be done by improving educational measures at all levels of law enforcement, including police, lawyers, and judges. Incorporating the advisement of the right to consular assistance into the Miranda warning is an option that would establish a sound U.S. practice of informing foreign nationals of their rights; there would be greater certainty that all detained persons would be advised of their rights, thus limiting the instances of violations. This option, however, will likely be met with resistance by law enforcement officials.

At the very least, if advisement is not an automatic duty, all government officials should be aware of the Vienna Convention obligations and be trained to recognize when to make such an advisement. If the arresting officials fail in their duties, the district attorney should be responsible for ensuring that these rights are honored once the case is assigned to them, and definitely before trial. However, because of the passage of time before a district attorney is assigned, law enforcement may have already questioned the detained person for hours, days, or even weeks. Therefore, there is a strong likelihood that the defendant would already be prejudiced by a confession or some other action that may be used as evidence of his guilt.

If the justice system was to enforce these treaty rights through mitigation or dismissal of the charges, law enforcement officers would be much more likely to comply upon arrest. If the information gathered from the suspect is gained without notifying the suspect of his rights, that information should not be admissible as evidence against the defendant in court. Of course, the community rightfully wants to protect itself from dangerous criminals, but if officials comply with the treaty, there is no risk to public safety.

B. Creation of a Review and Reconsideration Process

Since violations are likely to continue, it is necessary to establish a review and reconsideration process. Since the Presidential Order mandating state courts to review and reconsider the cases of the Mexican foreign nationals listed in the *Avena* case is limited to only those persons, the United States has not taken precautions to ensure future compliance with paragraph two of Article 36. The Order is extremely positive in that it does grant a remedy to the petitioners in *Avena*; however, its narrow scope means that foreign nationals not listed in *Avena* cannot benefit from the Order. The United States is not creating a permanent procedure for review and reconsideration of any foreign national's claim, and thus, the application of the procedural default, at this time, is still applicable and may prevent review of future claimant's allegations of violations. There are three possible ways in which the United States could remedy this problem and resolve any confusion among lower courts; each of the solutions involves a different branch of government.

The United States can satisfy the requirements of paragraph two and avoid future judicial inquiry into this issue if congressional action is taken. If Congress agrees with the binding nature of the ICJ's interpretation of paragraph two's requirements, it could amend the current federal habeas corpus statute and include an exception to the procedural default doctrine, such that it could not be applied in Vienna Convention cases when application would deny the petitioner the right to review and reconsideration of his Vienna Convention claim. A narrow exception limited to this specific circumstance would put the United States in compliance with its Vienna Convention obligations without seriously altering the procedural default doctrine. This option is very difficult to pursue because of the requirement of congressional action, but it would be the most effective way of ensuring compliance with respect to the review and reconsideration process.

A second option is for the president to clarify the February 2005 Presidential Order or issue a new order which applies to all foreign nationals that have been deprived of their Vienna Convention rights. This act would be congruent with the issuance of the February Order because that was done based on principles of comity, and it logically follows that

based on principles of comity, the United States should respect the ICJ's interpretation that review and reconsideration is required for all foreign nationals. This option may be the easiest to implement, but the hardest to defend, because of the possible claim that the president is overstepping his authority by dictating how state courts handle their judicial procedure.[232] If this action is undertaken, it would improve the United States' image to the international community, especially after the United States withdrew from the Optional Protocol and jurisdiction of the ICJ. It would show that the United States does respect the ICJ's interpretation of the Convention and that the United States will comply with it.

The last option is for the U.S. Supreme Court to rule for the petitioner in *Medellin*, if the case returns on subsequent review. However, such a decision, if following the narrow issues presented, will not affect the situation of any future foreign nationals making the case; the issues are limited to the applicability of the *Avena* holding. If the Court wishes to make a more substantial impact on this issue, its ruling must be broader than the issues presented and must include language that gives all foreign nationals the right to effective review and reconsideration in light of the ICJ's determination that current methods are inadequate. The holding would deem the procedural default doctrine inapplicable in Vienna Convention claims, overturning the decision in *Breard*. Additionally, the Court must decide that foreign nationals have an individually recognizable right to enforce the treaty obligations.[233]

VI. CONCLUSION

The United States has violated its Vienna Convention treaty obligations through inadequate implementation of monitoring and enforcement mechanisms. This has led to consistent failures by arresting officials to inform foreign nationals of their right to consular assistance and failures by the courts to provide adequate review and reconsideration

232. The states have their own habeas laws, and an Order requiring review in state habeas when the state statutes ban it could create conflict, like the current conflict between Texas and the Presidential Order.

233. Since the *Medellin* case was dismissed as improvidently granted, these options would only be available if the case returns to the U.S. Supreme Court on later review.

when such violations occur, thus preventing the full effect and purpose to the Vienna Convention treaty.[234] The lack of a sound U.S. policy on how to address Vienna Convention claims has serious ramifications for foreign nationals—they are left unprotected, despite the treaty. Now that the United States has withdrawn from the Optional Protocol, other nations cannot even bring claims against the United States to the ICJ. Proper action must be taken to resolve the conflict and uncertainty that are currently looming over courts facing these issues. The action may take the form of legislative, executive, or judicial measures, and any of them would be a step in a positive direction and a possible solution to this controversy.

234. *See supra* Part IV.A.