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"In Accordance with General Principles of Comity": President Bush's Memorandum in Medellin v. Dretke and the Constitutional Limitations on the President's Ability to Enforce the ICJ's Avena Judgment at the State Level

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"IN ACCORDANCE WITH GENERAL PRINCIPLES OF COMITY": PRESIDENT BUSH'S MEMORANDUM IN *MEDELLIN v. DRETKE* AND THE CONSTITUTIONAL LIMITATIONS ON THE PRESIDENT'S ABILITY TO ENFORCE THE ICJ'S *AVENA* JUDGMENT AT THE STATE LEVEL

INTRODUCTION

During its 2005 term, the Supreme Court of the United States heard oral arguments in *Medellin v. Dretke*.[1] Jose Ernesto Medellin, a Mexican citizen on death row in Texas for the 1993 rape and murder of two Houston teenage girls, asked the Court to review his conviction and death sentence.[2] Medellin alleged that his conviction should be overturned because he had not been informed at the time of his arrest of his right under Article 36(1) of the Vienna Convention on Consular Relations[3] to contact the Mexican consulate and seek consular assistance in his defense.[4]

Medellin was arrested in Houston in connection with the two murders in June 1993.[5] At the time of his arrest, Medellin told the arresting officers that he was born in Mexico.[6] Before trial, he also told Texas authorities that he was not a U.S. citizen.[7] Nevertheless, Medellin was not informed of his right to seek assistance from the Mexican consulate.[8] In September 1994, Medellin was convicted and sentenced to death.[9] Mexican authorities did not learn of Medellin's case until 1997, shortly after his death sentence was affirmed on direct appeal.[10]

Shortly thereafter, with the aid of the Mexican consulate, Medellin sought a writ of state habeas corpus based on the violation of his rights under the

1. 544 U.S. 660 (2005).

2. *Id*. at 662.

3. Vienna Convention on Consular Relations art. 36(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the President of the United States Nov. 12, 1969).

4. *Medellin*, 544 U.S. at 662.

5. Brief of Applicant Jose Ernesto Medellin at 7, *Ex parte* Medellin, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) [hereinafter Brief of Applicant].

6. *Id.* at 7–8.

7. *Id*. at 8.

8. *Id*.

9. *Id*.

10. Brief of Applicant, *supra* note 5, at 9.

Vienna Convention.[11] The Texas trial court denied the writ, finding that Medellin's failure to raise the issue at his state criminal trial procedurally barred him from raising it in a state habeas petition.[12] The Fifth Circuit Court of Appeals also denied federal habeas relief on the ground that Medellin had failed to litigate the issue at the state level.[13]

In *Medellin*, Medellin asked the Supreme Court to overturn the Fifth Circuit's decision and to review his conviction and death sentence, despite his procedural default.[14] Specifically, Medellin predicated his claim for relief on an earlier decision by the International Court of Justice (ICJ), *Mexico v. United States* (the *Avena* case).[15] In *Avena*, Mexico sued the United States on behalf of itself and fifty-four Mexican nationals on death row throughout the United States, including Medellin.[16] Mexico alleged that the plaintiffs' convictions had all been obtained in violation of their rights under Article 36(1) of the Vienna Convention because none of them were notified at the time of their original detention of their right to contact the Mexican consulate.[17]

Prior to *Avena*, the ICJ had interpreted Article 36(1) of the Vienna Convention to confer on citizens an *individual* right to receive consular access, in addition to a signatory nation's right to be notified that its citizen has been detained.[18] In *Avena*, the ICJ went one step further and concluded that a foreign national convicted in violation of his Article 36(1) rights is entitled to judicial review of his conviction and sentence to determine whether that violation prejudiced his case; the ICJ advised the United States to provide such review for the *Avena* plaintiffs.[19] The ICJ also found that procedural default rules, whereby "a defendant who . . . fails to raise[] a legal issue at trial will

11. *Id*. at 9–10.

12. *Id.* at 10.

13. Medellin v. Dretke, 544 U.S. 660, 663 (2005).

14. *Id*. at 661–62.

15. *See id*. at 662–63; Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (I.C.J. Mar. 31, 2004).

16. *Avena*, 43 I.L.M. at 588. Although Mexico originally sued on behalf of itself and fifty-four of its citizens, it later adjusted its claim so that the final *Avena* decision involved only fifty-two Mexican nationals, including Jose Ernesto Medellin. *Id*. at 592. Governor Brad Henry of Oklahoma subsequently commuted the death sentence of *Avena* plaintiff Osvaldo Torres to life without parole on May 13, 2004. *See* Torres v. State, 120 P.3d 1184, 1186 (Okla. Crim. App. 2005).

17. *Avena*, 43 I.L.M. at 589.

18. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27) ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.").

19. *Avena*, 43 I.L.M. at 615. The *Avena* court added that "the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task." *Id.* at 619.

generally not be permitted to raise it in future proceedings,"[20] should be suspended for the *Avena* plaintiffs.[21] This ruling was based on the ICJ's finding that procedural default had prevented many foreign nationals, such as Medellin, from obtaining judicial review.[22] Finally, the ICJ found that the state clemency process, review of sentences by a panel of prison authorities, is not sufficient and that foreign nationals are entitled to *judicial* review.[23]

Rather than either affirming or reversing the Fifth Circuit, the Supreme Court dismissed the writ issued in *Medellin* as improvidently granted.[24] The majority relied heavily on a 2005 memorandum from President George W. Bush to Attorney General Alberto Gonzalez.[25] In the memorandum, President Bush directed the states to comply with the ICJ's decision and review the sentences of the *Avena* plaintiffs, including Jose Ernesto Medellin.[26] Citing this memorandum, the *Medellin* Court found it likely "that the Texas courts will provide Medellin with the review he seeks."[27] Therefore, the Supreme Court concluded that it would be premature to rule on his case.[28]

The *Medellin* decision does not address whether state procedural default rules are preempted by the President's order. However, the Court's decision to

20. *Id*. at 613 (quoting Mexico's unchallenged definition of the American procedural default rule).

21. *Id*.

22. *Id*. at 618. The *Avena* court added,

> "If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals . . . . As a result, a claim based on the violation of Article 36 . . . however meritorious in itself, could be barred in the courts of the United States . . . ."

Id. at 617 (quoting testimony regarding U.S. criminal procedure) (emphasis removed).

23. *Id*. at 619.

24. Medellin v. Dretke, 544 U.S. 660, 662 (2005).

25. *Id*. at 663–64. Although the majority apparently deferred to the President's memorandum, the principal dissent in *Medellin* questioned the President's authority to issue such an order. *See id.* at 673 (O'Connor, J., dissenting) (noting with disfavor the majority's decision to dismiss the writ because Medellin might obtain relief in state court proceedings as a result of the President's memorandum, though the majority remained "rightfully agnostic" as to the constitutionality of the memorandum).

26. Brief for the United States as Amicus Curiae Supporting Respondent, app. 2: Memorandum for the Attorney General, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) [hereinafter Brief for the United States as Amicus Curiae].

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision . . . *Mexico v. United States of America* . . . 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.

Id. (citation omitted).

27. *Medellin*, 544 U.S. at 666.

28. *Id*. at 666–67.

send Medellin's case back to the Texas courts, which had previously denied further review on the grounds of procedural default, suggests this conclusion.[29] This Comment will address several questions raised but not answered by *Medellin*. Is the President's memorandum binding on the judiciary so that state courts *must* review the convictions of the *Avena* plaintiffs regardless of state procedural default rules? If the President's memorandum is *not* binding, how should state courts handle appeals brought by the *Avena* plaintiffs in light of state procedural default rules and the clemency process? Finally, what effect does the Supreme Court's recent decision in *Sanchez-Llamas v. Oregon*, holding that states can apply procedural default to the Article 36(1) claims of plaintiffs not named in *Avena*,[30] have on appeals by the *Avena* plaintiffs?

One possible answer is that the President's memorandum is binding—state courts must review the *Avena* plaintiffs' convictions, regardless of procedural default rules, because the President's memorandum directs them to do so,[31] and it preempts conflicting state law.[32] Arguably, the President has broad Article II powers to direct the nation's foreign affairs, in this case by enforcing the ICJ's *Avena* decision in state courts.[33] Accordingly, state procedural rules that interfere with the President's foreign policy objectives should be nullified by his preemptive foreign affairs power.[34]

A second possibility is that the President's memorandum is *not* binding, but that courts must defer to his interpretation of the treaty.[35] Arguably, the President, as the executor of the laws of the nation, has implicit power to interpret those laws when necessary, and state courts are bound by his interpretations.[36] Therefore, under this rationale, state courts must uphold the President's interpretation of the Vienna Convention in ruling on the *Avena* plaintiffs' appeals.

29. *See id*. at 666; Brief of Applicant, *supra* note 5, at 10.

30. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006). For reasons that will be discussed *infra* Part IV, the author believes that *Sanchez-Llamas* may not extend to the *Avena* plaintiffs, and, therefore, does not foreclose the issues raised by this Comment. Nonetheless, Part IV of this Comment will refute the Supreme Court's decision in *Sanchez-Llamas*.

31. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at app. 2.

32. *Id.* at 44–46.

33. *See* U.S. CONST. art. II, § 2.

34. Brief for the United States as Amicus Curiae, *supra* note 26, at 44–46 (arguing that the Court has consistently upheld Executive branch dominance over foreign affairs, and noting that executive agreements with other nations preempt conflicting state law).

35. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 870 (2001) (reviewing FRANCES FITZGERALD, WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR (2000)).

36. *Id*.

Even after *Avena* and *Medellin*, the Executive Branch does not read the treaty to confer any *privately enforceable* individual rights.[37] According to the Executive Branch, although foreign citizens may have individual rights under Article 36(1), only foreign nations are entitled under Article 36(2) to a remedy for a violation of their citizens' rights.[38] Their citizens have no individually enforceable remedy under U.S. domestic law, including judicial review.[39] The President's decision to grant review to the *Avena* plaintiffs did not signal a reversal of this position—instead, he made a one-time exception out of deference to the ICJ and respect for the international community, which applied only to the *Avena* plaintiffs.[40] However, if the President's memorandum is not binding, state courts should disregard the exception (the memorandum) and follow the President's interpretation. Review should be denied because, as the President interprets the treaty, individuals alleging violations of Article 36(1) have no remedy under U.S. law.[41]

This Comment will first suggest that the President's memorandum is not preemptive and so state courts are not required by his order to review the *Avena* plaintiffs' convictions where doing so would violate otherwise applicable procedural default rules. However, this Comment will also argue that state courts are not bound to uphold the President's treaty interpretation and *deny* review to the *Avena* plaintiffs. Courts also owe deference to the ICJ's interpretation, because the United States specifically ceded jurisdiction to the ICJ to interpret the treaty.[42] The two interpretations of the President and the ICJ are mutually inconsistent, and therefore, courts cannot defer to both.[43]

37. Brief for the United States as Amicus Curiae, *supra* note 26, at 22–23 ("The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence.").

38. *Id.* at 23 ("The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts.").

39. *Id.* at 22–23.

40. *See id.* at app. 2.

41. *Id.* at 22–23.

42. *See* Vienna Convention on Consular Relations, Optional Protocol concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 326, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

43. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 615 (I.C.J. Mar. 31, 2004) (stating that a foreign national deprived of his Article 36(1) rights is entitled to an individual remedy under Article 36(2), namely judicial review of his conviction and sentence, to determine whether the violation prejudiced his case); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27) (stating that the "clarity of these provisions, viewed in their context, admits of no doubt" and that Article 36(1) unequivocally creates individual rights for foreign citizens detained abroad to receive consular access and assistance); Brief for United States as Amicus Curiae, *supra* note 26, at 18–30 (discussing the U.S. government's position that Article 36(1) does not create any rights that can be enforced in U.S. courts by an individual

Therefore, this Comment will propose a third answer—state courts should interpret the treaty on their own and choose to follow the ICJ's interpretation, not out of deference, but because it correctly reflects the meaning behind the treaty's provisions. The ICJ's interpretation is supported by the actual text of the treaty and ensures that violations of Article 36(1) do not go unanswered. State courts should interpret the treaty to confer an individual right to consular aid and assistance that is privately enforceable by individuals in U.S. courts.[44] Furthermore, state courts should conclude that judicial review of a foreign national's conviction and sentence for prejudice is the proper remedy for a violation of this right, regardless of otherwise applicable state procedural default rules.[45]

Part I discusses the preemptive weight of the President's memorandum and concludes that states are not bound by it to enforce the *Avena* judgment, as the President does not have the Constitutional power to preempt state law merely by issuing a statement of foreign policy. Part II rejects the notion that courts must uphold the President's interpretation of the treaty. Part II also argues that although there are substantial reasons for deferring to the President's interpretation, there are equally weighty grounds for deferring to the ICJ, and courts cannot defer to both. Part III examines the ICJ's interpretation and concludes that it best effectuates the purposes of Article 36. Finally, Part IV explores the Court's recent decision in *Sanchez-Llamas v. Oregon*, and concludes that the Court wrongly discarded the ICJ's interpretation.

I. CONSIDERING THE CONSTITUTIONAL BASIS FOR EXECUTIVE PREEMPTION: DOES THE PRESIDENT HAVE AN ARTICLE II POWER TO PREEMPT STATE LAW?

One possible response for state courts faced with appeals by the *Avena* plaintiffs is to follow the President's directive and grant review, despite otherwise applicable procedural default rules. Arguably, because the President is the nation's designated leader in foreign affairs, he can prevent states from thwarting his foreign policy objectives.[46] If the President believes that review for the *Avena* plaintiffs is crucial to national foreign policy interests, state courts must abide by his decision, and state procedural default laws that would otherwise prevent review must yield.[47] However, this argument rests on the debatable premise that the President, merely by issuing a national foreign policy directive, can create preemptive federal law that nullifies conflicting state law. This Part will argue that the President lacks such lawmaking power.

foreign national and that only foreign nations are entitled to a remedy for violations of Article 36).

44. *See LaGrand*, 2001 I.C.J. at 494.

45. *See Avena*, 43 I.L.M. at 615.

46. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at 43–48.

47. *See id*. at 43.

The Constitution of the United States does not vest the President with unlimited foreign affairs powers.[48] Under Article II, the President "shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties,"[49] to "nominate, and *by and with the Advice and Consent of the Senate*, [to] appoint Ambassadors,"[50] and to "receive Ambassadors and other public Ministers."[51] However, despite the textual limitations imposed by the Constitution, the Executive Branch has come to dominate the area of foreign affairs, usually with little interference by the other branches of government.[52]

Courts and scholars alike have recognized the Executive's power to act for the nation in the international sphere.[53] The Supreme Court has routinely upheld Executive Branch dominance over foreign affairs, recognizing that "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'"[54]

Therefore, both history and precedent seem to support the President's power to issue a binding order requiring state courts to review appeals by the *Avena* plaintiffs. The United States government took this position in its amicus brief submitted in *Medellin*.[55] The United States urged the Court to dismiss Medellin's petition because the President had already determined that, in the interests of foreign policy, with respect to fifty-one individuals, the *Avena* decision should be enforced in state courts.[56] Specifically, the government argued that President Bush had determined that enforcement of the ICJ's *Avena* directive was crucial to U.S. foreign policy, in light of the many Americans detained abroad, depending for their own well-being on consular assistance.[57] The government urged the Court to defer to the President's

48. U.S. CONST. art II.

49. *Id.* art. II, § 2, cl. 2 (emphasis added).

50. *Id.* (emphasis added).

51. *Id*. art. II, § 3.

52. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 40–41 (2d ed. 1996).

53. *Id*. Louis Henkin, a renowned international law scholar, has characterized the expansion of the presidential foreign affairs power as follows: "[B]y constitutional exegesis, by inferences and extrapolations small and large . . . Presidents have achieved and legitimated an undisputed, extensive, predominant . . . 'foreign affairs power,' though . . . its scope and content remain less than certain." *Id.*

54. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

55. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at 43–48.

56. *Id*. at app. 2.

57. *See id*. at 41.

directive and dismiss, rather than independently deciding whether state courts were bound by the ICJ's decision.[58]

Relying on the Court's 2003 decision in *American Insurance Association v. Garamendi*,[59] the government pointed out that the Court had consistently upheld the President's power to act independently in the international sphere.[60] The government argued that the President can make executive agreements with other countries and that such agreements do not depend for their validity on "ratification by the Senate or approval by Congress."[61] Furthermore, these agreements have preemptive effect.[62] Therefore, the government concluded that a President able to make executive agreements "to resolve a dispute with a foreign government . . . should be equally free to resolve a dispute with a foreign government" by deciding how to comply with the ICJ's *Avena* decision.[63]

In reaching this conclusion, the government relied heavily on *Garamendi*, where the Supreme Court enjoined enforcement of a state law because it impermissibly interfered with the President's conduct of foreign affairs and conflicted with an executive agreement between the United States and Germany.[64]

A. American Insurance Association v. Garamendi*: Setting the Stage for Executive Foreign Policy Preemption*

In *Garamendi*, a group of insurers sued the Insurance Commissioner of the State of California to prevent enforcement of the 1999 Holocaust Victim Insurance Relief Act (HVIRA).[65] HVIRA was aimed at compensating Holocaust survivors living in California who had been deprived of valid life insurance claims during and after World War II.[66] HVIRA required all insurers operating in California to disclose the details of any policies issued to Europeans between 1920 and 1945 by either themselves, a parent, or a subsidiary.[67] Failure to meet the burdensome disclosure requirements could result in the insurer losing its California insurance license.[68] In 2000, President Clinton and German Chancellor Schröder had addressed the same concern on

58. *See id*. at 40–42.
59. 539 U.S 396 (2003).
60. Brief for the United States as Amicus Curiae, *supra* note 26, at 44–46.
61. *Id.* at 45.
62. *Id.*
63. *Id*.
64. *See Garamendi*, 539 U.S. 396.
65. *See id*. at 412.
66. *Id*. at 408–09.
67. *Id*. at 409–10.
68. *Id*. at 410.

an international level, signing the German Foundation Agreement.[69] In the agreement, Germany agreed to establish and fund a foundation aimed at finding and compensating Holocaust victims for unpaid life insurance claims, and President Clinton agreed to argue for dismissal in light of foreign policy interests "whenever a German company was sued on a Holocaust-era claim in an American court."[70]

The Supreme Court in *Garamendi* found that California's HVIRA was preempted by the President's foreign affairs power.[71] As a preliminary matter, the Court addressed the general notion of foreign affairs preemption, stating:

> There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.[72]

The *Garamendi* Court then concluded that HVIRA conflicted with the national foreign policy codified in the agreement.[73] While President Clinton had repeatedly allowed "European governments and companies to *volunteer* settlement funds,"[74] the Court found that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment."[75] The Court also found that HVIRA posed a significant threat to insurers, given its potential to oust a company completely from a significant American market.[76] In doing so, the law chipped away at the President's ability to negotiate with foreign governments by giving him "less to offer and less economic and diplomatic leverage."[77] Ultimately, the Court concluded that "the state Act stands in the way of [the President's] diplomatic objectives."[78]

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69. *See Garamendi*, 539 U.S. at 405–06. In addition to the German Foundation Agreement with the Republic of Germany, the United States negotiated similar agreements with the governments of France and Austria. *Id*. at 408 n.3. The agreement with Austria most closely paralleled the German Foundation Agreement at issue in *Garamendi*. *Id*. Specifically,

> Austria agreed to devote a $25 million fund for payment of claims . . . . Austria also agreed to "make the lists of Holocaust era policy holders publicly accessible, to the extent available." The United States Government agreed, in turn, that the settlement fund should be viewed as the "exclusive . . . forum" for the resolution of Holocaust-era claims asserted against the Austrian Government or Austrian companies.

Id. (citation omitted).

70. *Id.* at 405–06.

71. *Id*. at 401.

72. *Id*. at 413.

73. *Id.* at 420.

74. *Garamendi*, 539 U.S. at 421 (emphasis added).

75. *Id.* at 423.

76. *Id.* at 423–24.

77. *Id*. at 424.

78. *Id*. at 427.

Writing for the four dissenters, Justice Ginsburg failed to perceive an express conflict between the state law, which required disclosure of information but did not expressly authorize claims against Germany or insurance companies, and the national foreign policy, which sought to promote the German foundation as the sole arbiter of unpaid Holocaust-era insurance claims.[79] Finding no express conflict, Justice Ginsburg concluded the majority found preemption based solely on "statements by individual members of the Executive Branch" that the state law interfered with the President's conduct of foreign affairs.[80] Justice Ginsburg argued, "[W]e have never premised foreign affairs preemption on statements of that order. . . . We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch."[81]

B. The Inherent Dangers of the Garamendi *Precedent*

If the *Garamendi* precedent is accepted, then at first blush, the case for executive preemption seems stronger when applied to the facts in *Medellin* than it did when the Court actually found executive preemption in *Garamendi*. As Justice Ginsburg noted in *Garamendi*, no express conflict existed between the California state law and the executive agreements in that case.[82] HVIRA was purely a disclosure law, while the executive agreements were silent on disclosure.[83] Instead, the *Garamendi* Court found preemption based on "foreign policy objectives implicit in the executive agreements."[84] By contrast, there *is* a direct conflict between President Bush's foreign policy directive in *Medellin* and many state procedural default rules.[85] President Bush has directed state courts to review appeals by the *Avena* plaintiffs.[86] State procedural default rules that prevent further review for many *Avena* plaintiffs directly conflict with his order.[87] Therefore, under *Garamendi*, executive preemption on the facts in *Medellin* would seem a foregone conclusion.

79. *Garamendi*, 539 U.S. at 435 (Ginsburg, J., dissenting).

80. *Id.* at 441.

81. *Id.* at 442.

82. *Id*. at 435.

83. *Id*.

84. *Garamendi*, 539 U.S. at 439 (Ginsberg, J., dissenting).

85. For example, see the discussion of Texas state procedural default rules as applied in Medellin's case, *infra* note 211.

86. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at app. 2.

87. For an example specifically pertinent to Medellin's case in the Texas courts, see TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (preventing litigants from raising an issue in a successive habeas petition if they failed to raise the issue in the original petition, unless they can meet certain requirements). Procedural default rules in general, and more specifically, the possible consequences such rules will have on appeals brought by the *Avena* plaintiffs, are discussed at length *infra* Part III.A.2.

However, several scholars have argued, and rightly so, that the *Garamendi* precedent is fundamentally flawed.[88] At the heart of *Garamendi* lies the assumption that national foreign policy (like the Constitution, treaties, and Acts of Congress) is the supreme law of the land and under the Constitution can preempt conflicting state law.[89] Indeed, the *Garamendi* Court extended to the President previously unheard-of authority:

> No congressional act authorized the executive policy [at issue in *Garamendi*], even implicitly. Nor did the executive branch negotiate the Foundation Agreement as a treaty and present it to the Senate for its advice and consent. . . . [T]he President asserted an independent power to oust the state law, based solely upon a policy formulated within the executive branch.[90]

There are several inherent problems with according preemptive effect to executive foreign policy. First, the idea that executive foreign policy has preemptive effect is devastating to the separation of powers doctrine because it elevates the Executive to the position of lawmaker.[91] Preemptive effect implies the weight of legal authority.[92] According preemptive affect to the President's memorandum puts President Bush's statement of foreign policy on par with the Constitution, international treaties, and Acts of Congress—it becomes a law, rather than a mere policy.[93] "[S]eparation of powers meant

88. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 827 (2004); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1964 (2003).

89. Denning & Ramsey, *supra* note 88, at 828–29.

> [T]he essence of the decision is that the President, at least in some circumstances, does have . . . preemptive power in foreign affairs. . . . The final outcome, however, was that a state law fell, not because the law was in itself unconstitutional, but because the executive branch disagreed with it as a policy matter. As the Court itself said, the case was one of "preemption by executive conduct."

Id.

90. *Id*. at 898.

91. *Id*. at 908. The argument that executive foreign policy preemption and executive lawmaking contradict the intentions of the Framers is further supported by their own writings. *See* THE FEDERALIST NO. 47 (James Madison). Addressing critics of the new Constitution, James Madison readily admitted, "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *Id*. at 244 (Bantam ed., 1982). However, Madison defended the new Constitution as free from such hazards to democratic government, noting "[t]he magistrate in whom the whole executive power resides *cannot of himself make a law*, though he can put a negative on every law, nor administer justice in person, though he has the appointment of those who do administer it." *Id*. at 245 (emphasis added).

92. *See* Denning & Ramsey, *supra* note 88, at 908.

93. *Id*.; *see also* U.S. CONST. art. VI, cl. 2 ("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,

that executive power is separated from the legislative power . . . . As a result, the Framers placed the preemptive power in the hands of Congress, an allocation that followed directly from the basic principles of separation of powers."[94]

Additionally, executive foreign policy lacks the democratic characteristics that usually accompany preemptive federal law, suggesting the Framers would not have *intended* to make it preemptive. "[T]he . . . British monarch did not have a domestic rulemaking power in support of foreign affairs objectives—even foreign affairs objectives specified in treaties. It is hard to imagine that the Framers constituted their President with greater powers than the British monarch."[95] Under the Supremacy Clause, three types of law—the Constitution, the laws of the United States, and treaties—enjoy the weighty status of supreme law and can preempt conflicting state laws.[96] These have a common underlying element—all are enacted pursuant to some democratic process.[97] The Constitution was submitted to the people for ratification, and amendments today require a similar ratification process by voters in each state.[98] Acts of Congress are enacted pursuant to a majority vote of both Houses, by popularly elected representatives.[99] Even treaties, though

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.").

94. Denning & Ramsey, *supra* note 88, at 908–09.

95. *Id*. at 913.

96. U.S. CONST. art. VI, cl. 2.

97. *See* Denning & Ramsey, *supra* note 88, at 829. "The Constitution's Article VI places the power of preemption in the legislative branch by making laws and treaties, but not executive decrees, the supreme law of the land." *Id*.

98. *See* U.S. CONST. pmbl. (stating that the Constitution was enacted by the people); U.S. CONST. art. V (stating that amendments to the Constitution shall be proposed "whenever two thirds of both Houses shall deem it necessary" or when the legislatures of two thirds of the states call a convention, and shall be ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof").

99. *See* U.S. CONST. art. I, § 7.

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id.

originally introduced by the President, cannot become law without the participation of the Senate.[100]

Executive foreign policy stands in stark contrast to these examples of democratic lawmaking. According preemptive effect to executive foreign policy ignores the safeguards imposed by the democratic process and enhances the power of the Executive Branch.[101] As scholars have recognized, if the President alone can preempt state law, he has no need to seek the cooperation of Congress to further his objectives.[102] Instead, "the President's ability to pursue a unilateral foreign policy agenda is enhanced and Congress' role in deciding foreign policy priorities is diminished."[103]

Finally, if executive foreign policy is preemptive, the portion of the Supremacy Clause that makes treaties supreme law would be redundant.[104] "[I]f executive foreign policy is preemptive . . . and if treaties reflect executive foreign policy (as they surely do), then the Supremacy Clause is unnecessary to make them supreme over state law—something that plainly escaped the notice of the Framers."[105]

C. Author's Analysis

According preemptive weight to President Bush's memorandum in *Medellin* is even more suspect than the executive preemption in *Garamendi*. In *Garamendi*, the agreements at issue were formal, published international agreements entered into after long sessions of international negotiations.[106] By contrast, when this Comment was written, the President's memorandum in *Medellin* had never been published and was only made public as an appendix to the United States' amicus brief.[107]

As such, the President's memorandum demonstrates the dangers inherent in an extension of the *Garamendi* precedent.[108] The policy embodied in the memorandum was never submitted to the people in any codified way and was never "enacted" pursuant to any democratic process. Yet, if the *Garamendi* precedent is endorsed, this unpublished directive from President Bush to one of

100. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

101. *See* Denning & Ramsey, *supra* note 88, at 829.

102. *Id*. at 905.

103. *Id*.

104. *Id*. at 913–14.

105. *Id*. at 914.

106. *See* United States-Germany: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, 39 I.L.M. 1298.

107. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at app. 2.

108. For a discussion of the constitutional problems with the *Garamendi* precedent, see *supra* Part I.B.

his underlings at the Justice Department has the binding force of supreme law and can nullify conflicting state procedural default laws enacted pursuant to state democratic processes.[109] Given these shortcomings, the *Garamendi* precedent should not be embraced as the source of the President's authority to order state court review of the *Avena* plaintiffs' appeals.

II. "[H]E SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED:"[110] TO WHAT EXTENT MUST STATE COURTS DEFER TO THE PRESIDENT'S INTERPRETATION OF THE VIENNA CONVENTION?

A second possible response for state courts facing appeals by the *Avena* plaintiffs is to deny further review, thereby upholding the President's interpretation of the treaty rather than enforcing his memorandum. The Executive Branch has consistently maintained that the Vienna Convention does not create judicially enforceable rights for individuals—even assuming an individual foreign national can prove his Article 36(1) rights were violated, he is not entitled to an individual remedy, including judicial review.[111] The

109. On at least two other occasions, the Supreme Court has upheld executive preemption where state common law conflicted with a formalized executive agreement. *See* United States v. Pink, 315 U.S. 203, 230–31 (1942); United States v. Belmont, 301 U.S. 324, 331–32 (1937). *Pink* and *Belmont* both involved the Litvinov Agreement, an executive agreement signed by President Roosevelt in 1933, formally recognizing the Soviet government. Sloss, *supra* note 88, at 1969. In 1918, the new Soviet government appropriated all privately-held Russian assets, including those held by Russian corporations located in the United States. *Id.* In the Litvinov Agreement, the Russian government assigned any remaining interest in assets located in the United States to the United States government in return for formal recognition. *Id.*

Belmont and *Pink* involved claims filed by the United States in New York seeking assets assigned to the United States by the Russian government. *Id.* In both cases, the state of New York refused to honor the Russian government's assignment of those assets "as a matter of judicial policy" because the assignment resulted from the prior expropriation of private funds. *Id.* In both cases, the Supreme Court held the executive agreement preempted New York state common law, finding President Roosevelt had "decided . . . to accept the validity of the Soviet expropriation." *Id.* Although these cases present a direct conflict more in line with the conflict between state procedural default laws and the President's memorandum in *Medellin*, these cases are also distinguishable because they involved a conflict between state *common* law and an executive agreement. *Id.* In both cases, the Litvinov agreement was found to supersede the judicial policies of New York. *Id.* However, the Court was not asked to decide in either case whether an executive agreement would also supersede state laws duly enacted by a state legislature. *See Pink*, 315 U.S. at 221–23; *Belmont*, 301 U.S. at 327.

110. U.S. CONST. art. II, § 3.

111. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at 20. "The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence." *Id.* at 22–23. The State Department's current process for redressing Article 36(1) violations is limited to issuing a formal apology to the foreign national's home state if the claim is corroborated by independent agency investigation. *Id.* at 23.

President's decision to order review for the *Avena* plaintiffs was merely an exception to this interpretation and applies only to those plaintiffs.[112]

Arguably, the President, as executor of the nation's laws,[113] enjoys an implicit power to interpret those laws.[114] Thus, while state courts are not bound to implement his memorandum, state courts must uphold the President's interpretation of the nation's treaty obligations. Accordingly, state courts should deny further review, because as the President interprets the treaty and U.S. domestic law, an individual foreign national has no judicially enforceable remedy for a violation of his Article 36(1) rights.[115]

However, as in *Garamendi*, this argument is predicated on an underlying assumption that has been problematic to scholars—this view tacitly accepts that the President has the final power to interpret treaties and that courts owe absolute deference to the President's interpretation. But, if it is "emphatically the province and duty of the judicial department to say what the law is,"[116] what role should courts play in treaty interpretation? Additionally, what weight, if any, should state courts accord to the ICJ's interpretation of the Vienna Convention, given the ICJ's jurisdiction over disputes involving the correct interpretation of the treaty?[117]

> The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. . . . As of 1999, the State Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process.

Id. at 24.

112. *See id*. at app. 2.

113. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

114. *See* HENKIN, *supra* note 52, at 50. "[T]reaties and customary international law . . . are also the law of the land, and Presidents have asserted [some] responsibility (and authority) to interpret such international obligations and to see that they are 'faithfully executed,' even when Congress has not enacted implementing legislation." *Id*.

115. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at 22–23.

116. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803):

> If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177–78.

117. *See* Optional Protocol, *supra* note 42, at art. I ("Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.").

A. Making the President's Case: Why The Judiciary Might be Bound to Uphold the President's Interpretation

Professor John Yoo has argued that the Executive Branch alone is empowered to interpret treaties, and the judiciary is bound to follow those interpretations.[118] According to Professor Yoo, no political branch is expressly vested under the Constitution with the power of treaty interpretation, but Article II *implicitly* vests the Executive Branch with interpretive power.[119] To support his conclusion, Professor Yoo notes that although treaties hinge on the advice and consent of the Senate, the Framers placed the treaty power in Article II, among the powers of the Executive.[120] This "indicates that the power to make treaties, and by extension interpret them, remains an executive one."[121]

Additionally, Professor Yoo argues, the only reason the Framers did *not* expressly grant the exclusive power of treaty interpretation to the Executive is because the Executive's authority in that area was uncontested when the Constitution was written.[122] "[M]aking and interpreting treaties . . . was traditionally considered an executive function by Anglo-American constitutional theory of the eighteenth century."[123] Therefore, Yoo concludes, the Framers assumed that the Executive's exclusive power to interpret treaties was a foregone conclusion and did not feel the need to spell it out.[124]

Finally, Professor Yoo argues, the Executive Branch is best suited to the task of treaty interpretation because the Executive dominates foreign affairs anyway and has "structural abilities to wield power quickly, effectively and in a unitary manner."[125] Thus, the President enjoys more legitimacy than judges when interpreting treaties because he is a nationally-elected leader vested with control over the nation's foreign affairs.[126] Likewise, an active role in the treaty process allows the Executive to "read the text of the treaty in line with its intentions and harmonize that interpretation with current foreign policy demands."[127] By contrast, Yoo argues, judicial interpretations of treaties lack legitimacy because judges are neither elected by the people nor specifically vested with any powers to make foreign policy.[128]

118. Yoo, *Politics as Law?*, *supra* note 35, at 870.
119. *Id.*
120. *Id*.
121. *Id*.
122. *Id*.
123. Yoo, *Politics as Law?*, *supra* note 35, at 870.
124. *Id.*
125. *Id*. at 872.
126. *Id*. at 876.
127. *Id*.
128. Yoo, *Politics as Law?*, *supra* note 35, at 876.

B. The Death of the Separation of Powers Doctrine: Constitutional Problems with Binding the Judiciary to the Executive's Interpretation

For several reasons, Professor Yoo's theory that the judiciary is bound to uphold Executive Branch treaty interpretations can be rejected as extreme. First of all, Professor Yoo's interpretation of Article II would render other portions of the Constitution redundant.[129] Professors Derek Jinks and David Sloss reject Professor Yoo's conclusion that the Constitution does not expressly vest any political branch with the power of treaty interpretation.[130] Instead, they argue that under the Constitution, "[t]he power to interpret the law is granted primarily, but not exclusively, to the judiciary."[131] Article VI recognizes treaties as supreme law and states that "the Judges in every State shall be bound thereby."[132] Article III extends judicial power to treaties.[133] Taken together, these provisions expressly grant at least some powers of treaty interpretation to the judiciary.[134] However, these references to the treaty power of the judiciary would be unnecessary if Article II gave the President the exclusive power to interpret treaties.[135]

Likewise, Professor Yoo's interpretation gives little meaning to the Senate's role in the treaty process.[136] Under the Constitution, the Senate

129. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 195 (2004).

130. *Id*. at 195–96. As Professors Jinks and Sloss point out, the extent of the President's power of treaty interpretation, as well as the *limitations* on that power, have been codified in the Restatement (Third) of Foreign Relations Law of the United States: "Courts in the United States have final authority to interpret an international agreement . . . but will give great weight to an interpretation made by the Executive Branch." *Id*. at 194 n.507 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987)). Therefore, although they concede that the President's interpretation is entitled to some deference, the authors reject Yoo's argument for an *exclusive* executive branch power of treaty interpretation. *Id*. at 194–95. "Yoo's argument is flawed . . . because it assumes that the power to interpret treaties, in its entirety, is an 'unenumerated executive power.'" *Id*. at 195.

131. *Id.* at 195.

132. U.S. CONST. art. VI.

133. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

134. Jinks & Sloss, *supra* note 129, at 195.

135. *Id*.

136. Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1277 (2002). Van Alstine adds that the result of vesting sole interpretive powers in the executive, and thereby marginalizing the role of the Senate, is to leave "the very content of the law . . . subject to the fleeting whims of executive-branch officials." *Id*. at 1278.

In *The Federalist*, Alexander Hamilton viewed the roles of both the Executive and the Senate as crucial to the treaty process. *See* THE FEDERALIST NO. 75 (Alexander Hamilton). Defending the Framers' decision to place the treaty-making power with the Executive Branch, Hamilton pointed to the Executive's unique capability for swift and decisive action: "The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point

retains the power to advise the President and to consent to a treaty before it is enacted.[137] "If, subsequent to the Senate's advice and consent . . . the President had a unilateral, unreviewable power to interpret (and reinterpret) it, the careful cooperation between the executive and legislative branches prescribed by the Constitution becomes meaningless."[138]

Finally, the argument that the placement of the treaty-making power in Article II also gives the President an implicit power of treaty interpretation is inconsistent with the doctrine of separation of powers.[139] "[T]he Supreme Court long ago established that the initial power to create law does not include the subsequent power to interpret it."[140] To illustrate, though Congress enjoys power under the Constitution to pass legislation, the Supreme Court has unequivocally rejected attempts to extend congressional power to interpreting legislation.[141] In like manner, though President Bush enjoys the power under the Constitution to negotiate treaties, this should not lead to the conclusion that he also has the power to bind the judiciary to his interpretation of those treaties.[142]

C. The Judicial Power of Treaty Interpretation and the Arguments Against Judicial Deference to the Executive Branch and the ICJ

Even the government in *Medellin* stopped short of arguing that the judiciary was *bound* to uphold the President's interpretation of the Vienna Convention; instead, the government argued the President's interpretation was "entitled to great weight."[143] Therefore, the question remains: What deference, if any, should state courts accord to the Executive Branch interpretation of the Vienna Convention?

In practice, courts throughout the United States have often deferred to the Executive Branch in matters touching on foreign affairs.[144]

> The reasons for deference are not often articulated and are rarely examined, but high among them appears to be some sense that the governmental act in

out the Executive as the most fit agent in those transactions." *Id*. at 380 (Bantam ed., 1982). However, Hamilton also saw reason to curb the powers of the Executive by giving the Legislative Branch a role in the treaty process, noting "the operation of treaties as laws, plead strongly for the participation of . . . the legislative body in the office of making them." *Id.*

137. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

138. Van Alstine, *supra* note 136, at 1277–78.

139. *Id*.

140. *Id*. at 1276.

141. *Id*.

142. *Id*. at 1237.

143. Brief for the United States as Amicus Curiae, *supra* note 26, at 22.

144. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 70 (1990).

> question may implicate the national interest in relation to other nations, if not national security, and that in foreign affairs the United States must "speak with a single voice" and that voice must be that of the experts, usually the executive branch.[145]

Additionally, especially with treaties primarily involving foreign relations or national defense, the Executive Branch is actively involved in the daily implementation of the treaty.[146] Therefore, "some level of executive branch interpretation is simply unavoidable."[147] However, the extent to which courts *must* defer to Executive Branch treaty interpretations remains unclear.[148] This Part will propose that courts should not accord great deference to the President's interpretation of the Vienna Convention.

Proponents of judicial deference argue that the President is the popularly elected and constitutionally designated leader of foreign affairs, making his interpretation the most legitimate.[149] However, Executive Branch treaty interpretations are not necessarily more legitimate than judicial interpretations, because unelected bureaucrats play a major or even predominant role in interpretation.[150] "Today, none of the members of the Executive Branch, other than the President, is elected by the people, except in the most indirect and fictional sense."[151] The role played by unelected bureaucrats substantially undermines any legitimacy the President's interpretation might otherwise gain by virtue of *his* elected status.[152] By contrast, judges, though not popularly elected, enjoy practical legitimacy because they have more experience with statutory and legislative interpretation.[153] As such, "judges are perhaps better qualified . . . to read what is relevant, including constitutional history and constitutional experience."[154]

Of course, it is true that judges encounter treaties on an infrequent basis, while Executive Branch officials are actively engaged in day-to-day treaty

145. *Id*. at 70–71.

146. Van Alstine, *supra* note 136, at 1298.

147. *Id*.

148. Jinks & Sloss, *supra* note 129, at 194.

149. HENKIN, *supra* note 144, at 78.

150. *Id.* The government's brief as amicus curiae, submitted in *Medellin*, refers interchangeably to the Executive Branch's interpretation of Article 36 and the State Department's interpretation of Article 36, and aptly demonstrates the substantial role that unelected bureaucrats play in treaty interpretation. *See* Brief for the United States as Amicus Curiae, *supra* note 26, at 22–24.

151. HENKIN, *supra* note 144, at 78.

152. *See id*.

153. *Id*.

154. *Id*.

implementation.[155] As such, many within the Executive Branch may have a wealth of real-life experience to supplement their interpretive powers and to enhance the legitimacy of Executive Branch treaty interpretations. However, the careful balance created by the Constitution ensures that "one political branch (here, the Executive) cannot combine its authority to create legal rights and obligations with an unchecked power to interpret and apply them to specific citizens and disputes."[156] Therefore, Executive Branch officials *may* justifiably claim unique insight into the daily operation of the Vienna Convention.[157] However, state courts should not accord great deference to an Executive Branch interpretation to avoid upsetting the careful balance created between the three branches of government.[158]

Finally, in interpreting the Vienna Convention, courts owe at least "respectful consideration"[159] to the ICJ's interpretation. By signing the Optional Protocol to the Vienna Convention, the United States ceded jurisdiction to the ICJ for disputes arising under the treaty.[160] Additionally, the United States has actively endorsed the ICJ's jurisdiction over disputes arising under the treaty by suing other nations in the ICJ for treaty violations.[161] In

155. John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1310 (2002) ("The President must constantly interpret international law in the course of conducting our day-to-day foreign affairs.").

156. Van Alstine, *supra* note 136, at 1277.

157. Yoo, *supra* note 155, at 1309.

158. *See* Van Alstine, *supra* note 136, at 1277.

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

> [W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.

Id.

160. *See* Optional Protocol, *supra* note 42, at art. I. As of March 2005, the United States is no longer a party to the Optional Protocol. *See* Medellin v. Dretke, 544 U.S. 660, 682 (2005) (O'Connor, J., dissenting) (citing Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)). At the direction of President Bush, Secretary of State Condoleeza Rice withdrew the United States from the Optional Protocol shortly after the President issued his memorandum directing the Attorney General to enforce the ICJ's *Avena* decision. *See id.* However, at the time the ICJ rendered the *Avena* decision in 2004, the United States was still a party to the Optional Protocol and subject to the ICJ's jurisdiction. *Id.*

161. *See* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 7 (May 24). For a discussion of the United States' interpretation of Article 36(1) and (2) during the Iran Hostage Crisis, see John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 39, 45–46 (2004); *see also* Emily Deck Harrill, *Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S.C. L. REV. 569, 584–85 (2004) (noting that although the U.S. government maintains an official position today that Article 36(1) does not

doing so, the United States has sought to bind other nations under the jurisdiction of the ICJ to that tribunal's interpretation.[162] Surely, this nation is equally obligated to accord at least some weight to the ICJ's interpretation of Article 36, which was rendered when the United States was still subject to the ICJ's jurisdiction.[163]

Justice O'Connor, dissenting in *Medellin*, touched on a second important justification for deference to the ICJ—the need to maintain one uniform interpretation of the treaty.[164] A single interpretation of the treaty would promote uniform application of the treaty, which, in turn, would reinforce the legitimacy of the international system.[165] The ICJ's jurisdiction under the Optional Protocol gives its interpretation legitimacy in *all* signatory countries, and so adoption of the ICJ's interpretation encourages uniform application of the treaty *in all signatory countries*.[166]

The need for a single uniform interpretation of the treaty is evidenced by the conflicting interpretations that have resulted as lower courts have struggled to interpret the treaty for themselves. The Fifth Circuit Court of Appeals refused to grant Medellin a writ of habeas corpus, finding, in direct contravention to *Avena*, that the Vienna Convention did not create individual rights.[167] By contrast, the Oklahoma Court of Criminal Appeals deferred to the ICJ when it stayed the execution of *Avena* plaintiff Osvaldo Torres pending a hearing to determine whether the violation of his Article 36(1) rights had

create an individual right to consular access, the government took the opposite position when U.S. officials wanted access to hostages confined in the American embassy in Tehran).

162. Quigley, *supra* note 161, at 45–46.

163. The ICJ's interpretation of Article 36 was the cumulative result of several decisions, mainly the 2001 *LaGrand* case between Germany and the United States and the 2004 *Avena* case between Mexico and the United States. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (I.C.J. Mar. 31, 2004); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). The United States remained a party to the Optional Protocol and was subject to the ICJ's jurisdiction until March 2005. *See Medellin*, 544 U.S. at 682 (O'Connor, J., dissenting) (citing Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

164. *Medellin*, 544 U.S. at 684 (O'Connor, J., dissenting). Discussing the questions presented, O'Connor noted, "[This case] asks whether and what weight American courts should give to *Avena*, perhaps *for the sake of uniform treaty interpretation*, even if they are not *bound* to follow the ICJ's decision." *Id.* at 684 (emphasis added). Notably, Justice O'Connor continued, "When called upon to interpret a treaty in a given case or controversy, we give considerable weight to the Executive Branch's understanding of our treaty obligations. . . . But a treaty's meaning is not beyond debate once the executive has interpreted it." *Id.* at 685–86 (citation omitted).

165. *Id.* at 684.

166. *See* Optional Protocol, *supra* note 42, at art. I.

167. *Medellin*, 544 U.S. at 663.

prejudiced his case.[168] Judge Chapel, concurring in that case, "said that by virtue of the United States' ratification of the Optional Protocol, his court was obligated to comport with the ICJ judgment in the *Avena* case."[169]

D. Author's Analysis

Courts cannot defer to both the President's interpretation and the ICJ's interpretation in ruling on appeals by the *Avena* plaintiffs. As discussed, the President does not interpret Article 36(1) to confer a privately enforceable individual right, while the ICJ *does* interpret the treaty as conferring individual rights that can be enforced in U.S. courts.[170] In the 2006 decision *Sanchez-Llamas v. Oregon*, the Supreme Court reached this same impasse and chose to defer to the President's interpretation.[171] Although the *Sanchez-Llamas* Court did not ultimately decide whether Article 36 confers individual rights, the Court did conclude, in direct opposition to the ICJ, that state courts can apply rules of procedural default to block otherwise viable Article 36(1) claims.[172] Arguably, this decision does not extend to the *Avena* plaintiffs, because the *Sanchez-Llamas* Court again deferred to the President's memorandum, apparently assuming (but not deciding) that it might still entitle those named in *Avena* to judicial review despite their procedural default.[173] However, regardless of whether *Sanchez-Llamas* extends to appeals by the *Avena* plaintiffs, this author believes that it was wrongly decided, as will be discussed in Part IV.

There are weighty reasons for deferring to both the President *and* the ICJ, and even the Supreme Court should not choose one over the other. Instead, traditions of deference should be abandoned in interpreting Article 36. Rather, the United States should adopt the ICJ's interpretation, *not out of deference to the ICJ*, but because it best effectuates the purpose of Article 36. Part III will demonstrate that a court should logically reach the ICJ's interpretation when analyzing the treaty for the true meaning of its provisions. Part IV will then discuss the shortcomings of *Sanchez-Llamas* and conclude that the *Sanchez-Llamas* Court wrongly rejected the ICJ's interpretation of Article 36.

168. John Quigley, *Application of Consular Rights to Foreign Nationals: Standard for Reversal of a Criminal Conviction*, 11 ILSA J. INT'L & COMP. L. 403, 411–12 (2005) (citing Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, Torres v. Oklahoma, No. PCD-04-442, slip. op. at 2 (Okla. Crim. App. May 13, 2004)).

169. *Id*. at 412.

170. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 26, at 22–23.

171. *See* Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2685 (2006).

172. *Id*. at 2687.

173. *Id*. at 2685.

III. FROM *LAGRAND* TO *AVENA*: ENCOURAGING COURTS TO EMBRACE THE ACCURACY OF THE ICJ'S INTERPRETATION OF ARTICLE 36

Having rejected two possible responses by state courts facing appeals from the *Avena* plaintiffs, this Comment suggests that the United States should adopt the ICJ's interpretation of Article 36. The *Avena* plaintiffs' appeals should be reviewed by state courts, in accordance with that interpretation, because it best effectuates the purpose of Article 36. The ICJ has had two major opportunities to delineate its interpretation and has considered both the creation of individual rights under Article 36(1) and the remedy for the violation of those rights under Article 36(2).[174] This section will discuss each provision and the accuracy of the ICJ's interpretation of each in turn.

A. The LaGrand *Case—Individual Rights Under Article 36 and the Problem with Procedural Default*

1. Article 36(1) and the Creation of Individual Rights

The foundation of the ICJ's interpretation lies in its reading of Article 36(1). The ICJ has consistently interpreted Article 36(1) to confer individual rights on foreign nationals, namely the rights to have their consulate notified of their detention and to receive consular aid and assistance.[175] Article 36(1) of the Vienna Convention provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the

174. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (I.C.J. Mar. 31, 2004); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

175. *LaGrand*, 2001 I.C.J. at 494.

> right to visit any national of the sending State who is in prison, custody, or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody, or detention if he expressly opposes such action.[176]

The ICJ first considered whether Article 36(1) creates an *individual* right to consular assistance in the *LaGrand* case.[177] In *LaGrand*, Germany sued the United States on behalf of itself and two German citizens, Walter and Karl LaGrand.[178] The LaGrand brothers were convicted of murder in Arizona and sentenced to death without being notified of their right to contact the German consulate.[179] The United States objected to Germany's representation of the LaGrands as individuals, arguing that Article 36(1) only created rights in signatory nations.[180] The United States conceded that Germany had a right to consular notification and could pursue a remedy for the United States' failure to notify the German consulate that its citizens had been detained.[181] However, the United States argued the LaGrands did not have an individual right to *receive* consular assistance, and thus had no standing to sue.[182]

After careful examination of Article 36(1), the ICJ emphatically sided with Germany and concluded that Article 36(1) creates individual rights in citizens.[183] The ICJ first noted that Article 36(1) specifically requires authorities to "inform the person concerned . . . of *his rights* under this subparagraph."[184] The court concluded that the phrase "his rights" created an *individual* right to seek consular assistance, apart from a nation's right to render such assistance.[185] The ICJ also found that a nation cannot provide assistance to an individual "if he expressly opposes such action."[186] That a detained foreign national could prevent his nation from intervening on his behalf reinforced the ICJ's conclusion that citizens have individual rights under Article 36(1).[187]

Opponents of the ICJ's interpretation of Article 36(1) have argued that "Article 36 . . . is an awkward place to enumerate the rights of an individual

176. Vienna Convention on Consular Relations, *supra* note 3, at art. 36(1).

177. 2001 I.C.J. 466.

178. *Id* at 470–72.

179. *Id.* at 475.

180. *Id.* at 493.

181. *Id.*

182. *LaGrand*, 2001 I.C.J. at 493.

183. *Id.* at 494 ("The clarity of these provisions, viewed in their context, admits of no doubt.").

184. *Id.* (quoting Vienna Convention on Consular Relations, *supra* note 3, art. 36(1)) (emphasis added).

185. *Id.*

186. *Id.*

187. *LaGrand*, 2001 I.C.J. at 494.

national,"[188] as the main objective of the Vienna Convention was to establish a system of consular relations *among nations*.[189] Specifically, critics point to the preamble language, stating that "the purpose of [consular] privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective states."[190] However, when read in context, the preamble does not contradict the ICJ's interpretation.[191] Because most of the Vienna Convention *is* devoted to the rights and benefits of consular officials, the preamble is directed toward that general purpose.[192]

However, the mere fact that the general purpose of a treaty is to create rights and privileges between nations does not prevent specific provisions *within* the treaty from creating individual rights. In 1796, the Supreme Court found that the Treaty of 1783, though generally enacted to establish peaceful relations between Great Britain and the United States after the Revolutionary War, also created individual rights in citizens.[193] The plaintiff in *Ware v. Hylton*, a British subject, sued several Virginia citizens to recover debts incurred prior to the American Revolution.[194] Immediately after the war, Virginia had enacted a law that allowed Virginians owing debts to British subjects to pay the amount owed to the Commonwealth of Virginia and be discharged from the debt.[195] The defendants in *Ware* alleged that their debts were settled pursuant to this law.[196]

Ware argued that the Treaty of 1783, signed by the United States and Great Britain, nullified Virginia's law and reinstated the debts owed to him.[197] A key provision of the treaty stated, "It is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery in the full value of sterling money, of all bona fide debts, heretofore contracted."[198] The Court recognized that the general purpose of the treaty was to establish peace between Great

188. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 593 (1997).

189. *Id.* Kadish notes that, if taken out of context, the preamble language and the avowed purpose of the Vienna Convention as stated in the preamble seem to support the U.S. government's current interpretation of the treaty. *Id.* at 593–94.

190. *See* Quigley, *supra* note 161, at 44 (emphasis added).

191. *See id*. at 45.

192. *See id*. Read in context, the preamble conveys the idea that "the privileges and immunities granted in the Vienna Convention are to enable the consul to perform his enumerated functions, not to benefit the consul personally." Kadish, *supra* note 188, at 594.

193. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 245 (1796).

194. *See id*. at 199.

195. *Id*. at 199–200.

196. *See id*. at 200.

197. *See id*. at 210.

198. *Ware*, 3 U.S. (3 Dall.) at 239 (quoting Treaty of 1783, U.S.-Gr. Brit., art. 4, Sept. 3, 1783).

Britain and the United States.[199] However, the *Ware* Court also found that the treaty created an unambiguous individual right to recover debts lawfully incurred prior to the war.[200] Accordingly, the Court found for Ware and concluded that the Virginia law unlawfully impeded his ability to recover the debts.[201]

a. Author's Analysis

The Supreme Court's logic in *Ware v. Hylton* is equally applicable to the preamble language of the Vienna Convention. Unquestionably, the general purpose of the Convention is to establish a system of consular relations among nations.[202] However, as in *Ware*, this does not negate the possibility that the specific purpose of Article 36(1) is to establish the rights of an individual citizen detained in a foreign nation.

Additionally, the ICJ's reading of Article 36(1) furthers the purpose of that provision.[203] A basic tenet of treaty interpretation is that the provisions of a treaty are to be read "in their context and in the light of [the treaty's] object and purpose."[204] One purpose for providing consular assistance is to aid an individual under prosecution in a foreign country; consular officials can help detainees find good lawyers and collect evidence and can help detainees understand the foreign legal system.[205] The ICJ's interpretation of Article 36(1) recognizes and effectuates this purpose.[206]

199. *See id*. at 238. A principle object of the treaty, in the eyes of the United States, was to establish the independence of the new government from the Crown. *See id.* The treaty provided for "[a]n acknowledgement of their independence, by the crown of Great Britain," as well as "[a] settlement of their western bounds. . . . [t]he right of fishery. . . . [and] [t]he free navigation of the Mississippi." *Id.*

200. *See id*. at 245. Specifically, the Court's decision noted:

> I cannot conceive that the wisdom of men could express their meaning in more accurate and intelligible words . . . the words, in their natural import, and common use, give a recovery to the British creditor from his original debtor of the debt contracted before the treaty, notwithstanding the payment thereof into the public treasuries, or loan offices, under the authority of any State law.

Id.

201. *Id.*

202. *See* Vienna Convention on Consular Relations, *supra* note 3, at pmbl.

203. *See* Quigley, *supra* note 161, at 43–44.

204. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *see also Ware*, 3 U.S. (3 Dall.) at 239 ("The intention of the framers of the treaty, must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures.").

205. *See* Adrienne M. Tranel, Comment, *The Ruling of the International Court of Justice in* Avena and Other Mexican Nationals*: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L. L. REV. 403, 411 (2005) (detailing the wide array of services

2. Article 36(2) and the Doctrine of Procedural Default

In the context of finding a remedy for Article 36(1) violations by the United States, the ICJ has grappled with this nation's doctrine of procedural default.[207] Procedural default, whereby "a defendant who . . . fails to raise a legal issue at trial will generally not be permitted to raise it in future proceedings,"[208] has often prevented foreign nationals from asserting otherwise valid Article 36(1) claims on appeal.[209]

In the United States, procedural default rules exist at both the state and federal levels. At the state level, a criminal defendant sentenced to death may appeal his sentence directly on the grounds that the judge misapplied the law;[210] theoretically, he may appeal all the way to the Supreme Court of the United States on these grounds.[211] However, on direct review, a defendant procedurally defaults if he fails to raise an issue at his original criminal trial—state appellate courts and the Supreme Court hearing a case on direct review cannot generally adjudicate an issue on appeal that was not raised at trial.[212]

Criminal defendants may also file petitions for habeas corpus review. Habeas corpus review, which exists at both state and federal levels, is also known as collateral review because it allows a litigant to assert a civil claim challenging the legality of his confinement as a violation of his rights under the Constitution.[213]

A petition for state habeas relief allows a litigant to bring a civil claim against the State, challenging his confinement by the state as illegal.[214] However, as with direct appeals, state laws often prevent litigants from raising

that consular officials can provide to detained foreign nationals, upon proper notification); *see also* Brief of Applicant, *supra* note 5, at 8 (detailing the services routinely rendered by the Mexican consulate to assist Mexican citizens detained abroad).

206. *See* John Quigley, *supra* note 161, at 43–44.

207. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 613 (I.C.J. Mar. 31, 2004); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 495 (June 27).

208. *Avena*, 2004 I.C.J. at 613.

209. *LaGrand*, 2001 I.C.J. at 497.

210. For example, see TEX. CODE CRIM. PROC. ANN. art. 44.02 (1979).

211. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393–94 (1821) (establishing the Supreme Court's power to review state court criminal convictions).

212. For example, in Texas, if a litigant wishes to appeal his conviction on the grounds that the trial court allowed inadmissible evidence, under the contemporaneous objection rule, the litigant will first have to show that he made a timely objection to the admission of the evidence at trial. *See* Satillan v. State, 470 S.W.2d 677, 678 (Tex. Crim. App. 1971).

213. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1, 838 (3d. ed. 1999).

214. *See* TEX. CODE CRIM. PROC. ANN. art. 11.01 (2005) ("The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty."); *id.* art. 11.14 ("The petition must state substantially: 1. that the person for whose benefit the application is made is illegally restrained in his liberty").

an issue in a habeas petition that the litigant failed to raise at trial.[215] Additionally, some states limit a litigant's ability to file successive petitions for habeas relief raising an issue not raised in the original petition.[216]

At the federal level, a federal court may issue a writ of habeas corpus and review a state criminal conviction where "a person . . . claims to be held in custody by a state government in violation of the Constitution, treaties, or laws of the United States."[217] If the court finds in the prisoner's favor, "the federal court may order the release of a state prisoner who is held by the state in violation of federal law."[218] Federal habeas corpus review has its own procedural default rules—a litigant must show that he has exhausted his state remedies and that the issue he raises in his federal habeas petition was fully presented in state court.[219] Additionally, the Antiterrorism and Effective Death Penalty Act (AEDPA) severely restricts the power of federal courts to issue successive writs.[220] For those *Avena* plaintiffs who have exhausted their state

215. In Medellin's case, the Texas trial court rejected his petition for state habeas relief, although "[t]he state did not contest that . . . state officials had failed to advise Mr. Medellin of his right under Article 36." Brief of Applicant, *supra* note 5, at 10. The trial court denied relief, finding that Medellin was procedurally barred from raising his Article 36(1) claim on appeal, having failed to object at his trial. *Id*.

216. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (2005). For example, the state of Texas prevents a litigant from raising a new issue in a successive petition unless the litigant can show that "the current claims and issues have not been and could not have been presented previously . . . because the factual basis for the claim was unavailable on the date the applicant filed the previous application." *Id.* These restrictions could negate the effect of the ICJ's *Avena* decision if enforced. To illustrate, a foreign national in Texas, who exhausts his remedies under direct review and files an initial state habeas petition without learning of his right to consular assistance may be prevented from bringing a second petition when he does learn of the violation, unless the Texas court determines the "the factual basis for the claim was not available" at the time he filed his original petition. *Id*.

Since *Avena*, at least one state court *has* agreed to review a third successive habeas petition on this ground. *See* Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005); Quigley, *supra* note 168, at 411–12. Although it had previously denied two successive habeas petitions, the Oklahoma Court of Criminal Appeals directed a trial court to review a third habeas petition by Osvaldo Torres, another *Avena* plaintiff, in light of the ICJ's ruling in *Avena*. *Id*. Before a decision could be rendered by the lower court on remand, Torres's death sentence was commuted to a life sentence without possibility of parole by Oklahoma Governor Brad Henry. *Torres*, 120 P.3d at 1186.

217. CHEMERINSKY, *supra* note 213, at § 15.1, 838.

218. *Id.* Federal habeas is a very complex area of law. Put simply, a litigant seeking a federal writ of habeas corpus must demonstrate that he is "'in custody,' all available state remedies have been exhausted, and the petition [does] not duplicate an earlier petition that was presented and rejected." *Id*. at 855.

219. *Id*. at 859, 863. As to the second requirement, a litigant seeking federal habeas relief may not raise an issue that was not litigated in state court unless he can show "either actual innocence or good 'cause' for the procedural default and 'prejudice.'" *Id*. at 881.

220. *Id*. at 870. Under AEDPA, a federal court can grant a successive petition for federal habeas corpus in only two circumstances. *Id*. at 870–871.

remedies, the combined effect of the federal procedural default rules and AEDPA could be to deny them *any* forum within which to litigate the denial of their Article 36 rights.[221]

The ICJ first confronted the application of procedural default to Article 36(1) claims in the *LaGrand* case.[222] Germany argued that procedural default had prevented the LaGrands from redressing the violation of their rights.[223] Germany argued that procedural default, as applied to the LaGrands, violated Article 36(2),[224] which provides:

> [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 purpose for which the rights accorded under this article are intended*.[225]

The United States disputed Germany's interpretation of Article 36(2), arguing that the phrase "said laws and regulations" was not meant to encompass criminal procedure laws in a signatory state's judicial system.[226] Instead, the United States argued it referred to "[laws] that may affect the

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> First, a successive petition may be allowed if, "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." Alternatively, the petition may be permitted if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Id. at 871 (quoting Felker v. Turpin, 518 U.S. 651, 656, 657 (1996)).

221. This can be illustrated by applying the rules to the case of a hypothetical foreign national. If a foreign national is arrested and convicted in violation of Article 36(1), without ever being notified of his right to contact the consulate, he will not raise the issue of the denial of his Article 36(1) rights at his original criminal trial. (Indeed, he *cannot* assert the claim at his original criminal trial, because if he has never been notified of his rights, he has no way of knowing he even has such rights, much less that they have been violated.) If he then goes on to exhaust his state remedies, direct appeal, and state habeas corpus without learning of his Article 36(1) rights, he *never* has the chance to litigate the issue in a state court proceeding. Upon applying for a federal writ of habeas corpus, he may only raise the issue of his Article 36(1) rights if he can show either actual innocence or both cause and prejudice. Further, assuming he does not learn of his right to consular assistance until *after* his original petition for federal habeas relief is denied, AEDPA will restrict his right to file a successive petition asserting the denial of his Article 36(1) rights.

222. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 495 (June 27).

223. *Id.*

224. *Id.*

225. Vienna Convention on Consular Relations, *supra* note 3, at art. 36(2) (emphasis added).

226. *LaGrand*, 2001 I.C.J. at 496.

exercise of specific rights under Article 36(1), such as . . . timing of communications, visiting hours and security in a detention facility."[227]

Once again, the ICJ sided with Germany.[228] The ICJ found that procedural default rules had prevented the LaGrands from receiving meaningful review of their Article 36(1) violation and thereby violated Article 36(2).[229] By the time German consular officials learned of the LaGrands' predicament, the brothers' trial and sentencing had already occurred without the brothers ever being notified of their Article 36(1) rights.[230] Because they were never informed of those rights, the issue was not raised at their criminal trial; yet they were prevented by procedural default from asserting the issue later in a habeas petition.[231] The ICJ concluded that procedural default rules prevented U.S. courts from "attaching any legal significance" to the violation of the LaGrand brothers' Article 36(1) rights because the issue was *never* reviewed by *any* United States court.[232] The ICJ further concluded that the *only* way for the United States to meet its Article 36(2) obligations was to provide some review of the convictions and sentences of individuals convicted in violation of their Article 36(1) rights.[233]

a. Author's Analysis

Here, as above, there is ample reason to embrace the ICJ's interpretation and limit the application of state procedural default rules where they would prevent a litigant from asserting an otherwise valid Article 36(1) claim.[234] First of all, as a matter of treaty interpretation, treaty provisions are to be read in light of their context and the underlying purposes of the treaty itself.[235] At least one purpose of Article 36 is clearly to protect a foreign national detained

227. *Id*.

228. *Id*. at 497–98.

229. *Id*.

230. *Id*.

231. *LaGrand*, 2001 I.C.J. at 497–98.

232. *Id*. at 497.

233. *Id*. at 513–14 ("[I]f the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. . . . [I]t would be incumbent upon the United States to allow for the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.").

234. Although this Part includes an explanation of federal habeas corpus, this is only intended to provide the reader with the background information necessary to understand the doctrine of procedural default. The author does not propose that federal courts abandon the complex rules of procedural default that govern petitions for federal habeas relief. This argument is strictly limited in scope to those procedural default rules applicable to appeals for direct review at the state level and to petitions for state habeas relief.

235. Vienna Convention on the Law of Treaties, *supra* note 204, at art. 31(1).

and prosecuted in an unfamiliar legal system. When procedural default rules prevent a litigant from ever asserting the denial of his Article 36(1) rights in some forum, the purpose behind those provisions goes unfulfilled.

Likewise, a fundamental tenet of this country's jurisprudence is that a litigant with a legal right must have some means to enforce that right.[236] If the *Avena* court is correct in finding that Article 36(1) confers an individual right to consular assistance (as this author believes it is), procedural default can, in some circumstances, rob a foreign national of any opportunity to ever vindicate that right.[237] In those cases, the application of procedural default stands squarely in opposition to 250 years of U.S. jurisprudence.

B. The Avena *Case—Defining the Scope of Individual Rights Under Article 36(1) and Finding an Appropriate Remedy Under 36(2)*

1. The Meaning of "Without Delay"

In 2004, the ICJ revisited the issue of the proper interpretation of Article 36(1) in the *Avena* case.[238] One major issue in *Avena* was the proper definition of the phrase "without delay" in Article 36(1)(b).[239] Article 36(1)(b) makes it the duty of the arresting nation's authorities to "inform [the foreign national] . . . *without delay* of his rights under this subparagraph."[240] Mexico lobbied for a definition of "without delay" that would require notification "'immediately,' and in any event before any interrogation occurs."[241] The ICJ rejected Mexico's strict interpretation and read Article 36(1)(b) to require notification to a foreign national "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[242]

a. Author's Analysis

The ICJ's conclusion on this point is well-taken. Providing notification at an early stage in the proceedings may prevent a litigant adrift in a foreign legal

236. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

237. For instance, see the hypothetical example *supra* note 221.

238. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (I.C.J. Mar. 31, 2004).

239. *Id*. at 596.

240. Vienna Convention on Consular Relations, *supra* note 3, at art. 36(1)(b) (emphasis added).

241. *Avena*, 43 I.L.M. at 604.

242. *Id*.

system from making serious, or even potentially fatal, errors in judgment.[243] The case of Angel Francisco Breard is illustrative. Breard, a Paraguayan citizen, was arrested for rape and murder and convicted in Virginia in violation of his Article 36(1) rights.[244] Without consular assistance to explain to Breard the consequences of his actions in the American legal system, he chose to confess to the jury, although he pleaded not guilty.[245] "Breard's decision exemplified his misperception of the U.S. legal system; he believed that if he confessed his crime and explained his new 'conversion and rebirth in Jesus Christ,' the jury would forgive him as had Christ."[246] Instead, his confession sealed his fate, and the jury sentenced Breard to death.[247] Early consular notification and assistance by the Paraguayan consulate in Breard's defense might have saved his life.

2. The Shortcomings of Clemency

The ICJ in *Avena* also revisited the proper remedy, under Article 36(2), for a violation of an individual's Article 36(1) rights.[248] Despite repeated requests by Germany in *LaGrand*, the ICJ in that case had refused to define a preferred method of review the United States should follow in redressing future Article 36(1) violations.[249] However, the ICJ in *Avena* reiterated its earlier objection to procedural default and rejected the clemency process as a means for providing meaningful review.[250]

In *Avena*, Mexico attacked the United States' system of reviewing Article 36(1) violations, which, despite the *LaGrand* holding, consisted of continued adherence to procedural default and reliance on the clemency process to provide a forum where a litigant procedurally defaulted.[251] Mexico argued that the *LaGrand* court had implicitly found clemency was an inadequate method

243. *See* Kadish, *supra* note 188, at 582 (detailing the legal ramifications and the eventually fatal consequences of delayed consular notification in the case of Angel Francisco Breard of Paraguay). For another discussion of Breard's case and his ill-advised confession, see Harrill, *supra* note 161, at 583.

244. *See* Kadish, *supra* note 188, at 582.

245. *Id*.

246. *Id*.

247. *Id*. at n.110.

248. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 614 (I.C.J. Mar. 31, 2004).

249. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 514 (June 27). While noting that the United States' obligations under the treaty would require some kind of review and reconsideration of future convictions obtained in violation of Article 36, the *LaGrand* court concluded, "This obligation can be carried out in various ways. The choice of means must be left to the United States." *Id*.

250. *Avena*, 43 I.L.M. at 619–20; Tranel, *supra* note 205, at 445–46 ("Clemency generally refers to the executive power to commute or pardon a sentence or conviction.").

251. *Avena*, 43 I.L.M. at 618.

of review.[252] Mexico pointed out that the ICJ in that case had found the United States to be in violation of Article 36(2), although the LaGrand brothers' sentences had already been reviewed by the Arizona Pardons Board.[253] Thus, Mexico argued, *LaGrand* indicated that clemency review does not fully effectuate an individual's Article 36(1) rights, as required by Article 36(2).[254] Mexico also argued that the clemency process gives no consideration to innocence on the underlying conviction, as required by the court in *LaGrand*; rather, "the focus of capital clemency review is on the propriety of the sentence."[255]

The ICJ in *Avena* agreed with Mexico that clemency had proved ineffective as a means of reviewing Article 36(1) violations.[256] Although it recognized the *LaGrand* court's decision to leave the method of review up to the United States, the *Avena* court concluded that Article 36(1) violations should be considered in a *judicial* forum.[257]

a. Author's Analysis

Here, as above, sound rationale supports the ICJ's determination. Professor Linda Carter has argued that clemency is an inadequate means of redressing Article 36 violations because the process lacks judicial oversight, and thus is inconsistently applied, and also because clemency is rarely granted.[258] Clemency is generally considered an executive power and so "[t]here is virtually no judicial oversight of the Executive's grant or denial of clemency."[259] As such, clemency is not subject to concrete standards of review and is applied inconsistently from state to state.[260] As Professor Carter points out, Governor George Ryan granted clemency to all 167 prisoners on death row in Illinois in 2003.[261] By contrast, California has not granted

252. *Id*.
253. *Id*.
254. *Id*.
255. *Id*.
256. *Avena*, 43 I.L.M at 619–20.
257. *Id*. at 619.

> The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

Id.

258. Linda E. Carter, *Lessons From* Avena*: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259, 266–69 (2005).
259. *Id*. at 266.
260. *Id*. at 267.
261. *Id*. at 268.

clemency to a single death row inmate since the death penalty was reinstated in 1976, and yet it has the largest death row population.[262]

Additionally, clemency is granted so rarely that it simply is not a reliable means of reviewing Article 36(1) violations.[263] Since 1976, only 228 inmates, including the 167 inmates in Illinois in 2003, have been granted clemency.[264] Conversely, "960 executions have taken place, and . . . over 3,400 [people are] on death row in the United States."[265]

IV. *SANCHEZ-LLAMAS V. OREGON*: THE DOCTRINE OF PROCEDURAL DEFAULT IN THE WAKE OF *AVENA*

The correct interpretation of Article 36 of the Vienna Convention remains a highly relevant issue today. In June 2006, the Supreme Court handed down its decision in *Sanchez-Llamas v. Oregon*, a consolidated case that considered the Article 36(1) claims of two other foreign nationals, Moises Sanchez-Llamas of Mexico,[266] and Mario Bustillo of Honduras.[267] In *Medellin*, the

262. *Id*.

263. *See* Carter, *supra* note 258, at 269–70. The *Avena* case aptly demonstrates the exceedingly rare nature of clemency (and consequently, the danger of relying on clemency as a remedy for redressing Article 36 violations). While reviewing the plaintiffs' cases, the ICJ in *Avena* noted that although "in at least [thirty-three] cases, the alleged breach of the Vienna Convention was raised by the defendant either during pre-trial, at trial, or on appeal or in *habeas corpus* proceedings . . . . To date, in none of the [fifty-two] cases have the defendants had recourse to the clemency process." Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 594 (I.C.J. Mar. 31, 2004).

264. Carter, *supra* note 258, at 268–69.

265. *Id*. at 269.

266. In 1999, Moises Sanchez-Llamas, a Mexican citizen, was arrested after a gun battle with police that left one officer injured. State v. Sanchez-Llamas, 108 P.3d 573, 574 (Or. 2005). After his arrest, officers read him his Miranda rights in both English and Spanish, but did not inform him of his Article 36(1) rights. *Id*. He was later interrogated and made incriminating statements to police. *Id*. As a result, Sanchez-Llamas was charged with attempted murder and various other crimes. *Id*. At trial, he moved to suppress the statements made during his interrogation on the ground that they had been obtained in violation of his Article 36(1) rights. *Id*. The trial court found that suppression was not required, even assuming Sanchez-Llamas' rights had been violated. *Id*. Ultimately, Sanchez-Llamas was convicted of multiple felonies and sentenced to over twenty years in prison. *Id*. The Supreme Court of Oregon affirmed, concluding that Article 36(1) does not create privately enforceable rights for individual foreign nationals. *Id*. at 578.

267. Mario Bustillo, a Honduran national, was charged and convicted of murdering a man with a baseball bat outside a restaurant in Springfield, Virginia. *See* Petition for a Writ of Certiorari at 2, Bustillo v. Johnson, 126 S. Ct. 2315 (2006) (No. 05-51). Although three eyewitnesses identified Bustillo as the killer, two other eyewitnesses named another Honduran national, Julio Orsoto, who could not be located during Bustillo's criminal trial. *Id*. On appeal, Bustillo alleged that the Commonwealth of Virginia had failed to inform him of his rights under Article 36(1) of the Vienna Convention. *Id*. at 3. Additionally, he submitted an affidavit from the Honduran consulate, stating that if it had learned of his case in time, "it would have (at a minimum) confirmed Julio Orsoto's . . . nationality, provided official records of his arrival in

Supreme Court had dismissed the writ partly because the case came to the Court on federal habeas review, so that various procedural hurdles would have prevented the Court from giving a definitive answer.[268] However, the *Medellin* Court indicated that it *would* finally decide whether state courts are bound by the ICJ's interpretation of Article 36 if the issue came up on direct review.[269] In *Sanchez-Llamas*, which came on direct review, the Court considered 1) whether Article 36(1) of the Vienna Convention creates individually enforceable rights to consular access and assistance, 2) whether a state court may refuse to review an Article 36(1) claim because the defendant procedurally defaulted, and 3) whether suppression of evidence is an appropriate remedy for an Article 36(1) violation.[270]

Ultimately, the *Sanchez-Llamas* Court concluded that neither petitioner was entitled to the relief he sought, and refused to reach the issue of whether

Honduras shortly after [the victim's death], attempted to interview [Orsoto], and provided the defense with [Orsoto's] picture." *Id*. at 9. Despite this affidavit and the fact that the United States conceded that it had violated Bustillo's rights and issued a formal apology to Honduras, Virginia state courts refused to review his conviction, finding that Bustillo had procedurally defaulted by failing to raise the issue at trial. *Id*.

268. *See* Medellin v. Dretke, 544 U.S. 660, 666 (2005) (discussing the difficulties that Medellin would face in getting a certificate of appealability, and in proving that he had exhausted his state court remedies, both of which would be required for him to "pursue the merits of his claim on appeal").

The *Medellin* Court also found it likely that the state of Texas would grant Medellin further review, in light of the President's memorandum. *Id*. at 666. After his writ was dismissed by the Supreme Court, Medellin filed a successive petition for state habeas relief, citing the *Avena* decision and the President's memorandum in *Medellin* as preemptive federal law that provided previously unavailable factual and legal bases for habeas relief in his case. *See Ex Parte* Medellin, No. AP-75207, 2006 WL 3302639, at *2–3 (Tex. Crim. App. Nov. 15, 2006). In November 2006, the Texas Court of Criminal Appeals issued a decision dismissing Medellin's successive habeas petition. *See id*. at *24. The court found that the President lacked the power to require state courts to comply with the *Avena* decision and rejected this argument as a basis for habeas relief in Medellin's case. *Id*. at *10. The court further concluded that the ICJ's interpretation of the treaty in *Avena* did not constitute binding federal law that could preempt Texas procedural default laws. *Id.* at *9. In so holding, the Texas court relied on the Supreme Court's decision in *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006), where the Supreme Court rejected the ICJ's interpretation of Article 36 as inconsistent with the American legal system. *Id.*

269. *See Medellin*, 544 U.S. at 666. The majority cited "the possibility that the Texas courts will provide Medellin with the review he seeks . . . [and] *the potential for review in this Court once the Texas courts have heard and decided Medellin's pending action*." *Id*. (emphasis added). Justice Ginsburg in her concurrence also felt that deciding the issue as presented by a habeas petitioner was too difficult procedurally. *See id*. at 668–69. However, Justice Ginsburg joined the decision to dismiss the writ, "recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings, and at that time, to rule definitively on 'the Nation's obligation under the judgment of the ICJ if that should prove necessary.'" *Id.* at 669 (Ginsburg, J., concurring) (quoting Souter, J., dissenting.).

270. *See* Questions Presented, Bustillo v. Johnson, No. 05-51 (U.S. Nov. 7, 2005), *available at* http://www.supremecourtus.gov/qp/05-00051qp.pdf (last visited Feb. 6, 2007).

Article 36(1) creates individual rights.[271] In the case of Moises Sanchez-Llamas, the Court found that, even assuming the treaty creates individual rights, suppression is not a proper remedy for a violation of those rights.[272] More pertinent to this Comment, the Court also held that the state of Virginia could refuse to review Mario Bustillo's conviction because he had procedurally defaulted by failing to raise the violation of his Article 36(1) rights at his criminal trial.[273]

In deciding that Virginia could apply procedural default to Bustillo's Article 36(1) claim, the *Sanchez-Llamas* Court first held that U.S. courts are not bound by the ICJ's decision that Article 36 precludes the application of procedural default.[274] First, the Court noted that under the Constitution, U.S. courts have the ultimate authority to interpret treaties.[275] Second, the Court found that under the Optional Protocol, an ICJ decision only binds the two parties involved and only in that particular case—ICJ decisions do not create binding precedent.[276] Third, the Court noted that the Executive Branch, the political branch actually responsible for implementing the Vienna Convention, has not taken the position that the ICJ's interpretation of the treaty binds U.S. courts.[277] Finally, the Court found that President Bush withdrew from the Optional Protocol to the Vienna Convention shortly after *Avena* was decided.[278] As the United States is no longer under the ICJ's jurisdiction, the Court concluded that the ICJ is merely another international court, and its interpretation is entitled to nothing more than "respectful consideration."[279]

After concluding that U.S. courts are not *bound* to follow the ICJ's interpretation, the Court expressly rejected that interpretation as "inconsistent with the basic framework of an adversary system."[280] The Court found that the ICJ's rejection of procedural default conflicted with the express language of Article 36(2) that the treaty "shall be exercised in conformity with the laws and regulations of the receiving State."[281] The Court pointed out that many other viable claims besides Article 36(1) claims are regularly denied a forum to promote the twin goals of procedural default—the prompt litigation of claims and the finality of judgments in the American legal system.[282] Finally, the

271. *Sanchez-Llamas*, 126 S. Ct. at 2681.
272. *Id*. at 2682.
273. *See id*. at 2687.
274. *Id*. at 2684–85.
275. *See id*. at 2684.
276. *Sanchez-Llamas*, 126 S. Ct. at 2684.
277. *Id*. at 2685.
278. *Id*.
279. *See id*.
280. *Id*. at 2686.
281. *Sanchez-Llamas*, 126 S. Ct. at 2685.
282. *See id*. at 2685–86.

Court found that, in the United States, which has an adversarial legal system where the parties, and not the judge, are responsible for conducting a factual and legal investigation, "the responsibility for failing to raise an issue generally rests with the parties themselves."[283]

Justice Breyer wrote a spirited dissent that decried the Court's lack of deference to the ICJ's interpretation of the treaty.[284] He argued that state procedural default rules *should* yield for Article 36(1) claims, at least where the failure to raise the issue at trial is due to the government's failure to inform a foreign national of his rights and no other means is provided by the state to redress the violation.[285]

CONCLUSION

This author believes that *Sanchez-Llamas* was wrongly decided and that the Court should have adopted the ICJ's interpretation and read the treaty to preclude the application of procedural default, at least in some instances. Specifically, this Comment proposes that Article 36(1) claims should be heard despite procedural default rules in *any* instance where the violation prejudiced the individual's case.

The *Sanchez-Llamas* decision is problematic because it seems to promote different applications of the same law to litigants in similar situations. To illustrate, the *Sanchez-Llamas* holding likely did not encompass the *Avena* plaintiffs. As in *Medellin*, the *Sanchez-Llamas* Court cited the President's memorandum and appeared to presume that the *Avena* plaintiffs *are* entitled to have their convictions reviewed despite otherwise applicable procedural default rules.[286] A few paragraphs later, however, the majority concluded that Mario Bustillo was *not* entitled to such review.[287] Yet Mario Bustillo is in the same situation as many *Avena* plaintiffs, including Medellin—like Medellin, authorities failed to notify Bustillo of his Article 36(1) rights and he was convicted without ever learning of those rights.[288] Each defendant's criminal

283. *Id*. at 2686.

284. *See id*. at 2702 (Breyer, J., dissenting) ("Today's decision interprets an international treaty in a manner that conflicts not only with the treaty's language and history, but also with the ICJ's interpretation of the same treaty provision. In creating this last-mentioned conflict . . . the Court's decision is unprecedented.").

285. *See id*. at 2702–03 (Breyer, J., dissenting).

286. *See Sanchez-Llamas*, 126 S. Ct. at 2685 (majority opinion) (citing President Bush's memorandum and noting that "the United States has agreed to 'discharge its international obligations' in having state courts give effect to the decision in *Avena*").

287. *See id*. at 2687.

288. *See* Petition for a Writ of Certiorari, *supra* note 267, at 3; Brief of Applicant *supra* note 5, at 8.

case was prejudiced by the violation of his Article 36(1) rights.[289] Both defendants failed to raise the issue at their criminal trials because neither had been informed of his rights; therefore, each man procedurally defaulted.[290] Yet under *Sanchez-Llamas*, Medellin may be entitled to have his Article 36(1) claim reviewed despite his procedural default, while Bustillo is not.[291]

By contrast, the solution proposed by this Comment results in a uniform outcome for both litigants. Under the ICJ's interpretation, procedural default is inappropriate in *any* case where it would prevent a litigant whose case was prejudiced by the denial of his Article 36(1) rights from asserting that violation in some judicial forum.[292] Under this interpretation, both Medellin and Bustillo are entitled to have their Article 36(1) claims reviewed, because review is necessary to give those rights "full effect" within the meaning of Article 36(2). The ICJ's interpretation thus ensures that egregious Article 36(1) violations are not ignored, as often results from application of procedural default rules and reliance on the clemency process.[293] As the *Sanchez-Llamas* Court pointed out, the treaty is to be implemented in accordance with the laws of each signatory country—but only so far as those laws allow the provisions of the treaty to have their intended effect.[294] Where procedural default rules prevent a litigant like Bustillo from *ever* asserting his rights in *any* judicial forum, they *do* prevent Article 36(1) from having its intended effect.

Additionally, following the ICJ's interpretation of the treaty could have positive long-term consequences for the United States' interests abroad. "[T]he policy [of ignoring Article 36(1) violations] is counter-productive, since the United States has thousands of its nationals abroad at any given time and thus has more to gain from strict enforcement of consular access rights than do most other States of the world."[295] Adopting the ICJ's interpretation and refusing to apply procedural default rules where they prevent a prejudiced litigant from ever asserting an Article 36(1) violation would encourage other countries to respect the Article 36(1) rights of U.S. citizens.

Finally, adopting the ICJ's interpretation of the treaty would show respect for the international community and could help restore this country's

289. *See* Petition for a Writ of Certiorari, *supra* note 267, at 14 (discussing how records of the Honduran consulate could have verified that another man whom defense witnesses had identified at Bustillo's trial as the true killer had fled to Honduras the day after the murder); Brief of Applicant, *supra* note 5, at 9 n.9 (discussing how Medellin's court-appointed counsel, while preparing Medellin's case for trial, was suspended from the practice of law for six months for his unethical behavior in another case).

290. *See* Petition for a Writ of Certiorari, *supra* note 267, at 3; Brief of Applicant, *supra* note 5, at 10.

291. *Sanchez-Llamas*, 126 S. Ct. at 2685, 2687.

292. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497–98 (June 27).

293. *See supra* Part III.

294. *See* Vienna Convention on Consular Relations, *supra* note 3, at art. 36(2).

295. Quigley, *supra* note 161, at 52.

reputation as a defender of international law. By repeatedly shirking its obligations under Article 36, the United States has damaged its relationships with other states in the international community.[296] The *Sanchez-Llamas* Court did nothing to mend those rifts by rejecting the ICJ's well-reasoned interpretation of Article 36.

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296. *Id.* "The United States' failure to provide relief after a violation of the Article 36 notification requirement has taken its place alongside other well-known U.S. violations of international law that are cited by states and others depicting the United States as an international scofflaw."

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