No. AP-75,207

In the Court of Criminal Appeals of Texas

EX PARTE JOSE ERNESTO MEDELLIN

On Application for Writ of Habeas Corpus from Cause No. 675430 in the 339th District Court of Harris County

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BRIEF OF THE STATES OF ALABAMA, MONTANA, NEVADA, AND NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The States of Alabama, Montana, Nevada, and New Mexico respectfully submit this brief as *amici curiae* in support of Respondent. Like the State of Texas, the *amici* States all have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. Of course, under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the *amici* States are, like Texas, subject to the requirements of Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94 ("Vienna Convention"), when their law enforcement officials arrest foreign nationals.

According to a recent study, over 56,000 noncitizens were in state prisons in 2003. Paige M. Harrison & Jennifer C. Karbert, Bur. of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2003*, Bur. of Justice Statistics Bull. 5 (May 2004, rev. July 14, 2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf/. According to one estimate, at least 120 foreign nationals have been convicted and are sentenced to death in the United States; of this number, 43 are in California, 28 in Texas, 21 in Florida, 4 each in Nevada and Ohio, 3 in Arizona and Louisiana, 2 in Pennsylvania, and 1 each in Alabama, Georgia, Mississippi, Montana, Nebraska, Oklahoma, Oregon, and Virginia. *See* Mark Warren, *Foreign Nationals and the Death Penalty in the United States*,

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[1] In accordance with Texas Rule of Appellate Procedure 11(c), *amici* represent that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (information as of May 28, 2005) (last visited Aug. 29, 2005).

STATEMENT OF THE CASE, STATEMENT OF JURISDICTION, AND STATEMENT OF ISSUES PRESENTED

Amici agree with and adopt the statement of the case, statement of jurisdiction, and statement of issues presented in the brief of the State of Texas. This brief addresses only the effect of the President's Memorandum on this case.

SUMMARY OF ARGUMENT

Our Constitution governs foreign and domestic affairs alike. This case, involving both the treaty commitments of the United States and a State's administration of its criminal justice system, demonstrates that these categories of foreign and domestic affairs frequently overlap. Contrary to the suggestion of petitioner's *amici* that "[w]hen treaties are at issue, the states disappear," Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner at 11-12, Texas retains important interests in enforcing its criminal laws and maintaining an orderly system of procedure. And as the *Steel Seizure Case* demonstrated long ago, the President does not have *carte blanche* to act—especially contrary to the will of Congress—simply because foreign policy interests are involved. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Fortunately, this Court need not explore the limits of presidential authority in this case. The President's Memorandum upon which Medellin relies is best read as a *request* to the state courts to "give effect" to the International Court of Justice's *Avena* decision to the extent that state law permits them to do so—not as an order that preempts state rules

of procedural default and requires the state courts to exercise jurisdiction over successive habeas petitions that state law does not confer. The Memorandum was directed to the Attorney General of the United States, not the state courts. It lacks mandatory language, and instead speaks in the discretionary terms of "comity." Nothing in the Memorandum suggests that the Executive means to reverse the position it took in the *Breard* case, which is that the President has power under these circumstances to *request*, but not to compel. *See* Brief for the United States as *Amicus Curiae*, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 and 97-8214), 1997 LEXIS U.S. Briefs 1390 ("United States *Breard* Br.").

If this Court *does* read the President's Memorandum as a mandatory order, then that order is unconstitutional. This is true for two distinct reasons. First, the President lacks power, by unilateral act, to issue orders to the state courts under these circumstances. No such power appears in Article II, and indeed the President's only unilateral power over criminal convictions—the Pardon Power—is carefully limited to *federal* crimes. U.S. CONST. art. II §2. Moreover, since *Youngstown* the Supreme Court has recognized that the President's power is "at its lowest ebb" when he acts contrary to the will of Congress. 343 U.S. at 648 (Jackson, J., concurring). Here, the federal habeas corpus statute has carefully limited the situations under which federal authority will reopen state criminal convictions, and that statute plainly bars relief here. A mandatory reading of the President's Memorandum would thus fly in the face of Congress's authority.

Second, any federal order to reconsider Medellin's case would violate principles of state sovereignty by "commandeering" the state courts. *See Printz v. United States*, 521 U.S. 898 (1997). State courts may be required to hear claims under federal law when those courts possess adequate jurisdiction to do so; they are forbidden to adopt restrictive procedural rules that *discriminate* against federal law. But the Supreme Court has never upheld a requirement that the state courts put aside neutral, established jurisdictional requirements in order to hear a federal claim. Texas's rules of procedural default and its bar on successive state habeas petitions are exactly this sort of neutral procedural requirements because they limit claims for violations of both state and federal law. To override such requirements would be an unprecedented intrusion into the State's right to structure its judicial system.

ARGUMENT

I. THE PRESIDENT'S MEMORANDUM DOES NOT PERMIT OR REQUIRE THE STATE COURTS TO HEAR MEDELLIN'S SUCCESSIVE STATE HABEAS PETITION.

This Court must permit Medellin's successive habeas petition to go forward if either of two things is true: either the President's Memorandum *satisfies* the Texas habeas rules by providing a factual or legal basis for relief that was "unavailable" when Medellin filed his previous petition, TEX. CODE CRIM. PROC., art. 11.071, § 5(a)(1), or the Memorandum *overrides* Texas's habeas rules and itself confers jurisdiction on the state courts that they would not otherwise have. The Memorandum does neither of these things. Its operative language consists of a single sentence:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), 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.

Memorandum for the Attorney General, Feb. 28, 2005 (attached as Appendix A). This Memorandum does not *order* anyone to do anything; it creates no new legal obligations. As such, it cannot provide a legal basis for Medellin's subsequent habeas petition, and it certainly does not purport to override Texas's rules or to confer new jurisdiction on the state courts.

A. The President's Memorandum does not provide a previously unavailable basis for Medellin's petition.

The President's Memorandum can provide the previously unavailable basis only if Medellin is correct that "the President's Determination . . . constitutes a binding federal rule of decision in Mr. Medellín's case." Medellin Br. at 53. But that reading fundamentally misconstrues the Memorandum. For reasons discussed in the next section, President Bush's Memorandum is best read as a simple statement that the United States will comply with the *Avena* decision in the same way that it complies with the Vienna Convention generally—by relying on the good faith of state and local officials. As such, the President's Memorandum is a statement about how longstanding rights—the rights in the Vienna Convention—will be enforced. Nothing in the Memorandum suggests any effort to create *new* legal rule that could, in itself, form the basis of a habeas petition.

The only "rights" in issue are provided by the treaty itself, and were "available" long before Medellin filed his first state habeas petition.

Even if the President's Memorandum had binding legal force, moreover, it would still not be the "legal basis" of Medellin's claim. That claim is today, as it has been all along, predicated on the Vienna Convention itself. The President's Memorandum, if it has any mandatory effect at all, goes only to the procedural rules for handling Medellin's Vienna Convention claim. It does not provide a *new* basis for that claim. Medellin has argued, of course, that the Memorandum has mandatory effect and therefore overrides article 11.071's limits on subsequent petitions. But that is quite different from saying that the Memorandum *satisfies* those limits.

B. The President's Memorandum does not override Texas's habeas rules or confer jurisdiction on the state courts to hear subsequent petitions.

If the President's Memorandum is an "order," it is a very odd one. It is styled as a "MEMORANDUM FOR THE ATTORNEY GENERAL," and it is directed to an officer of the federal Executive, rather than to the state courts. When U.S. Attorney General Alberto Gonzales transmitted the President's Memorandum to states affected by the *Avena* ruling, the transmittal letter was directed to the respective state attorneys general. *See* Letter from Attorney General Alberto Gonzales to the Honorable Greg Abbott, April 5, 2005 (attached as Appendix B). If the President's Memorandum were, in fact, an order requiring the state courts to perform a particular action, one would expect that order to be styled as an order and directed to the state courts.

The Memorandum itself contains no mandatory language. It says that "the United States will discharge its international obligations . . . by having State courts give effect to the [Avena] decision in accordance with general principles of comity . . . ." Nothing in this language is inconsistent with enforcement of the *Avena* decision in the same way that the Vienna Convention itself is enforced in this country: through the efforts of state and local law enforcement officials who come into contact with foreign nationals, without any federal implementing legislation creating further legal obligations.[2] The wording of the Memorandum suggests that state courts should read the *Avena* decision and determine what "effect" it can be given, consistent with other applicable principles of state and federal law. Some state courts may determine that their habeas regimes permit them to grant the "review and reconsideration" directed by the ICJ; for instance, some of the *Avena* prisoners may not have defaulted their Vienna Convention claims or may still be on their first habeas petition.

But nothing in the Memorandum purports to *require* reconsideration where, as in Texas, state law limits the discretion of the state courts more strictly. The Vienna Convention on Consular Relations itself states that consular notification rights "shall be exercised in conformity with the laws and regulations of the receiving [nation]." Vienna Convention Art. 36(2).[3] Given that the U.S. Government has consistently argued that the

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[2] *See* United States *Breard* Brief at 7 n.1 (observing that a "brochure" issued to law enforcement officials "is the State Department's most definitive statement on how consular notification and access obligations should be honored by law enforcement officials").

[3] The same article qualifies this statement by noting that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are

application of federal and state procedural rules that may limit the right to raise Vienna Convention claims is valid and consistent with the treaty, it would be exceptionally odd to read the President's Memorandum as overriding those rules.

This lack of mandatory language should not be surprising, given the position of the national Executive the last time a consular relations case reached the U.S. Supreme Court. In its *amicus curiae* brief in *Breard v. Greene*, the United States stated that

> [t]he "measures at [the United States'] disposal" under our constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here.

United States *Breard* Br. at 51. Nothing in the President's Memorandum calls into question that earlier position—that the U.S. has power to request that the States handle Consular Convention cases in a particular way, but not to *command* the States to do so.

Any lingering doubt as to the President's meaning ought to be dispelled by his emphasis on "principles of comity." Comity is, by definition, discretionary: "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987). No court is free, on grounds of comity, to override a clear statutory constraint on its jurisdiction. When the President called for state courts to give effect to the *Avena*

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intended." *Id.* It is true that the ICJ held in *Avena* (contrary to the position of the U.S. government) that some rules of procedural default may not meet this standard. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1, 60. But the ICJ did not have before it, and therefore did not pass upon, the restrictions imposed on successive *habeas* petitions in Texas Code of Criminal Procedure article 11.071.

judgment "in accordance with general principles of comity," he was not binding them to do a particular act but requesting them to exercise whatever discretion they may have in such a way as to comply with the ICJ's ruling.

C. Multiple canons of construction counsel against any mandatory construction of the President's Memorandum.

Amici believe that the President's Memorandum is *clearly* a request to the state courts rather than an order of any kind. But even if the Memorandum were ambiguous, this Court should construe it to avoid a mandatory reading. The Supreme Court has repeatedly held, for instance, that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1981)). Construing the Memorandum as an unprecedented Executive order to the state courts would surely alter the federal balance, and such action would be even more problematic coming from the Executive branch—in which the States are not directly represented—than from Congress. The *Gregory* canon ought thus to apply with special force here.

Likewise, this Court should disfavor any reading of the Memorandum that would preempt ordinary state rules of procedural default or limits on successive petitions. Just last Term, the Court reaffirmed that courts "have a duty to accept the reading that disfavors pre-emption. . . . In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences LLC*, ___ U.S. ___, 125 S.Ct. 1788,

1801 (2005) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Certainly, the operation of state criminal procedure rules is an "area of traditional state regulation." But there is an even more specific canon, "'bottomed deeply in the believe in the importance of state control of state judicial procedure, . . . that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)). Hence, the Court has exercised the "utmost caution" before construing federal law to require a state court to hear federal claims notwithstanding "a neutral state rule regarding the administration of the courts." *Howlett*, 496 U.S. at 372.

These federalism-based canons are buttressed, in the present case, by the canon of avoiding constitutional doubts. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Yorko v. State*, 690 S.W.2d 260, 270 (Tex. Crim. App. 1985) (Teague, J, dissenting) ("Our courts are obligated to . . . avoid doubts as to the constitutionality whenever possible."). Reading the President's Memorandum as a mandatory order to the state courts would raise two different sets of very serious doubts as to the Memorandum's constitutionality. First, a mandatory order would lack any

foundation in the enumerated powers assigned to the President by Article II of the Constitution, and it would fly in the face of Congressional legislation that has, for many decades, sharply limited federal interference with state criminal processes. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). We discuss this issue in Part II of this brief. Second, an order by any arm of the federal government directing the state courts to hear federal claims in violation of nondiscriminatory state procedural rules, and under circumstances in which no similar obligation has been imposed on the *federal* courts, would be a major intrusion on state sovereignty under the Supreme Court's federalism cases. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997). We discuss this issue in Part III of this brief.

It is unlikely, to put it mildly, that President Bush intended his two-sentence memorandum to invite a judicial inquiry into such basic questions of constitutional structure concerning the extent of the President's foreign affairs power and the structure of state judicial sovereignty. And the present case is difficult enough without this Court seeking out an interpretation of the Memorandum that would require judicial resolution of these questions. If there is any plausible construction of the President's action that would avoid them, this Court should adopt it.

D. The U.S. Department of Justice's interpretation of the President's Memorandum is not entitled to judicial deference.

Notwithstanding the Memorandum's text and these considerations of federalism and constitutional avoidance, the Department of Justice's filing in the United States Supreme Court case arising out of Medellin's federal habeas petition interpreted the

Memorandum as a "binding federal rule" before which state procedural rules must "give way." Brief of United States as *Amicus Curiae*, *Medellin v. Dretke*, __ U.S. __, 123 S.Ct. 2088 (2005) (No. 04-5928), 2004 LEXIS U.S. Briefs 5928 at 42-43 ("United States *Medellin* Supreme Court Br."). Even the Department of Justice's interpretation, however, is ambiguous; it acknowledges, for instance, that "[s]tate courts are not required to reach any particular outcome," *id.* at 44, and it repeats the discretion-conferring reference to "comity," *id.* at 42. To the extent that the Department of Justice's position is read as endorsing a mandatory construction of the Memorandum, however, that position is not entitled to any deference from this Court.

If the Department of Justice were construing its own rule or regulation, then it might be entitled to some judicial deference so long as its interpretation was reasonable. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). But the President's Memorandum is obviously *not* a regulation promulgated by the Department of Justice. Nor can there be any analogy to the deference ordinarily accorded an administrative agency's construction of a statute that it is charged to enforce. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). There is no delegation of authority to Department of Justice to enforce the Memorandum, let alone of authority to issue binding interpretations of it. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (suggesting that *Chevron* deference is inappropriate when an agency has not been delegated the authority to issue rules and regulations). Nor is the deference sometimes accorded to Executive interpretations in the realm of foreign affairs

appropriate here. That is because the Department of Justice is not the agency that negotiated the Vienna Convention or that is charged with overseeing the implementation of the Vienna Convention. That agency, of course, is the Department of State.

Courts have been especially reluctant to defer to executive agency interpretations of law when those interpretations are embodied not in a formal rule or regulation, but instead in a litigation position embodied in a brief. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) ("Of course we deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). That hesitance is especially appropriate here, where the DOJ's current position on whether the President has constitutional *authority* to issue a mandatory order to the state courts directly contradicts the position that it took in 1998 in the *Breard* case. United States *Breard* Br. at 51. This case thus presents the opposite situation from *Rocha v. State*, 16 S.W.3d 1, 16 n.13 (Tex. Crim. App. 2000), in which this Court deferred to a *State Department* letter on the ground that it was *not* a litigation position and *not* a reversal of the Government's prior position.[4] Here we have the wrong agency, taking a new position, in a brief. In any event, as discussed in the remaining two parts, the Department of Justice's prior position—that the President lacks the power to compel the state courts—was the correct one.

[4] The *Rocha* majority and Judge Holland's concurring opinion disagreed about whether the State Department's position in that case was, in fact, a mere litigation position. *See* 16 S.W.3d at 27 n.5 (Holland, J., concurring). But both opinions seemed to agree that if it *were*, then it would not be entitled to deference.

II. THE PRESIDENT LACKS THE POWER TO UNILATERALLY OVERRULE STATE-LAW PROCEDURAL DEFAULT RULES.

If the President's Memorandum to the Attorney General were an attempt by the President to order this Court to disregard Texas's habeas statute, it would be ineffective, because the President lacks power to give such an order. That, in fact, was the position that the Justice Department took in *Breard*, and the Supreme Court's opinion in that case seemed to agree that the President's options were limited to "diplomatic discussion with Paraguay" and "a letter to the Governor of Virginia requesting that he stay Breard's execution." *Breard v. Greene*, 523 U.S. 371, 378 (1998). No enumerated power in Article II of the Constitution authorizes such a mandatory order, and the President's "inherent" power over foreign affairs has never been stretched so far. Moreover, an order attempting to override state rules of procedural default and limitations on habeas jurisdiction would fly in the face of Congress's longstanding and precise specifications, in the federal habeas statute, of when federal law will require the reopening of state criminal convictions. Finally, the Department of Justice's radical view of presidential power lacks any limiting principle. If the President may act, on his own, to preempt state law whenever he feels that foreign policy would be served by doing so, then he may preempt state death penalty laws entirely or extend his pardon power to any prisoner in state custody whose release would please foreign opinion.

Justice Jackson warned in the *Steel Seizure Case* that assertions of presidential power to act unilaterally must be "scrutinized with caution, for what is at stake is the

equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at, 637-38 (Jackson, J, concurring). That warning is particularly apt here.

A. The President has no power to impose obligations on the state courts or to override their rules of procedure.

Obviously, no enumerated power in Article II authorizes the President to require the state courts to hear a case. As we discuss further in Part III, *Congress* often obliges the state courts to hear cases by creating a federal rule of decision and conferring concurrent jurisdiction on the state courts to enforce that rule. There is no doubt that creating such an obligation is a legislative act. In this case, as in *Youngstown*, "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." 343 U.S. at 588. To be sure, the Vienna Convention itself was ratified by the Senate. But the United States has consistently taken the position that neither the Vienna Convention nor its Optional Protocol *themselves* require any American court to provide "review and reconsideration" in this case. *See, e.g.*, United States *Medellin* Supreme Court Br. at 18-38. What the President is requiring the state courts to execute—if he is requiring them to do anything at all—is his *own* policy decision that the state courts should do as the ICJ has asked. As Justice Black observed in *Youngstown*, however, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 588.

Not surprisingly, the United States seeks refuge in the President's "independent authority to act" in foreign affairs. United States *Medellin* Supreme Court Br. at 44

(quoting *Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 414 (2003)). Every case cited in the United States's brief, however, involved either no assertion of executive authority at all,[5] express or implied congressional authorization,[6] or the enforcement of a treaty or executive agreement with some other nation.[7] No executive agreement, without more, has been held to preempt state law outside the core executive function of the recognition and settlement of private claims against foreign nations. In any event, the Court has never recognized a unilateral foreign-affairs power to preempt state law based not on any bilateral executive agreement, but merely on the President's own assertion that the preemption serves the Nation's foreign policy interests.[8] And no prior case has involved a core *state* domestic interest like the administration of the death penalty.

Finally, it is worth noting that the Constitution is not silent on the issue of a President's power to reopen and overturn past criminal convictions. Instead, it confers on the President "power to grant reprieves and pardons for offences *against the United States*." U.S. CONST. art. II, § 2 (emphasis added). By expressly limiting the President's

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[5] *See First Nat'l City Bank v. Banco Nacional de Cuba*, 460 U.S. 759 (1972) (plurality opinion).

[6] *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

[7] *See Garamendi*, 539 U.S. 396; *Sanitary Dist. v. United States*, 266 U.S. 405 (1925).

[8] It does no good to say that the President is "executing" the Vienna Convention's Optional Protocol that renders the ICJ's judgment binding on the U.S. The Optional Protocol is not self-executing. *See* Brief for Professors of International Law, Federal Jurisdiction, and the Foreign Relations Law of the United States as *Amici Curiae* in Support of Respondent at 9-18. The President thus has authority to "execute" it only insofar as he would otherwise possess constitutional authority to act. Because he lacks such authority, the proper way to render the ICJ's judgment binding on the state courts would be by an Act of Congress.

power to interfere with criminal proceedings to *federal* crimes, the Pardon Clause strongly suggests that the President has *no* unilateral authority over state convictions.

B. The President's action in this case is directly contrary to the expressed will of Congress.

Ever since *Youngstown*, it has been clear that the extent of a President's power to act is largely a function of whether his action coincides with, or contradicts, the will of Congress. 343 U.S. at 635 (Jackson, J, concurring).[9] As described in Justice Jackson's famous concurrence, the exercise of Presidential power falls into three categories:

> 1. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."
>
> 2. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."
>
> 3. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . . Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."

Id. at 635, 637-38. When the President's action falls into the third category, of actions contradictory to the will of Congress, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, because what is at stake is the equilibrium established by our Constitutional system." *Id.* In this case, the

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[9] A majority of the Court adopted and applied Justice Jackson's analysis in *Dames & Moore,* 453 U.S. at 674.

President's action falls into *Youngstown*'s third category. The Supreme Court has never upheld an exercise of presidential power falling in this category.

To the extent that the Federal Government has power to interfere with state criminal proceedings, that authority derives from powers specifically vested in Congress: the power to enforce federal constitutional rights, U.S. CONST. amend. XIV, §5, to regulate the jurisdiction of the federal courts, *id.* art. III, §1, and to regulate the writ of habeas corpus specifically under the Suspension Clause, *id.* art. I. §9; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). Congress has exercised that power by drafting statutes to govern the granting of writs of habeas corpus to prisoners in custody because of a state-court judgment.

Congress comprehensively reassessed the question of federal intervention in state criminal proceedings in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. The AEDPA amended the federal habeas statute to set out detailed and strict conditions for when a federal court may hear a federal claim despite the petitioner's failure to raise that claim in state court:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the court of the State; or (B) (i) there is an absence of State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. §2254(b); *see also* §2254(d). It also restricts the ability of a federal court to hold an evidentiary hearing on a federal claim when the federal petitioner has not developed the factual basis for his claim in state court:

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

Id. §2254(e)(2).

Taken together, sections 2254(b) (d), and (e) restrict the federal government's interference with state-court criminal judgments to narrow circumstances. A state prisoner must exhaust claims in state court before bringing them to federal court and cannot receive an evidentiary hearing on a federal claim in federal court if the legal basis for the claim is not new and the factual predicate for the claim could previously have been discovered with diligence. Medellin failed to exhaust his claims in state court, the legal basis for his claim is not new, and the factual predicate for the claim could have been discovered through the exercise of diligence. Yet the President's Memorandum, if read as an order, requires this Court to hear Medellin's federal claim even though the AEDPA would prohibit that same claim from being heard in federal court. The President would be attempting to exercise the federal power to interfere with state-court criminal judgments in a way that contradicts the limitations on that power imposed by Congress in the AEDPA.

Nor can Congress's ratification of the Vienna Convention in 1969 give the stamp of congressional approval to the President's action. The Supreme Court has made clear

that a Vienna Convention claim, like all claims based on federal law, is subject to the restrictions imposed by the AEDPA:

> [A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of the provisions of the Constitution itself, to which the rules of procedural default apply. The Vienna Convention . . . has continuously been in effect since 1969. But in 1996, . . . Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). . . . Breard's ability to obtain relief based on violations of the Geneva Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be.

Breard, 523 U.S. at 376. Medellin's Vienna Convention claim, too, is subject to the AEDPA limitations, which he cannot overcome. The President's Memorandum, if read as an order, attempts an end-run around those AEDPA restrictions, and so puts the President into conflict with the will of Congress.

Because the President's Memorandum is contrary to the will of Congress, a mandatory reading of that Memorandum describes an order that falls into *Youngstown*'s third category, where the President's power is at its "lowest ebb" and his claims of wide authority "must be scrutinized with caution." *Youngstown*, 343 U.S. at 639 (Jackson, J. concurring). That scrutiny is virtually always fatal in fact: The United States can cite to no Supreme Court decision upholding presidential action under these circumstances. *Cf., e.g., Dames & Moore*, 453 U.S. at 680 ("Crucial to our decision today is that Congress has implicitly approved the practice of claim settlement by executive agreement.").

C. A mandatory reading of the President's Memorandum would amount to an unprecedented and limitless assertion of presidential power to override state law.

The power claimed by the President is not rooted in the text of the Constitution or the Vienna Convention itself, and is beyond any inherent or implicit executive power previously recognized by the Supreme Court. The claimed power is subject to no limiting principle, and acknowledging it would give the President an essentially unlimited ability to preempt state law based on the assertion of a foreign-affairs interest. Because the President's claims are unsupported, and unlimited, under *Youngstown*'s "cautious scrutiny" this Court should hold that the President's Memorandum cannot force it to disregard Texas's rules of procedural default.

The United States's best case is *Garamendi*, which held that an executive agreement could preempt state law even though it had not been ratified as a treaty by the Senate. The narrow 5-4 vote in *Garamendi* makes clear that that case was at the outer limit of presidential authority; moreover, the majority importantly relied on the fact that the particular executive agreement in question fell within the President's traditional use of such agreements to settle private claims involving foreign governments. *See* 539 U.S. at 421 (noting that "there is a 'longstanding practice' of the national Executive to settle [claims by U.S. citizens against foreign governments] in discharging its responsibility to maintain the Nation's relationships with other countries") (quoting *Dames & Moore*, 453 U.S. at 679). In any event, there is no executive agreement in the present case.

The United States would dispense with the need for an actual agreement as a predicate for the exercise of Presidential power. But the bilateralism limitation on the President's power to preempt state law by invoking foreign affairs provides an important limit on that power. Without a limitation to specific bilateral obligations, the President could preempt state law based on nothing more than a general statement to tie the preemption to some treaty. *Cf. Garamendi*, 539 U.S. at 442 (Ginsburg, J, dissenting) ("The displacement of state law by preemption properly requires a considerably more formal and binding executive instrument."). The President would have broad power to interfere in state laws merely by invoking international affairs, and a wide variety of unilateral initiatives by the President could be linked to some putative source in treaties or customary international law.

For example, the President could pardon state prisoners if doing so would, in his opinion, advance the Government's foreign policy objectives. When Texas executed Karla Faye Tucker in 1998, there was a widespread outcry from foreign governments and human rights organizations. *See, e.g., Resolution on the Death Sentence Passed on Karla Faye Tucker in the United States*, 1998 O.J. (C 34) 168 (resolution of the European Parliament strongly condemning the execution). It would have been easy, in those circumstances, to argue that pardoning Tucker or commuting her sentence to life would have advanced the foreign policy interests of the United States. If the President needs no binding executive agreement as a predicate for preempting state law, then there would be no constitutional impediment to such an order.

Likewise, former diplomats have argued strongly that "the United States' adherence to the death penalty has become a growing irritant with other nations. . . . Increasingly, this issue has placed America and Europe on a collision course in almost every multilateral human rights forum. . . Inevitably, these differences have begun to warp U.S. foreign policy." Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1105 (2002). If the United States is right about the scope of presidential power in the present case, then there is no principled theory that would foreclose unilateral presidential abolition of state death penalty statutes based on his finding that abolition was in keeping with the United States' foreign policy interests.

The President's position, if accepted, would give him a practically unfettered power to override state law based on his mere assertion that preemption serves the foreign policy interests of the U.S. That sweeping power is unsupported by the constitutional text, and goes far beyond what any previous case has recognized. The unsupported claim that the President possesses such a limitless power cannot be accepted under the cautious scrutiny that is required when President acts in a way that is contrary to the will of Congress. *Youngstown*, 343 U.S. at 637-38. Therefore, this Court cannot be bound by the President's Memorandum to disregard Texas's habeas rules.

III. A MANDATORY READING OF THE PRESIDENT'S MEMORANDUM WOULD VIOLATE PRINCIPLES OF STATE SOVEREIGNTY.

A mandatory reading of the President's Memorandum would overstep not only the President's authority but also limits of national power vis-à-vis the States. The United States acknowledged as much in its *Breard* brief, when it argued that

> [T]he measures at [the United States's] disposal are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here.

United States *Breard* Br. at 51. A mandatory reading of the President's Memorandum would violate the well-established principle that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992).[10] To be sure, there is an exception to this principle for courts: State courts generally must hear suits under federal law *if* they "have jurisdiction adequate and appropriate under established local law to adjudicate the action." *Testa v. Katt*, 330 U.S. 386, 394 (1947). But that does not mean that the Federal Government may impose *any* task on the state courts, under *any* circumstances. And it certainly does not mean that the Federal Government may require state courts to hear cases that they do not have jurisdiction to adjudicate under established and neutral state

[10] *See also FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982) ("[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations").

procedural rules. Nothing in *Testa* suggests that the federal government may rewrite a state's established jurisdictional law, as opposed to merely using a state court's established jurisdiction for the enforcement of federal claims. By requiring the state courts to exercise jurisdiction that they do not have under state law—and to hear cases that the federal courts are neither required nor permitted to hear—a mandatory reading of the President's Memorandum would fall outside *Testa*'s limited exception.

A. Ordering state courts to enforce the *Avena* judgment in violation of their own neutral procedural rules would violate the anti-commandeering doctrine.

The "anti-commandeering doctrine" holds that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz v. United States*, 521 U.S. at 935 (1997). As Justice Scalia explained in *Printz*, "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people." *Id.* at 919-20. The States do, of course, *voluntarily* implement federal law and policy in any number of areas, and we have already argued that the President's Memorandum is best construed as a request that they do so here. If that Memorandum is instead read as an attempt to *compel* the State courts

to implement a Presidential command, that would run afoul of the anti-commandeering doctrine.

The Court acknowledged in *Testa*, however, that courts are different from state legislators and executive officers in that they routinely enforce laws promulgated by other sovereigns. *Testa* thus affirmed the principle that "a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" 330 U.S. at 393 (quoting *Minneapolis & St. Louis. R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916)). The Court emphasized that "this same type of claim arising under Rhode Island law would be enforced by that State's courts," and that "the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action." *Id.* at 394.

The fact that, in *Testa*, the state courts would have been open to hear claims like Testa's, had they arisen under state law, has been critical in subsequent cases applying *Testa*'s rule. The Supreme Court has repeatedly upheld state court refusals to hear federal claims where such refusals were predicated upon a "valid excuse"—that is, a rule of state law that barred federal and state claims alike under similar circumstances. In *Missouri ex rel. S. Ry. v. Mayfield*, 340 U.S. 1 (1950), for example, the Court upheld a state court's refusal to adjudicate a federal claim under the Federal Employee's Liability Act on *forum non conveniens* grounds. In so holding, Justice Frankfurter rejected the notion that prior cases "limited the power of a State to deny access to its courts to persons

seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . so as not to involve a discrimination against Employers' Liability Act suits." *Id.* at 4.[11]

Where the Court has struck down state law restrictions barring the adjudication of a federal claim, it has emphasized this nondiscrimination principle. In *Howlett v. Rose*, for example, the Court invalidated a state law immunity defense for local school boards that applied only to federal claims. 496 U.S. at 382. The Court emphasized that "the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state law actions against state defendants, violates the Supremacy Clause." *Id.* at 375. Likewise, in the course of striking down a state public policy bar to federal FELA claims, the Court emphasized that Congress had not attempted "to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Mondou v. N.Y., N.H. & H.R. Co.*, 223 U.S. 1, 56 (1912).

The Supreme Court has thus never held that the Federal Government may require a state court to hear a federal claim in the face of a state law bar to jurisdiction that applies to federal and state claims alike. The Texas rules of procedural default, as well as Article 11.071's limitations on this Court's jurisdiction over subsequent habeas petitions, are precisely this sort of neutral rules: they apply without regard to whether the petitioner

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[11] *See also Herb v. Pitcairn*, 324 U.S. 117 (1945) (upholding a state court's dismissal of a federal FELA claim under a state law barring jurisdiction in a city court over causes of action arising outside the city and stating the rule that "the cause of action must not be discriminated against because it is a federal one"); *Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377 (1929) (upholding a state court's dismissal of a federal FELA claim based on a state law barring actions by nonresidents against foreign corporations).

seeks relief on the basis of a state law or a federal law ground. *Testa*'s narrow exception to the anti-commandeering doctrine has no application in this situation.

Indeed, *Testa* is inapplicable here for an even more basic reason. The case before this Court is a petition for a writ of habeas corpus under *state* law. The state courts' obligation to hear *federal* claims is thus irrelevant to this case. Even if the President's Memorandum is read as creating a substantive rule of law, no one has argued that it somehow creates some new federal cause of action. Nor has any court ever said that the Constitution itself obligates the *states* to provide a state law habeas procedure at all, much less a *second* opportunity for collateral attack in a subsequent petition. To interpret the President's Memorandum as requiring the state courts to conduct collateral review proceedings under *state* law, in violation of their own rules for such proceedings, would not only be highly implausible as a reading of the Memorandum but also a clear violation of the anti-commandeering doctrine.

B. Ordering state courts to bear the *exclusive* burden of enforcing the *Avena* judgment would likewise violate the anti-commandeering doctrine.

The President's Memorandum, if interpreted as Medellin suggests, would also be unprecedented for a second reason: unlike the federal causes of action at issue in *Testa* and all the other cases discussed in the last section, the obligation to hear procedurally-defaulted Vienna Convention claims under the President's Memorandum would fall *exclusively* on the state courts. The Fifth Circuit held that Medellin's Vienna Convention claim could *not* be enforced in the federal courts, under the federal habeas statute and the

rule of procedural default. *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5th Cir. 2004), *cert. dism'd*, __ U.S. __, 126 U.S. 2088 (2005). The United States has endorsed that view, United States *Medellin* Supreme Court Br. at 30-33, and nothing in the President's Memorandum purports to change it in this case or to authorize federal jurisdiction to hear the claims of any of the other *Avena* prisoners. The reason for that is obvious: opening the *federal* courts to procedurally-defaulted Vienna Convention claims would fly in the face of the Anti-terrorism and Effective Death Penalty Act even more clearly than the present case does, and the President plainly lacks power to overrule the statute. The upshot is that the President's Memorandum, if it requires anything of *any* court, requires it only of the *state* courts.

If upheld, such an order would have far-reaching consequences. The Committee on Long Range Planning of the Judicial Conference of the United States has proposed, for example, that some categories of federal criminal offenses—such as small-time drug offenses—should be filed nearly exclusively in the *state* courts. *See* Long Range Plan for the Federal Courts, 166 F.R.D. 49 (1996). In so doing, of course, the Federal Government would be alleviating federal docket pressures by the expedient of *increasing* such pressures in the state courts. Upholding the President's power to impose jurisdictional obligations on state courts that do not fit within their ordinary jurisdiction and that are not shared by the federal courts would amount to the first legal precedent for such a plan.

Such a holding would likewise facilitate direct federal interference with the state courts' exercise of their traditional jurisdiction. If the Federal Government is not limited to imposing obligations evenhandedly on federal and state courts alike, it could, for example, impose burdensome rehearing provisions in state capital cases across the board—not just in cases involving Vienna Convention claims.

These examples—as well as the present case—demonstrate why a mandatory construction of the President's Memorandum would implicate all of the core structural concerns of the anti-commandeering doctrine. In *New York*, Justice O'Connor emphasized that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. These political accountability concerns are, if anything, even more compelling in the present case. There are few less politically popular acts than granting a reprieve to a condemned murderer—especially at the behest of a mysterious foreign court. If the Federal Government can require such an unpopular order to come from the *state* courts, it may escape public accountability for its decision to comply with the ICJ's decision.

Printz likewise stressed the fact that commandeering allows the Federal Government to shift the financial cost of its programs to the states: "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to

ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. at 930. Here, of course, the costs of the "review and reconsideration" of Medellin's conviction and sentence would be born entirely by the State. That would be true in *every* case involving an *Avena* prisoner, as the President's Memorandum absolves the federal courts from any responsibility for such claims.

Finally, *Printz* emphasized the ability of commandeering to distort the separation of powers: "That unity [of the federal Executive function] would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." 521 U.S. at 923. The corresponding risk here is that the President is acting to circumvent Congress's primary control over the jurisdiction of the *federal* courts. If the President may not only create unauthorized rules of federal law but command their enforcement in the state courts, that would indeed shift the balance of power among the federal branches.

C. If there *is* a power to commandeer state courts in this way, it can only belong to Congress.

The last point emphasizes why, if the Federal Government is to have the power to compel state courts to ignore their own neutral procedural rules and shoulder burdens not borne by the federal courts, that power should not be exercisable without the full participation of Congress. Even the cases most solicitous of unenumerated Presidential powers have emphasized that any such powers exist only in the *external* sphere of foreign relations. *See United States v. Curtiss-Wright Exp. Co.*, 299 US 304 (1936). As such, they can have no application to the administration of criminal justice within a state.

Moreover, it is crucial that any such intrusive power over the state courts must, *at the very least*, be subject to the "political safeguards of federalism"—that is, to the approval of the States' representatives in Congress. *See Garcia v. San Antonio Metro. Transit Auth*, 469 U.S. 528, 551 & n.11 (1985).

This is why the Supreme Court has been particularly demanding of a clear statement of *Congress's* intent before construing federal law to authorize major intrusions on state autonomy. In the *Solid Waste* case, for example, the Court confronted a rule promulgated by the Army Corps of Engineers, pursuant to a broad grant of authority under the Clean Water Act, which required Corps approval before developing wetlands frequented by migratory birds. *Solid Waste Auth. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163-64 (2001). Noting that the rule was at the outer limit of national authority under the Commerce Clause, the Court determined that the specific impetus to stretch the Commerce Power so broadly must come from Congress, not an Executive Agency. *Id.* at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.") It therefore held that the "migratory bird rule" was unauthorized by the underlying statute. *Id.* at 172.

That resolution is the *least* that the Constitution requires here: While *amici* believe that the Federal Government as a whole lacks power to compel state courts to violate their own neutral procedural rules and hear claims over which the federal courts

themselves lack jurisdiction, at the very least such compulsion cannot come from the President alone.

CONCLUSION

For all these reasons, *amici* urge that this Court not rely on the President's Memorandum as a ground for granting review and reconsideration of the sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Appellate Procedure 9.5, on this 31st day of August, 2005, an original and eleven copies of the foregoing *Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent* were hand delivered to:

Troy C. Bennett, Jr. Clerk
Court of Criminal Appeals of Texas
201 West 14th Street, Room 1066
Austin, Texas 78701

In addition, one copy was sent via Certified Mail, Return Receipt Requested to each of the following:

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Ernest A. Young
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INDEX TO APPENDIX

APPENDIX A

THE WHITE HOUSE

WASHINGTON

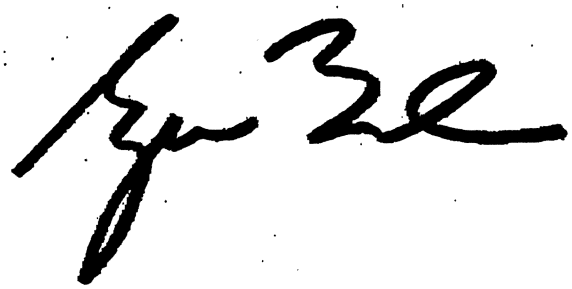
February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), 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.



APPENDIX B

SEAN

Office of the Attorney General
Washington, D. C. 20530

April 5, 2005

EXECUTIVE ADMINISTRATION
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ACTION BY CRUZ
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GA
CLEMMER
GENA BUNN

The Honorable Greg Abbott
Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711

Dear Attorney General Abbott:

The State of Texas has since 2003 been aware of the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Avena*), brought by Mexico against the United States in the International Court of Justice (ICJ), and provided critical assistance to the U.S. Department of State in preparation of the response of the United States in that proceeding. Of the 51 Mexican nationals subject to the ICJ's decision in the case, 2004 I.C.J. 128 (Mar. 31), fifteen were convicted and sentenced by the State of Texas.

In *Avena*, the ICJ concluded that the United States violated Article 36 of the Vienna Convention on Consular Relations (VCCR) by, among other things, not informing these 51 Mexicans that they were entitled to have Mexican consular officials notified of their arrest and detention. The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." The ICJ made clear that it did not prescribe a particular outcome for the review and reconsideration, but instead specified that it was for the United States to determine in each case whether the violation of the VCCR "caused actual prejudice to the defendant in the process of administration of criminal justice."

Pursuant to the authority vested in him as President of the United States by the Constitution and the laws of the United States, the President has determined that "the United States will discharge its international obligations under the decision of the ICJ, 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." This determination was communicated to me in a Memorandum dated February 28, 2005, a copy of which is enclosed. This Memorandum was submitted to the United States Supreme Court as part of the amicus brief filed by the United States in *Medellin v. Dretke* (No. 04-5928). A copy of that brief, which explains the implications of the President's determination for the 51 cases addressed by the *Avena* ICJ judgment, is also enclosed.

The ICJ had jurisdiction to decide the *Avena* case because, at the time the suit was filed, both Mexico and the United States were parties to the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes. By letter dated March 7, 2005, the Secretary of State notified the United Nations of the United States' withdrawal from the Optional Protocol. As a consequence, the United States will no longer recognize the jurisdiction of the ICJ to resolve disputes concerning the interpretation and application of the VCCR.

This withdrawal action has no implications for the international legal obligation of the United States to comply with the *Avena* judgment or the President's determination. Nor does it have any implications for the obligations of the United States under the VCCR itself. The United States remains a party to the VCCR and must continue to provide consular notification and access as required in Article 36 of that treaty.

Sincerely,

Alberto R. Gonzales
Attorney General

Enclosures

THE WHITE HOUSE

WASHINGTON

February 28, 2005

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I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), 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.