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Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in *Medellín v. Texas*

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Summary

The Vienna Convention on Consular Relations (VCCR) is a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements between States (i.e., countries). Article 36 of the VCCR provides that when a national of a signatory State is arrested or otherwise detained in another signatory State, appropriate authorities within the receiving State must inform him “without delay” of his right to have his consulate notified. Nevertheless, foreign nationals detained by U.S. state and local authorities are not always provided with requisite consular information.

Until March 2005, the United States was also a party to the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes. Parties to the Optional Protocol agree to accept the jurisdiction of the International Court of Justice (ICJ) to resolve disputes arising between nations with respect to the VCCR. Prior to U.S. withdrawal from the Optional Protocol, the ICJ issued a judgment in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) (Avena)*, instructing the United States to review and reconsider the state convictions and sentences of 51 Mexican nationals who were not timely informed of their right to consular notification under VCCR Article 36, regardless of whether such review was otherwise barred by state procedural default rules. Although the United States subsequently withdrew from the Optional Protocol, the President thereafter issued a Memorandum instructing state courts to give effect to the ICJ's decision in *Avena* with respect to the 51 Mexican nationals at issue in that case.

On March 25, 2008, the Supreme Court issued a decision in the case of *Medellín v. Texas*. In an opinion written by Chief Justice Roberts and joined by Justices Alito, Kennedy, Thomas, and Scalia, the Court held that neither the judgment of the ICJ in *Avena* nor the President's Memorandum constituted enforceable federal law preempting state procedural default rules. Justice Stevens wrote an opinion concurring with the Court's judgment, and Justice Breyer issued a dissenting opinion that was joined by Justices Ginsburg and Souter. For further background on issues related to VCCR Article 36, see CRS Report RL33613, *Sanchez-Llamas v. Oregon: Recent Developments Concerning the Vienna Convention on Consular Relations*, by Michael John Garcia, and CRS Report RL32390, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, by Michael John Garcia.

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Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in *Medellín v. Texas*

On March 25, 2008, the Supreme Court issued a decision in the case of *Medellín v. Texas*.¹ In an opinion written by Chief Justice Roberts and joined by Justices Alito, Kennedy, Thomas, and Scalia, the Court held that neither the judgment of the International Court of Justice (ICJ) in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*² (*Avena*) nor the President's Memorandum requiring state courts to give effect to the *Avena* decision constituted enforceable federal law preempting state procedural default rules. Justice Stevens wrote an opinion concurring with the Court's judgment, and Justice Breyer issued a dissenting opinion that was joined by Justices Ginsburg and Souter.

Background

The Vienna Convention on Consular Relations (VCCR),³ ratified by the United States in 1969, is a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements between States (i.e., countries). When the United States became a party to the VCCR, it also chose to become a party to the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol).⁴ Parties to the Optional Protocol agree to accept the jurisdiction of the ICJ to resolve disputes arising between nations with respect to the VCCR. The ICJ is the "principle judicial organ of the United Nations,"⁵ and the ICJ Statute, establishing the organization and procedures of the court, is annexed to the U.N. Charter.⁶ Pursuant to Article 94(1) of the U.N. Charter, each U.N. Member "undertakes to comply" with decisions of the ICJ "in any case to which it is a party." Article 94(2) of the Charter provides that if a party fails to perform obligations required of it pursuant to an ICJ judgment, the other party may present the matter to the U.N. Security Council, "which may, if it deems necessary,

¹ *Medellín v. Texas*, — - S.Ct.—, 2008 WL 762533 (2008).

² *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128 (Judgment of March 31).

³ Vienna Convention on Consular Relations, done April 24, 1963, 21 U.S.T. 77.

⁴ Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done April 24, 1963, 21 U.S.T. 325.

⁵ United Nations Charter, Art. 92, 59 Stat. 1051, T.S. No. 993 (1945).

⁶ Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945).

make recommendations or decide upon measures to be taken to give effect to the judgment.” On March 7, 2005, the United States withdrew from the Optional Protocol, meaning that the ICJ’s jurisdiction over VCCR claims is no longer recognized by the United States.⁷

Pursuant to Article 36 of the VCCR, when a national of a signatory State is arrested or otherwise detained in another signatory State, appropriate authorities within the receiving State must inform him “without delay” of his right to have his consulate notified. This requirement is potentially beneficial to a detained national. For instance, a consulate might arrange for legal representation of the detained national, or help the national obtain evidence or witnesses to bolster the national’s defense in any subsequent criminal case. Nevertheless, foreign nationals detained by U.S. state and local authorities are not always provided with requisite consular information, and some have been convicted of criminal charges carrying serious penalties without ever having their consulate notified of their detention.

Further, under U.S. state and federal law, procedural default rules might prevent foreign nationals from obtaining a judicial remedy for an Article 36 violation when they only become aware of the VCCR’s consular notification requirements after having been convicted of an offense. As is the case on the federal level, state procedural default rules generally prevent the reopening of cases to consider claims that were not raised on a timely basis (e.g., before or during trial). The rule may preclude the raising of claims based on the violation of a treaty or (in many cases) a constitutional right. Although lower federal courts have jurisdiction to review state criminal convictions pursuant to writs of habeas corpus, the scope of such review is limited. A person convicted in state court who petitions for federal habeas relief on account of a violation of the Constitution or a federal statute or treaty must have first raised the claim in state court if he is to be provided an evidentiary hearing under federal habeas review.⁸

The availability of a judicial remedy for an Article 36 violation has been the subject of both domestic and international jurisprudence.⁹ Prior to U.S. withdrawal from the Optional Protocol, the ICJ considered a claim brought by Mexico against the United States for violating obligations owed under VCCR Article 36. In *Avena*, the ICJ held that Article 36 confers an individually-enforceable right to consular notification, and that the state convictions of 51 named Mexican nationals were entitled to review and reconsideration, regardless of whether such review was otherwise barred by state procedural default rules. Although the United States

⁷ Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, giving notice that the United States withdraws from the Optional Protocol (March 7, 2005).

⁸ 22 U.S.C. § 2254. A possible exception enabling otherwise procedurally defaulted constitutional claims to be raised in federal habeas courts occurs when the claim relies upon “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* at § 2254(e)(2)(A)(i).

⁹ For further discussion, see CRS Report RL32390, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, by Michael John Garcia.

subsequently withdrew from the Optional Protocol, the President thereafter issued a Memorandum instructing state courts to give effect to the ICJ's decision in *Avena* with respect to the 51 Mexican nationals at issue in that case.¹⁰

In the 2006 case of *Sanchez-Llamas v. Oregon*,¹¹ the Supreme Court found that even assuming that Article 36 created an individually enforceable right for detained foreign nationals, (1) suppression of evidence in a criminal proceeding is never an appropriate remedy for an Article 36 violation; and (2) federal and state procedural default rules prevent the raising of Article 36 claims that were not made on a timely basis. Although the Court considered the ICJ's interpretation of Article 36 as deserving respectful consideration, it did not deem it to be legally binding or necessarily persuasive. Because the *Sanchez-Llamas* case did not involve individuals named in the *Avena* decision, the Supreme Court's ruling addressed neither the domestic effect of the ICJ judgment instructing the United States review of the state criminal convictions of certain Mexican nationals, nor the legal weight of the President's Memorandum instructing state courts to comply with the *Avena* judgment.

Ernesto Medellín, who had been convicted and sentenced in Texas state court for murder, was one of the Mexican nationals named in the *Avena* decision. In 2004, the Supreme Court granted certiorari in the case of *Medellín v. Dretke*,¹² in which Medellín argued, among other things, that his conviction by a Texas court should be reconsidered in light of the ICJ's ruling, despite such reconsideration being barred by Texas's procedural default rules. Prior to the Supreme Court reaching a decision on this issue, President Bush issued the Memorandum instructing state courts to give effect to the *Avena* decision. The Court subsequently dismissed its writ of certiorari in *Medellín* as improvidently granted, as it was no longer clear that Medellín had exhausted his remedies at the Texas state level in light of the President's Memorandum.¹³ On November, 15, 2006, the Texas Criminal Court of Appeals held that neither *Avena* nor the President's Memorandum preempted state procedural default rules, and it rejected Medellín's petition for habeas relief.¹⁴ The Supreme Court thereafter granted certiorari to review the Texas court's judgment.

Issues Decided in *Medellín*

The Court granted certiorari in *Medellín* to address two issues: (1) whether the ICJ's decision in *Avena* was directly enforceable in U.S. state courts; and (2) whether the President's Memorandum independently compelled states to review and

¹⁰ President Bush Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena*, February 28, 2005, available at [<http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>].

¹¹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). For further discussion, see CRS Report RL33613, *Sanchez-Llamas v. Oregon: Recent Developments Concerning the Vienna Convention on Consular Relations*, by Michael John Garcia.

¹² *Medellín v. Dretke*, 544 U.S. 660 (2005) (per curium).

¹³ *Id.* at 664.

¹⁴ *Ex parte Medellín*, 223 S.W.3d 315 (Tex.Crim.App.2006).

reconsider the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules.¹⁵

Domestic Legal Effect of the ICJ’s Judgment in *Avena*. The Court first examined whether the ICJ’s judgment in *Avena* constituted binding domestic law. Medellín argued that treaties requiring compliance with the *Avena* judgment — namely, the Optional Protocol, ICJ Statute, and U.N. Charter — constituted the “law of the Land” under the Supremacy Clause, thereby preempting contrary state procedural default rules that otherwise barred reexamination of Medellín’s habeas petition.

The Court began its analysis by acknowledging that the Optional Protocol, ICJ Statute, and U.N. Charter imposed upon the United States “an *international* law obligation” to comply with the ICJ’s judgment in *Avena*.¹⁶ However, the Court went on to explain that it had “long recognized the distinction between those treaties that — while they constitute international law commitments — do not themselves function as binding federal law” enforceable by U.S. courts.¹⁷ Here, the Court distinguished between the domestic legal effect of two categories of treaties — those that are self-executing and those that are non-self-executing. The Court defined a self-executing treaty as having “automatic domestic effect as federal law upon ratification.”¹⁸ A non-self-executing treaty, in contrast, “does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.”¹⁹ Further, even when treaties are considered “self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”²⁰

The Court held that the *Avena* judgment did not constitute automatically enforceable domestic law because none of its underlying treaty sources — i.e., the Optional Protocol, the ICJ Statute, or the U.N. Charter — created binding domestic law in the absence of implementing legislation, and no such legislation had been enacted by Congress. In assessing whether these treaty sources were self-executing, the Court first looked to the relevant treaty text in order to determine whether each treaty’s terms “reflect[ed] a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”²¹ Though the Court stated that treaty interpretation, like statutory interpretation, “begins with its text,” it also acknowledged that nontextual resources, including the negotiating and drafting

¹⁵ *Medellín*, 2008 WL 762533, at *6.

¹⁶ *Id.* at *9 (italics in original).

¹⁷ *Id.*

¹⁸ *Id.* at *9 n.2.

¹⁹ *Id.*

²⁰ *Id.* at *10 n.3.

²¹ *Medellín*, 2008 WL 762533, at *17.

history of the treaty and the poststratification understanding of treaty parties, could also serve as “aids to its interpretation.”²²

Turning first to the Optional Protocol, the Court concluded that the “most natural reading of the Optional Protocol is as a bare grant of jurisdiction” to the ICJ to hear disputes between VCCR parties.²³ According to the Court, “[s]ubmitting to jurisdiction and agreeing to be bound are two different things.”²⁴ The Optional Protocol was silent on the effect of an ICJ judgment and did not directly compel case parties to comply with ICJ decisions.

The Court found that any obligation to comply with an ICJ judgment derived not from the Optional Protocol but from Article 94 of the U.N. Charter, which describes the effect of ICJ decisions. Although Article 94(1) provides that parties to ICJ cases shall “undertake[] to comply” with its decisions, the Court did not interpret this language as “a directive to domestic courts.”²⁵ Instead, this provision was deemed to impose “a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.”²⁶ The Court found support for this interpretation in the language of Article 94(2), which provides that the sole remedy for noncompliance with an ICJ decision is referral of the matter to the U.N. Security Council, which must determine whether to take action to effectuate the judgment. Further, “as the President and the Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, the United States retained the unqualified right to exercise its veto over any Security Council resolution.”²⁷ According to the Court, interpreting ICJ judgments as automatically enforceable domestic law would eliminate the option of noncompliance with ICJ decisions contemplated under Article 94(2).

Additionally, the Court found nothing in the text of the ICJ Statute to suggest that the *Avena* judgment constituted automatically enforceable domestic law which could be relied upon by Medellín.²⁸ The ICJ Statute provides that ICJ decisions have “no binding force except between the parties,”²⁹ and only nations, not individuals, may be parties in cases before the ICJ. The Court reasoned that an individual like Medellín could not be considered a party to the *Avena* decision, and therefore could not rely on its judgment.

The Court also found support for its interpretation of the non-self-executing nature of the relevant treaties when it considered nontextual aids to treaty

²² Id. at *11.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. (italics in original).

²⁷ *Medellín*, 2008 WL 762533, at *12.

²⁸ Id. at *13.

²⁹ ICJ Statute, art. 59.

interpretation. The majority noted that U.S. interpretation of a treaty “is entitled to great weight,” and “the Executive Branch has unfailingly adhered to the view that the relevant treaties do not create domestically enforceable law.”³⁰ The Court further stated that its conclusion that *Avena* did not constitute binding federal law is confirmed by the “postratification understanding” of other signatories to the Optional Protocol. According to the Court, neither petitioner nor his *amici* identified a single country that treated ICJ judgments as automatically binding upon its domestic courts.³¹ The Court also stated that its conclusion was supported by general principles of interpretation, including the rule 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.”³²

Finally, the Court made clear that its holding was not intended to “suggest that treaties can never afford binding domestic effect to international tribunal judgments — only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so.”³³ The Court agreed with petitioner that in some cases an international agreement to abide by the result of an international adjudication may be self-executing.³⁴ Whether treaties underlying other judgments are self-executing so as to permit direct enforcement of these judgments by U.S. courts is “a matter for this Court to decide.”³⁵ The Court also stressed that its holding did not call into question the ordinary enforcement of foreign judgments or international arbitral agreements by U.S. courts.³⁶ Further, the Court acknowledged even international adjudications based on non-self-executing agreements constitute international obligations, and Congress may enact implementing legislation to give them domestic effect.³⁷

Writing in concurrence, Justice Stevens found “a great deal of wisdom” in the dissenting opinion, including its claim “that the text and history of the Supremacy Clause, as well as this Court’s treaty-related cases, do not support a presumption against self-execution.”³⁸ Nonetheless, Justice Stevens agreed with the majority that the relevant treaties did not authorize the Court to enforce the ICJ’s judgment in *Avena*. Like the majority, Justice Stevens interpreted the U.N. Charter’s requirement that parties “undertake[] to comply” with ICJ decisions as leaving the choice of compliance to the political, rather than judicial, department of government.³⁹ Justice Stevens also emphasized that the *Avena* decision, while not directly enforceable by U.S. courts, nonetheless imposed an international legal obligation upon both the

³⁰ *Medellín*, 2008 WL 762533, at *13.

³¹ *Id.* at *15.

³² *Id.*

³³ *Id.* at *17.

³⁴ *Medellín*, 2008 WL 762533, at *17.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at *18.

³⁸ *Id.* at *24 (Stevens, J., concurring).

³⁹ *Id.* at *24-25.

federal government and each of the U.S. states. Justice Stevens claimed that Texas's duty to comply with the *Avena* judgment "is all the greater since it was Texas that — by failing to provide consular notice in accordance with the Vienna Convention — ensnared the United States in the current controversy."⁴⁰ Justice Stevens urged Texas take appropriate action to ensure that it would not cause the United States to default upon its obligation under international law to comply with the *Avena* decision.⁴¹

In dissent, Justice Breyer (joined by Justices Ginsburg and Souter) argued that the "many treaty-related cases interpreting the Supremacy Clause...including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation."⁴² The dissent discussed several instances in which the Court had previously concluded that a treaty was self-executing, even in the absence of clear textual language on the point. The dissent argued that the majority's emphasis on a treaty's text when assessing a provision's self-executing nature was misplaced, and "erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones."⁴³ In an appendix, Justice Breyer listed 70 treaties containing ICJ dispute settlement provisions similar to that contained in the Optional Protocol, as examples of agreements that had their domestic legal effect potentially called into question by the majority's decision.⁴⁴

The dissent argued that established Supreme Court jurisprudence suggested "practical, context-specific criteria" for determining whether a particular treaty or treaty provision is self-executing, with a treaty provision's subject matter having particular importance.⁴⁵ Factors to be considered in determining whether a treaty provision is directly enforceable by a U.S. court include "whether the treaty provision confers specific, detailed individual legal rights;" whether it establishes "definite standards that judges can readily enforce;" whether direct judicial enforcement would "require the courts to create a new cause of action;" and whether direct enforcement by U.S. courts would "create constitutionally undesirable conflict with the other branches."⁴⁶ Considering these factors, the dissent concluded that the relevant treaty provisions underlying the *Avena* judgment were self-executing, and the judgment should therefore be directly enforceable by U.S. courts.

Legal Effect of the President's Memorandum. The second issue examined by the Court was the legal effect of the President's Memorandum. Both Medellín and the United States, as an amicus, argued that the Memorandum legally required the Texas state court to review and reconsider Medellín's conviction and

⁴⁰ Id. at *26.

⁴¹ Id.

⁴² *Medellín*, 2008 WL 762533, at *28 (Breyer, J., dissenting).

⁴³ Id. at *34.

⁴⁴ Id. at *46-49 (Appendix B).

⁴⁵ Id. at *35.

⁴⁶ Id. at *34.

sentence so as to give effect to the *Avena* judgment. In its amicus brief, the United States made two arguments in support of the legal validity of the President's Memorandum. First, it argued that relevant treaties, ratified by the United States following the approval of the Senate, gave the President the authority to implement the *Avena* judgment and that Congress had acquiesced to the exercise of such authority. Secondly, the government argued that the President possessed independent power to resolve international disputes wholly apart from any authority derived from relevant treaties.

The Court acknowledged that “the President’s constitutional role ‘uniquely qualifies’ him to resolve the sensitive foreign policy decisions” and found that the Memorandum sought to vindicate “plainly compelling” interests, including ensuring reciprocal observance of the VCCR, preserving foreign relations, and demonstrating U.S. commitment to the role of international law.⁴⁷ Nonetheless, the Court found that these interests “do not allow us to set aside first principles” which establish that the presidential authority to act is derived from either an act of Congress or the Constitution itself.⁴⁸

The Court analyzed the President’s action using the tripartite framework established by Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube v. Sawyer*.⁴⁹ First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁵⁰ Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can rely only on 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.”⁵¹ In these circumstances, “Congressional inertia, indifference or quiescence may...invite, measures of independent Presidential responsibility.”⁵² Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁵³

In support of the legal validity of the President’s Memorandum, the government argued that the Optional Protocol and U.N. Charter “create an obligation to comply with *Avena*...[and] *implicitly* give the President authority to implement that

⁴⁷ *Id.* at *19.

⁴⁸ *Medellín*, 2008 WL 762533, at *19.

⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁰ *Id.* at 635 (Jackson, J., concurring).

⁵¹ *Id.* at 637.

⁵² *Id.*

⁵³ *Id.* at 637-638.

treaty-based obligation.”⁵⁴ The government argued that the Memorandum fell under the first category of the *Youngstown* framework, because the President’s action was impliedly authorized by Congress, pursuant to Senate approval of treaties creating an obligation to comply with the *Avena* judgment. The Court disagreed. Having already concluded that neither the Optional Protocol nor the U.N. Charter were self-executing, the Court held that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”⁵⁵ The Court described a non-self-executing treaty as one that “by definition...was ratified with the understanding that it is not to have domestic effect of its own force.”⁵⁶ This understanding, the Court reasoned, means that “[w]hen the President asserts the power to ‘enforce’ a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate.”⁵⁷ Accordingly, the Court found that the President’s Memorandum fell within the third category of Justice Jackson’s *Youngstown* framework, because the President’s action was contrary to the express or implied will of Congress.⁵⁸

The Court also disagreed with the government’s argument that the President’s Memorandum should be given effect as domestic law in light of “congressional acquiescence” to such executive action. As a preliminary matter, the Court recognized “congressional acquiescence” as pertinent only when the President’s action falls under the second category of the *Youngstown* framework (i.e., in situations where the President acts in the *absence* of a congressional grant or denial of authority). Having already determined that the President’s attempt to enforce the *Avena* judgment fell within the third category of the *Youngstown* framework, the Court deemed congressional acquiescence to be irrelevant to its legal analysis.⁵⁹ Further, the Court stated that “even if we were persuaded that congressional acquiescence could support the President’s asserted authority to create domestic law pursuant to a non-self-executing treaty, such acquiescence does not exist here.”⁶⁰

Next, the Court addressed the government’s argument that, independent of United States treaty obligations, the Memorandum was a valid exercise of the President’s power to resolve international disputes with foreign nations. In support of this position, the government relied on a series of Supreme Court decisions upholding the President’s authority to settle foreign claims pursuant to executive agreement.⁶¹ The Court characterized these cases as standing for the proposition “that, if pervasive enough, a history of congressional acquiescence can be treated as

⁵⁴ *Medellín*, 2008 WL 762533, at *20 (italics in original).

⁵⁵ *Id.*

⁵⁶ *Id.* at *21.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at *22.

⁶⁰ *Medellín*, 2008 WL 762533, at *22.

⁶¹ *Id.* at *23 (citing *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937)).

a gloss on Executive Power vested in the President by § 1 of Art. II.”⁶² It further described these claim-settling cases as “involving a narrow set of circumstances” concerning the settlement of private claims between U.S. citizens and foreign nationals or governments, which was “supported by a ‘particularly longstanding practice’ of congressional acquiescence.”⁶³ In contrast, the Court characterized the President’s Memorandum ordering state courts to comply with the *Avena* judgment as an “unprecedented action...that reaches deep into the heart of the State’s police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.” The Court concluded that the President’s “narrow and strictly limited authority to settle foreign claims...cannot stretch so far as to support the current Presidential Memorandum.”⁶⁴

The Court also briefly considered an argument raised by Medellín, but not the United States, that the President’s Memorandum was a valid exercise of his constitutional power to “take Care that the Laws are faithfully executed.”⁶⁵ The Court rejected this argument because the Take Care clause permits the President to execute laws, not make them, and the Court had concluded that the *Avena* decision was not domestic law.⁶⁶

The Court emphasized that it had not held that “the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation.”⁶⁷ Though the President could not rely on the power of a non-self-executing treaty to establish legally-binding rules preempting contrary state law, the President could still enforce a non-self-executing treaty’s obligations using “some other means, so long as they are consistent with the Constitution.”⁶⁸

In his concurring opinion, Justice Stevens agreed with the majority that the President’s Memorandum did not constitute binding law.⁶⁹ Because the dissenting justices would have held the relevant treaties self-executing and the *Avena* decision directly enforceable as domestic law, they decided not to attempt to resolve the question of whether the President’s Memorandum constituted enforceable federal law preempting state procedural default rules.⁷⁰

⁶² Id. (internal quotations omitted)

⁶³ Id. at 24 (quoting *Garamendi*, 539 U.S. at 415).

⁶⁴ Id.

⁶⁵ U.S. CONST., art. II, § 3

⁶⁶ *Medellín*, 2008 WL 762533, at *24.

⁶⁷ Id. at *22.

⁶⁸ Id.

⁶⁹ Id. at *25 (Stevens, J., concurring).

⁷⁰ Id. at *44 (Breyer, J., dissenting).