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Don't Mess with Texas: Garcia v. Texas and the Supreme Court's Inversion of the Supremacy Clause

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DON'T MESS WITH TEXAS: *GARCIA v. TEXAS* AND THE
SUPREME COURT'S INVERSION OF
THE SUPREMACY CLAUSE

Noah Moss[†]

I. Introduction	347
II. Background	349
A. The Vienna Convention on Consular Relations	349
B. The ICJ's <i>Avena</i> Decision	350
C. The <i>Medellin v. Texas</i> Cases	351
D. Further Proceedings before the ICJ (2008-09)	354
III. Discussion	355
A. Procedural Disposition Leading up to <i>Garcia v. Texas</i>	355
B. Majority Opinion	356
C. Dissenting Opinion	357
IV. Analysis	360
A. Treaty Interpretation and the Scope of International Law	360
B. Executive Power to Implement the <i>Avena</i> Judgment	361
C. Legislative Efforts to Implement <i>Avena</i>	364
V. Impact	366
A. Uncertainty Over Who Governs Foreign Affairs	366
B. Damage to Mexico-U.S. Relations	367
VI. Conclusion	369

I. Introduction

As W. H. Auden famously observed, “Murder is unique in that it abolishes the party it injures, so that society has to take the place of the victim and on his behalf demand atonement or forgiveness; it is the one crime in which society has a direct interest.”¹ So when Humberto Leal Garcia was found guilty for the brutal rape and murder of 16-year-old Adria Saucedo, it was no surprise that the State of Texas demanded atonement.

Garcia, a Mexican national that had lived in the United States since the age of two, was arrested and subsequently convicted of capital murder in July 1995.² Following his arrest, however, law enforcement officials at no time informed him of his right under international law to contact the Mexican consulate for assistance with his defense.³ On February 4, 1998, the Texas Court of Criminal Ap-

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¹ W.H. Auden (quote is available at http://thinkexist.com/quotes/w_h_auden/3.html).

² *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

³ *Id.*

peals affirmed Garcia's conviction and sentence.⁴ Meanwhile, the International Court of Justice ("ICJ") issued an order calling on the United States to review Garcia's case with a view to ascertaining if denial of his rights under international law prejudiced the administration of justice.⁵ The ICJ found that the United States violated the Vienna Convention on Consular Relations ("Vienna Convention") when law enforcement officers in Texas failed to notify Garcia, along with fifty-one other Mexican nationals, of their right to access their consulate after arrest.⁶

While in prison awaiting execution, Garcia learned of his right to notify the Mexican Consulate of any legal proceedings against him with an eye towards securing legal counsel.⁷ In fact, Garcia learned of his rights not from any law enforcement officer or attorney, but from another death row inmate – and a full two years after his capital sentence was handed down.⁸ After being made aware of the situation, the Obama administration filed an amicus brief in Garcia's case and requested the U.S. Supreme Court to stay Garcia's execution.⁹ Despite this high-level intervention, the State of Texas put Humberto Leal Garcia to death by lethal injection on the evening of July 7, 2011.¹⁰ In allowing Garcia's execution to proceed, the Supreme Court ruled that the ICJ order was unenforceable as domestic law and therefore not binding on the State of Texas.¹¹

Part II of this Note discusses the relevant international agreements as well as the International Court of Justice, forming the backdrop against which *Garcia v. Texas* was decided. That Part also includes a discussion of *Medellin v. Texas*, the seminal case that shaped the jurisprudence surrounding the *Garcia* case. Part III contains an in-depth analysis of the Supreme Court's holding in *Garcia*, including a discussion of the dissenting opinion issued by Justice Stephen Breyer. Part IV situates the *Garcia* decision in the larger debate regarding treaty interpretation, executive powers, and legislative implementation of the rights at issue in this case. Finally, Part V looks at the potential negative impact that *Garcia* could have on the future of U.S.-Mexico relations and the steadily diminishing power of the president in this area of foreign relations.

⁴ *Garcia v. Thaler*, 793 F.Supp.2d 909, 921 (W.D. Tex. 2011) (citing *State v. Leal*, No. 72,210 (Tex. Crim. App. Feb. 4 1998) (unpublished opinion)).

⁵ *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ 12, ¶ 14 (Mar. 31).

⁶ *Id.*

⁷ *Garcia v. Texas*, 131 S.Ct. at 2867.

⁸ Adam Liptak, *Texas is Pressed to Spare Mexican Citizen on Death Row*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/2011/06/28/us/28bar.html>.

⁹ Brief for the United States as Amicus Curiae in Support of Applications for a Stay at 1, *Garcia*, 131 S.Ct. 2866 (2011).

¹⁰ Adam Liptak, *Mexican Citizen Is Executed as Justices Refuse to Step In*, N.Y. TIMES, July 7, 2011, <http://www.nytimes.com/2011/07/08/us/08execute.html>.

¹¹ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 532 (2008) (interpreting *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31)).

II. Background

A. The Vienna Convention on Consular Relations

The United States ratified the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes in 1969.¹² Under Article 36 of the Vienna Convention, the United States has an obligation to timely notify detained foreign nationals of their right to notify their consulate and to facilitate such communication.¹³ The language embodying these obligations appears in the following provisions:

(1)(a) [C]onsular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(1)(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.¹⁴

Unfortunately, the United States has a history of non-compliance with the latter provision of the section because law enforcement officers at all levels often fail to provide notice “without delay” to foreign nationals of their right to communicate with their consulates.¹⁵ As a result, consulates are often unaware when citizens and nationals from their countries have been detained in the United States.¹⁶ This has the potential to be particularly problematic because many of the remaining rights provided to detained foreign nationals under Article 36 are

¹² Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820; *see also* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

¹³ Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter “Vienna Convention”].

¹⁴ *Id.* art. 36(1)(a)-(b).

¹⁵ The United States’ failure to give notice and lack of consular access under Article 36 of the Vienna Convention was at issue in two additional cases filed in the ICJ against the United States: *Paraguay v. U.S.*, 1998 I.C.J. 248 (Apr. 9); *LaGrand Case (Ger. v. U.S.)* 2001 I.C.J. 466 (June 27).

¹⁶ *See e.g.* *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27). In the *LaGrand Case*, brothers and German nationals Karl and Walter Bernhard LaGrand orchestrated an armed bank robbery in Marana, Arizona, killing a man and severely injuring a woman in the process. *Id.* at ¶ 14. They were convicted and sentenced to death unbeknownst to their home country of Germany, who was made aware of the legal proceedings only after the Arizona Supreme Court rejected their challenges, effectively upholding the convictions and sentences. *Id.* at ¶ 19.

Don't Mess With Texas

contingent upon their knowledge of access to their consulate, or conversely, the consulate's knowledge of their arrest.¹⁷

Consequently, because the United States is a party to the Vienna Convention and because it at one time acceded to the Optional Protocol ("Protocol"), aggrieved nations have been able to file suit in the ICJ when apparent violations have occurred.¹⁸ The Optional Protocol states that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ]," and that any state party to the Protocol can bring suit against any other party to the Protocol.¹⁹ While the United States is still party to the Vienna Convention, it withdrew from the Optional Protocol in March 2005.²⁰ Tellingly, perhaps, one reason articulated for the United States' withdrawal from the treaty was that other state parties often sued the United States for failure to give foreign nationals the requisite consular notification.²¹

B. The ICJ's *Avena* Decision

In 2003, while Garcia's first petition for federal *habeas corpus* relief was pending before a district court in Texas, the government of Mexico initiated a cause of action against the United States in the ICJ, alleging violations of the Vienna Convention.²² Mexico filed its complaint on behalf of Garcia and fifty-three other Mexican nationals (including the named plaintiff, Avena), each of whom had been sentenced to death in state criminal proceedings.²³ Mexico sought relief both on its own behalf and, in the exercise of its right of diplomatic protection, on behalf of its nationals, specifically including Garcia by name.²⁴ The ICJ heard the case in December 2003 and issued a final judgment in March of 2004.²⁵ In the resulting *Avena* judgment, the ICJ expressly adjudicated Garcia's own rights, as well as those of the other nationals on whose behalf Mexico sought relief.²⁶

As a general matter, the ICJ found that authorities in Texas violated Garcia's Vienna Convention rights.²⁷ In particular, the ICJ held that the United States, acting through various state and local officials, had breached its obligations under

¹⁷ Vienna Convention, *supra* note 13, art. 36(1) (c). For example, consular officers would be unable to visit their detained national citizen for the purpose of arranging legal representation without knowledge of the detention.

¹⁸ See Optional Protocol, *supra* note 12, art. 1; see also Vienna Convention, *supra* note 13, art. 36. The United States is no longer a party to the Optional Protocol, having withdrawn in March of 2005.

¹⁹ *Id.*

²⁰ John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. & INT'L L. 263, 265 (2009).

²¹ *Id.* at 266.

²² Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, ¶ 12 (Mar. 31).

²³ *Id.*

²⁴ *Id.* ¶ 16.

²⁵ *Id.*

²⁶ *Id.* ¶¶ 40, 106.

²⁷ *Id.* at ¶ 106.

Don't Mess With Texas

Article 36(1)(b) of the Vienna Convention to “inform detained Mexican nationals of their rights.”²⁸ In forty-nine of those cases, again including Garcia, the ICJ also found that the United States breached its international obligations when officials failed “to notify the Mexican consular post of their detention.”²⁹ In the cases of Garcia and forty-eight other Mexican nationals, the ICJ further held that the United States had breached its obligation under Article 36(1)(a) “to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals.”³⁰ Furthermore, in the case of Garcia and thirty-three additional Mexican nationals, the ICJ added that the United States had failed to “enable Mexican consular officers to arrange for legal representation of their nationals.”³¹

The ICJ then turned to the remedies that would be available for breaches of the Vienna Convention. It held that the United States must provide “review and reconsideration” of the convictions and sentences imposed on Garcia and the other Mexican nationals in whose cases it found violations.³² The ICJ specified the nature of the review and reconsideration that the United States would need to provide Garcia.³³ First, the *Avena* judgment required that review and reconsideration must take place “within the overall judicial proceedings relating to the individual defendant concerned.”³⁴ Second, procedural default doctrines could not bar the required review and reconsideration where authorities of the detaining State had themselves failed in their obligation to notify.³⁵ Third, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right under state law.³⁶ Finally, the forum in which the review and reconsideration occurs must be capable of “examining the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.”³⁷

C. The *Medellin v. Texas* Cases

On March 25, 2008, while Garcia’s appeal was pending before the Fifth Circuit Court of Appeals, the U.S. Supreme Court decided *Medellin v. Texas* (“*Medellin I*”).³⁸ In *Medellin I*, the Supreme Court held that neither the *Avena*

²⁸ *Id.* at ¶ 106(1).

²⁹ *Id.* at ¶¶ 106(1)-(2), 153(4)-(5).

³⁰ *Id.* at ¶¶ 106(3), 153(6).

³¹ *Id.* at ¶¶ 106(4), 153(7).

³² *Id.* at ¶¶ 14, 121-22, 153(9).

³³ *Id.* at ¶¶ 111-13.

³⁴ *Id.*

³⁵ *Id.* at ¶¶ 120-22.

³⁶ *Id.* at ¶¶ 133-34.

³⁷ *Id.* at ¶¶ 138-41.

³⁸ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 491 (2008).

Don't Mess With Texas

judgment nor President George W. Bush's commitment to comply with the ICJ's *Avena* judgment constituted directly enforceable law in the United States.³⁹ The Court, for its part, acknowledged that the United States is obligated as a matter of international law to comply with the *Avena* judgment, noting, "No one disputes that the *Avena* decision – a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to the Vienna Convention disputes – constitutes an international law obligation on the part of the United States."⁴⁰ To be sure, the Court was unanimous on this point.⁴¹ In response, the *Medellin I* Court clarified the means available to the United States to come into compliance with its obligations under *Avena*, including legislative implementation by Congress.⁴² Justice John Paul Stevens, concurring in the judgment but not the opinion, urged the State of Texas to effect statewide compliance with *Avena*, noting that the "United States' obligation to 'undertake to comply' with the ICJ's decision falls on each of the States as well as the Federal Government."⁴³ As Justice Stevens pointed out, "the fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment."⁴⁴

All nine justices of the Supreme Court also recognized that the United States has a vital public interest in complying with its obligations under *Avena*.⁴⁵ Writing for the majority, Chief Justice John Roberts noted, "[In] this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law," interests he found "plainly compelling."⁴⁶ Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant."⁴⁷ Justice Breyer, joined by Justices David Souter and Ruth Bader Ginsburg, observed in his dissenting opinion that noncompliance with the *Avena* judgment would exact a heavy toll on the credibility of the United States in the international community.⁴⁸

Despite this abstract recognition of the importance of complying with an ICJ decision, the Court in its holding came to the opposite conclusion.⁴⁹ In the end,

³⁹ *Id.*

⁴⁰ *Id.* at 504 (construing the U.N. Charter art. 94, para. 1).

⁴¹ *Id.* at 504, 531, 538-39.

⁴² *Id.* at 520.

⁴³ *Id.* at 536 (Stevens, J., concurring).

⁴⁴ *Id.*

⁴⁵ *Id.* at 524, 537, 560.

⁴⁶ *Id.* at 524

⁴⁷ *Id.* at 537.

⁴⁸ *Id.* at 566. Justice Breyer expressed his concern over "increasing the likelihood of Security Council *Avena* enforcement proceedings, worsening relations with our neighbor Mexico, precipitating actions by other nations putting at risk American citizens who have the misfortune of being arrested while traveling abroad, or diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.*

⁴⁹ *Id.* at 532.

the Court voted not to stay Jose Medellin's execution.⁵⁰ It concluded that ICJ judgments in general are non-binding as domestic law, treating them instead as non-self-executing international obligations requiring affirmative action by Congress to become binding as domestic law.⁵¹

Quoting a decision of the First Circuit, the majority found that, "while treaties may comprise international commitment. . .they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on those terms."⁵² Chief Justice Roberts asserted that "because none of the treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* decision is not automatically binding domestic law."⁵³ Ultimately, the majority equated the Optional Protocol to a "bare grant of jurisdiction," similar to "compulsory non-binding arbitration."⁵⁴ Thus, the ICJ's decisions are not binding as domestic law and must instead be implemented specifically through federal statute to have any effect.⁵⁵

Furthermore, the Court construed the language of Article 94(1) of the UN Charter, in which "each member of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party," to create only a commitment by each UN member to take *future* action to achieve compliance through its respective political branches.⁵⁶ It held that the Supreme Court has no authority to enforce or implement ICJ decisions on its own.⁵⁷ Additionally, it noted that no other signatory nation treats ICJ judgments as automatically binding.⁵⁸ Consequently, the Court found that it was in no position to enforce ICJ judgments as binding domestic law in the absence of clear implementing statutes passed by Congress or action on behalf of the Executive.⁵⁹

As a result of this decision, Congress considered the *Avena* Case Implementation Act of 2008, which would have granted foreign nationals the right to judicial review of their convictions and sentences to the extent that there existed Vienna Convention violations.⁶⁰ However, in the follow-up case, *Medellin II*, the Supreme Court again denied a stay of execution for Medellin based on the mere proposal of this legislation in the House of Representatives.⁶¹ The Court rea-

⁵⁰ *Id.*

⁵¹ *Id.* at 510-11.

⁵² *Id.* at 505, n. 2 (citing *Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 150 (1st Cir. 2005)).

⁵³ *Id.* at 505-06.

⁵⁴ *Id.* at 507.

⁵⁵ *Id.*

⁵⁶ *Id.* at 492.

⁵⁷ *Id.* at 508-09.

⁵⁸ *Id.* at 510.

⁵⁹ *Id.* at 510-11.

⁶⁰ *Id.*

⁶¹ *Medellin v. Texas (Medellin II)*, 554 U.S. 759, 759-60 (2008) (*per curiam*) (highlighting the remote possibility of the *Avena* Bill passing). The Court stressed, "[N]either the President nor the Governor

Don't Mess With Texas

soned that neither the president nor the Department of Justice seemed to support the proposed legislation, and thus the enactment of the Avena Bill was too remote a possibility to set aside Medellín's verdict.⁶² The Court further emphasized, and notably extended the scope of its holding in *Medellin I*, that Medellín was not prejudiced by his lack of consular access.⁶³

D. Further Proceedings before the ICJ (2008-09)

Mere months after *Medellin v. Texas* had been decided, Mexico again turned to the ICJ. On June 5, 2008, Mexico filed a Request for Interpretation of the *Avena* judgment, asking the ICJ to declare that the United States has an obligation to use any and all means necessary to provide judicial review and reconsideration mandated by the *Avena* judgment *before* any execution is carried out.⁶⁴ In conjunction with its Request for Interpretation, Mexico also asked the ICJ to indicate provisional measures with respect to Garcia and four other Mexican nationals named in the *Avena* judgment, each of whom faced imminent execution in Texas.⁶⁵

The ICJ held oral proceedings as to Mexico's request for provisional measures on June 19 and 20, 2008. At oral argument, the Legal Advisor to the Secretary of State confirmed, "[t]he United States takes its international law obligation to comply with the *Avena* judgment seriously" and agreed that *Avena* requires U.S. courts to provide review and reconsideration *prior* to carrying out a death sentence.⁶⁶

Upon issuing its judgment, the ICJ refrained from issuing a reinterpretation of *Avena*.⁶⁷ However, it did hold that the United States had violated its international legal obligations by executing Jose Medellín.⁶⁸ The ICJ declared that the United States' commitments under *Avena* "must be met within a reasonable amount of time" and noted that the United States "has insisted that it fully ac-

of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action." *Id.*

⁶² *Id.* The dissenting justices believed the Court should grant the stay of execution in order to seek the views of the Solicitor General. *Id.* at 761-65 (Stevens, J., dissenting).

⁶³ *Id.* at 760.

⁶⁴ See Request for Interpretation of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 139, ¶ 6, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11> (last visited March 8, 2012) (the application, incidental proceedings, the parties' written and oral pleadings and judgment, orders and press releases of the ICJ in respect to the Request for Interpretation can be accessed by clicking on the applicable link) [hereinafter "Request for Interpretation"].

⁶⁵ *Id.*

⁶⁶ Transcript of Oral Argument at 60, Request for Reinterpretation of the Judgment of 31 March 2004 Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 139, available at <http://www.icj-cij.org/docket/files/139/14592.pdf>.

⁶⁷ Request for Reinterpretation, of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment of 19 January 2009, ¶ 56 & 61(4), available at <http://www.icj-cij.org/docket/files/139/14939.pdf>.

⁶⁸ *Id.* ¶ 61(2).

cepts" this obligation.⁶⁹ Meanwhile, it emphasized "the obligation upon the United States not to execute Humberto Leal Garcia [and other Mexican nationals] pending review and reconsideration being afforded is fully intact."⁷⁰

III. Discussion

A. Procedural Disposition Leading up to *Garcia v. Texas*

In July 1995, Garcia was convicted of capital murder and, upon the jury's recommendation, the trial court sentenced him to death.⁷¹ On February 4, 1998, the Texas Court of Criminal Appeals affirmed Garcia's conviction and sentence in an unpublished opinion.⁷² The Texas Supreme Court denied his *habeas* petition on October 20, 1999, and, after he sought federal relief, the U.S. Supreme Court denied Garcia's petition for a writ of *habeas corpus* on October 20, 2004.⁷³ On October 13, 2005, the Fifth Circuit Court of Appeals denied his request for a Certificate of Appealability.⁷⁴ On April 17, 2006, the U.S. Supreme Court denied certiorari.⁷⁵

Based on a memorandum issued by President George W. Bush calling for the United States to implement all obligations enumerated by the *Avena* decision, Garcia filed a subsequent application in the Texas state courts seeking enforcement of the rights he was denied.⁷⁶ On March 7, 2007, the Texas Court of Criminal Appeals held that state rules of criminal procedure barred reconsideration of a subsequent post-conviction application, even though it was filed pursuant to *Avena* and the president's determination.⁷⁷ Again unsuccessful, the Texas Court of Criminal Appeals dismissed Garcia's application, citing to its decision and the incorporated reasoning in *Medellin*.⁷⁸ On March 31, 2008, the U.S. Supreme Court denied certiorari.⁷⁹

Along with his petition in state court, Garcia immediately filed a petition to the U.S. Supreme Court seeking relief based on the *Avena* judgment and President Bush's Memorandum.⁸⁰ On December 17, 2007, the Supreme Court barred

⁶⁹ *Id.* ¶ 27-28.

⁷⁰ *Id.* ¶ 54.

⁷¹ *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

⁷² *Garcia v. Thaler*, 793 F.Supp.2d 909, 921 (W.D. Tex 2011) (citing *State v. Leal*, No. 72,210 (Tex. Crim. App. Feb. 4, 1998) (unpublished opinion)).

⁷³ *Leal v. Dretke*, 2004 WL 2603736 (W.D. Tex. 2004).

⁷⁴ *Leal v. Dretke*, 428 F.3d. 543 (5th Cir. 2005).

⁷⁵ *Leal v. Dretke*, 547 U.S. 1073 (2006).

⁷⁶ Second Subsequent Application For Post-Conviction Writ Of Habeas Corpus Or, In The Alternative, Suggestion to Reopen Previous Proceeding on Court's Own Motion, Ex Parte Humberto Leal, Cause No. 96-cr-4696, 2007 WL 678628, at *1 (Tex. Crim. App. 2007).

⁷⁷ *Id.* (citing to Texas Criminal Procedure Code Article 11.071, § 5). The Texas Court of Criminal Appeals also relied on its incorporated reasoning in *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

⁷⁸ *Id.* (citing *Medellin I*, 552 U.S. 491, 491 (2008)).

⁷⁹ *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

⁸⁰ Petition to Supreme Court for Habeas Relief, *Garcia v. Texas*, 131 S.Ct. 2866 (2011).

Garcia's petition as a successive petition, and, absent any response or briefing from Respondent, the Court alternatively adjudicated the merits of Garcia's claim.⁸¹ The Supreme Court granted a Certificate of Appealability, and Garcia subsequently filed a timely notice of appeal.⁸²

B. Majority Opinion

In a *per curiam* opinion, the majority on the Supreme Court denied both Garcia's application to stay his execution and his petition for writ of *habeas corpus*.⁸³ Addressing both applications together, the Court found Garcia's arguments unpersuasive.⁸⁴ Garcia's asserted basis for relief pointed to the legislation simultaneously under consideration in Congress to implement the holding of the ICJ's order in *Avena*.⁸⁵ He contended that the Due Process Clause prohibits Texas from carrying out his death sentence while such legislation is under consideration.⁸⁶

An amicus brief filed by the Solicitor General on behalf of the Executive presented an alternative basis for relief.⁸⁷ The Obama administration requested the Supreme Court to stay the execution until January 2012 in support of the Court's "future jurisdiction to review the judgment in a proceeding" under legislation introduced in the Senate.⁸⁸ Introduced by Senator Patrick Leahy, this bill had the Executive Branch's endorsement and support.⁸⁹

The Court, however, rejected these arguments.⁹⁰ The majority found it unpersuasive and inappropriate to stay a lower court judgment on account of proposed legislation, asserting that its "task is to rule on what the law is, not what it might eventually be."⁹¹ Incorporating its decisions in *Medellin I* and *Medellin II*, the Court further refused to grant Garcia's application for stay because "there is no fair prospect that a majority of the Court will conclude that the decision below was erroneous."⁹² Accordingly, without guiding precedent or hope for success, the majority denied Garcia's application to stay the execution.⁹³

Expounding upon its determination, the majority drew a comparison to the case of Jose Medellin. As discussed above, Jose Medellin appealed to the Court to stay his execution on the ground that Congress might enact implementing leg-

⁸¹ Leal v. Quarterman, 2007 WL 4521519, at *4-7 (W.D. Tex. 2007) (citing to 28 U.S.C. § 2244).

⁸² *Id.* at *7.

⁸³ *Garcia*, 131 S.Ct. at 2867.

⁸⁴ *Id.* at 2867-68.

⁸⁵ *Id.* at 2867.

⁸⁶ *Id.*

⁸⁷ U.S. Brief as Amicus Curiae, *supra* note 9, at 2-3, n.1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

⁹¹ *Id.*

⁹² *Id.* (quoting *O'Brien v. O'Laughlin*, 130 S.Ct. 5, 6 (2009) (discussing the traditional multi-factored analysis the Court has adopted when considering an application to stay a prisoner's execution)).

⁹³ *Id.*

islation.⁹⁴ The Court denied Medellín's application, explaining that "Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since [the Court's] ruling in *Medellin v. Texas* (*Medellin I*)."⁹⁵ Taking a similar tone to that adopted in the *Medellin* opinion, the *Garcia* Court reasoned that, "[i]f a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now."⁹⁶

Moreover, the majority dismissed the potential for "grave international consequences" that may flow from *Garcia*'s execution.⁹⁷ The Court put significant stock in Congress's refusal to promptly enact legislation implementing the *Avena* judgment, finding this to be an indication that Congress did not view these consequences sufficiently grave to spur it to action.⁹⁸ Without action from Congress, the Court found no authority to stay an execution merely in light of an appeal by President Bush of what it considered "free-ranging assertions of foreign policy consequences" unaccompanied by any "persuasive legal claim."⁹⁹

Finally, the majority reiterated its reasoning from *Medellin II*, namely that "[t]he beginning premise for any stay . . . must be that petitioner's confession was obtained unlawfully," and "the United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access."¹⁰⁰ According to the Court, the circumstances of *Garcia*'s appeal are inapposite because the United States had refused to argue that *Garcia* was prejudiced by the Vienna Convention violations, contending instead that the Court should stay the execution simply in light of "the possibility that [*Garcia*] might be able to bring a Vienna Convention claim in federal court, regardless of whether his conviction will be found invalid."¹⁰¹ The majority explicitly declined to take this position, finding no merit in the suggestion of granting a stay in view of "hypothetical legislation," especially when the United States had not argued that *Garcia*'s attempt to overturn his conviction had any prospect of success.¹⁰²

C. Dissenting Opinion

The dissent in this case was penned by Justice Stephen Breyer and is largely reminiscent of his similar dissent in *Medellin I*.¹⁰³ Justice Breyer began by pointing out that the United States is bound by the Vienna Convention to timely notify foreign nationals arrested in the United States of their right to request assistance

⁹⁴ *Medellin v. Texas* (*Medellin II*), 554 U.S. 759, 760 (2009).

⁹⁵ *Id.*

⁹⁶ *Garcia v. Texas*, 131 S.Ct. 2866, 2868 (2011).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting *Medellin II*, 554 U.S. 759, 760 (2009)).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Ilya Shapiro, *Medellin v. Texas and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63 (2008).

from their home country's consulate.¹⁰⁴ Furthermore, Justice Breyer found that the United States is bound by its obligation to abide by ICJ judgments regarding disputes arising out of the Vienna Convention through its signing of the Optional Protocol.¹⁰⁵ This obligation precluded withdrawal from the Optional Protocol because, according to Breyer, "withdrawal does not alter the binding status of its prewithdrawal obligations."¹⁰⁶ Accordingly, Justice Breyer found it troubling that, at the time Garcia's case was before the Supreme Court, no judicial authority had yet implemented what the ICJ had called for in its *Avena* judgment – a hearing to determine whether the violation amounted to harmless error.¹⁰⁷ Addressing the majority, the dissent found the ICJ's focus on procedural requirements to trump a domestic court's "guesses as to the results of that procedure," rendering them largely irrelevant for purposes of implementing U.S. treaty obligations.¹⁰⁸ Essentially, therefore, Justice Breyer agreed with the position taken by the United States, that a successful application to stay Garcia's execution in view of Vienna Convention violations can be decided aside and apart from a determination as to whether review of his conviction would find the violation to be harmless error.¹⁰⁹

Next, the dissent went to great lengths to differentiate the applications of Jose Medellin with the present case. In *Medellin I*, the Court was faced with an application to stay Jose Medellin's execution where Congress had not taken *any* steps to embody U.S. international legal obligations in domestic law.¹¹⁰ The Court later refused to grant a stay of execution in a similar case because "the President has not represented to [the Court] that there is any likelihood of congressional . . . action."¹¹¹

However, the dissent found Garcia's application to be free of the legal defects leading to the demise of Jose Medellin's applications. In contrast, Garcia's application was made in light of a bill introduced in the Senate "after extensive consultation with the Department of State and the Department of Justice."¹¹² The Solicitor General further urged the Court to grant Garcia's application for stay such that Congress would have adequate time to carry out "the legal responsibility that this Court has held belongs to the Legislative Branch."¹¹³ On this basis,

¹⁰⁴ Garcia v. Texas, 131 S.Ct. 2866, 2868-69 (2011) (Breyer, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2869 (citing Letter from Condoleezza Rice, Secretary of State, to Kofi Annan, Secretary General of the United Nations (Mar. 7, 2005)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2869.

¹¹⁰ *Id.* (citing *Medellin I*, 552 U.S. 491, 525-26 (2008)).

¹¹¹ *Id.* (citing *Medellin II*, 554 U.S. 759, 759-60 (2009)).

¹¹² *Id.* (citing U.S. Brief as Amicus Curiae, *supra* note 9 (describing the Consular Notification Compliance Act of 2011)).

¹¹³ *Id.* at 2869.

Don't Mess With Texas

Justice Breyer found that congressional action is a reasonable possibility, requiring the Court to grant a stay under the reasoning in *Medellin II*.¹¹⁴

Additionally, Justice Breyer also placed greater emphasis on the potentially damaging effect that denying Garcia's stay may have on foreign relations with Mexico.¹¹⁵ Again pointing to the amicus brief filed by the Executive Branch, Justice Breyer found persuasive the argument that failing to halt Garcia's execution would place the United States in irremediable breach of its international law obligations.¹¹⁶ He foresaw the possibility of "serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention."¹¹⁷ These statements are buttressed by the amicus brief filed by the Government of Mexico, stating that declining to stay Garcia's imminent execution "would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."¹¹⁸ Justice Breyer reminded the Court that such concerns are "plainly compelling."¹¹⁹ Moreover, the Court has long recognized the special constitutionally-based authority of the President in matters of foreign relations,¹²⁰ affording significant deference to such authority.¹²¹ It is Justice Breyer's contention that the majority should have respected this deference in Garcia's case.¹²²

The dissent concluded by stating that the Court had adequate legal authority to grant Garcia's stay.¹²³ Justice Breyer pointed out that under the All Writs Act the Supreme Court may take appropriate action to preserve its "potential jurisdiction."¹²⁴ With this in mind, Justice Breyer expressed his opinion that, should the implementing bill become law by the end of September, the Supreme Court would almost certainly grant Garcia's petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings.¹²⁵ Moreover, in the event the bill had not yet passed, but that the Solicitor General had indicated that it was about to become law, the Court would likely have held the petition until the bill is enacted, and then vacate and remand the case for further consider-

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2870.

¹¹⁶ *Id.* at 2870.

¹¹⁷ *Id.* (citing U.S. Brief as Amicus Curiae, *supra* note 9, at 12).

¹¹⁸ *Id.*

¹¹⁹ *See id.* (citing *Medellin I*, 552 U.S. 491, 524 (2008) (Stevens, J., concurring in judgment)); *see also id.* at 566 (Breyer, J., dissenting) (observing harms that would flow from non-compliance).

¹²⁰ *Id.* (citing *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

¹²¹ *Id.* (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy deference to the President in matters of foreign affairs").

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (citing *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966)).

¹²⁵ *Id.*

ation in light of such legislation.¹²⁶ In either case, he reasoned, the Court has the appropriate authority to grant a stay with a view towards preserving its potential jurisdiction.¹²⁷ Accordingly, Justice Breyer argued for the dissent that such action is appropriate and necessary in the case of *Garcia*.¹²⁸ For Breyer, “it is difficult to see how the State’s interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer.”¹²⁹

IV. Analysis

The majority opinion in *Garcia v. Texas* marks a notably consistent but nevertheless incomplete approach to the obligations and rights afforded to foreign nationals detained in the United States. In an increasingly globalized world, cooperative interactions among nations depend in large part on reciprocal recognition and enforcement of international obligations.¹³⁰ The decision in *Garcia v. Texas*, however, takes the diametrically opposite position, one in which the laws of a single state predominate over those of the national government. In essence, the Supreme Court has allowed the State of Texas to invert the Supremacy Clause.

A. Treaty Interpretation and the Scope of International Law

The Supremacy Clause of the United States Constitution provides that “all treaties. . . which shall be made. . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound hereby.”¹³¹ Whenever a treaty operates of itself without the aid of any implementing legislation, the clause has been interpreted to mean that courts should view treaties as equivalent to an act of Congress.¹³² The outcome in *Garcia*’s case turned on the question of whether the ICJ’s judgment in *Avena* is enforceable as a matter of domestic law, that is, whether it “operates of itself without the aid” of any further legislation.¹³³

As discussed above, the answer to this question requires the interpretation of three closely intertwined treaties and one ICJ judgment. The critical inquiry,

¹²⁶ *Id.*

¹²⁷ *Id.* at 2870-71.

¹²⁸ *Id.* at 2871.

¹²⁹ *Id.*

¹³⁰ See e.g. Heather M. Heath, *Non-Compliance With The Vienna Convention On Consular Relations And Its Effect On Reciprocity For United States Citizens Abroad*, 17 N.Y. INT’L L. REV. 1, 10 (2004); see also *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.V.I. 1999) (explaining the importance of reciprocal respect for international obligations created by the Vienna Convention).

¹³¹ U.S. CONST., art. IV, cl. 2.

¹³² *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 549 (2008) (citing *Foster v. Nielson*, 7 L.Ed. 415 (1829)).

¹³³ *Garcia v. Texas*, 131 S.Ct. 2866, 2867-69 (2011). One of the central disputes between the majority and Justice Breyer’s dissent is whether the ICJ’s judgments are binding on the individual States considering the U.S. withdrawal from the Optional Protocol.

Don't Mess With Texas

therefore, is whether the Supremacy Clause requires Texas to enforce the ICJ's *Avena* judgment based on these underlying treaties. In contrast to the Supreme Court's majority opinion in *Garcia v. Texas*, a more pragmatic interpretation would seem to favor granting Garcia's application to stay his execution and petition for writ of *habeas corpus*.

In his dissent to *Medellin v. Texas*, Justice Breyer argued that President Bush correctly determined that Congress need not enact additional legislation in order for the ICJ judgment to create a binding obligation to provide review and reconsideration of a conviction such as Garcia's.¹³⁴ He argued that the majority places too much weight on the treaty language, a perfunctory approach that overlooks the intricacies and subtleties of treaty negotiation.¹³⁵ In Justice Breyer's view, a treaty has never incorporated the "unobtainable language" that will unequivocally create a self-executing obligation on each individual state.¹³⁶ When presented with such a question, the Court should instead consider the language for purposes of applying the Supremacy Clause.¹³⁷ To further his line of reasoning, Justice Breyer points out that the Supreme Court has found self-executing multilateral treaty language that is far less direct or forceful than the language in the treaties underlying the ICJ and the Vienna Convention.¹³⁸ Indeed, in light of this factor, a proper interpretation requires that ICJ judgments have the effect of a self-executing treaty, binding on the individual states notwithstanding additional implementing legislation passed by Congress.¹³⁹ Accordingly, in the cases of both *Medellin* and *Garcia*, the appropriate remedy would have been to review their respective convictions by the Texas Court of Criminal Appeals to determine whether the failure to notify each defendant of their Vienna Convention rights was harmless error. Unfortunately for *Garcia*, the Supreme Court adopted a markedly different approach in *Medellin v. Texas*, one more narrowly focused on the explicit language of the treaty.

B. Executive Power to Implement the *Avena* Judgment

Moreover, just as Justice Breyer commented in his dissent in *Medellin I*, the *Garcia* Court should have afforded greater deference to the views of the Executive. Decades earlier, Justice Jackson articulated the pertinent spectrum of executive authority in his concurring opinion to *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁴⁰ The president's power "is at its maximum" when he is acting "pursuant to an express or implied authorization by Congress."¹⁴¹ Unilateral conduct too may fall within a second group of executive powers where Congress is silent,

¹³⁴ *Medellin I*, 552 U.S. at 542.

¹³⁵ *Id.*

¹³⁶ *Id.* at 553.

¹³⁷ *Id.*

¹³⁸ *Id.* (citing *e.g.*, *Trans World Airlines v. Franklin Mint Corporation*, 466 U.S. 243, 247 (1984)).

¹³⁹ *Id.*

¹⁴⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁴¹ *Id.*

but where it has either expressly or impliedly acquiesced to a known and consistent practice of the president.¹⁴² Finally, at the other end of the spectrum of presidential powers are those that the president asserts which conflict with the express or implied will of Congress.¹⁴³

On February 28, 2005, President Bush signed a written determination that state courts must provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* judgment, including Garcia, pursuant to the criteria set forth by the ICJ.¹⁴⁴ While it is true that the power of the president to make an enforceable order of this nature at the time was tenuous, it is at least clear that the Executive Branch attempted to comply with the ICJ's order.¹⁴⁵ Moreover, after *Avena*, the United States took further measures to comply when it sent letters to the relevant state courts and had diplomatic discussions to find alternatives for "review and reconsideration."¹⁴⁶ These actions show that the United States recognized the importance of compliance with the judgment to "smooth out U.S. relations with Mexico," to help repair its international integrity with respect to Article 36, and to encourage compliance with respect to U.S. citizens abroad.¹⁴⁷

According to the *Medellin* Court, the pertinent constitutional question was, "does the President's Memorandum independently require the States to provide review and reconsideration . . . without regard to state procedural default rules?"¹⁴⁸ To answer this question, the Court examined two arguments that the Executive Branch put forth as a basis for its power to issue and enforce the memorandum. First, the president has the power to carry out the *Avena* judgment because of the underlying treaties.¹⁴⁹ Second, the president may have the power to undertake "independent international dispute-resolution," allowing the president to implement the *Avena* judgment.¹⁵⁰

The Court found that the underlying international treaties did not give the president authority to enforce the ICJ's order because the president was acting

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Presidential Memorandum to the Attorney General (Feb. 28, 2005), available at http://brown.welsh.com/Archive/2005-03-10_Avena_compliance.pdf. In his memorandum to the Attorney General, President Bush declared:

I have determined, pursuant to the authority vested in me as the President by the Constitution and laws of the United States, 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)*, 2004 I.C.J. 128 (Mar 31), by having State courts give effect to the decision in accordance with general principles of comity in cases by the 51 Mexican nationals addressed in that decision. *Id.*

¹⁴⁵ Fredric L. Kirgis, *The Avena Case in the International Court of Justice and the U.S. Response*, 17 FED. SENT. R. 223, 224 (2005).

¹⁴⁶ Scott Lyons, *Breach Without Remedy in the International Forum and the Need for Self-Help: The Conundrum Resulting from the Medellin Case*, 13 LEWIS & CLARK L. REV. 73, 76-77 (2009).

¹⁴⁷ Kirgis, *supra* note 145, at 224.

¹⁴⁸ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 498 (2008).

¹⁴⁹ *Id.* at 524.

¹⁵⁰ *Id.*

Don't Mess With Texas

without congressional consent.¹⁵¹ The president's attempt to enforce the order fell under the third category of Justice Jackson's *Youngstown* framework, the Court found, because it was against the "implicit understanding of the ratifying senate."¹⁵² Further, the Court found that the president's memorandum was against the wishes of the ratifying Senate because it would give the Vienna Convention provisions binding effect domestically, something that a non-self-executing treaty would not do.¹⁵³ Under the third category of *Youngstown*, presidential power is at its "lowest ebb," and the Court therefore rejected the president's first argument.¹⁵⁴

The *Medellin* Court further found unpersuasive the argument that the president has "independent international dispute resolution power" that allowed him to independently give effect to the ICJ order.¹⁵⁵ The Court recognized presidential unilateral authority to settle international disputes in some cases.¹⁵⁶ However, it found these cases to be limited to those that had a long history of congressional consent to executive power to resolve specific types of international disputes.¹⁵⁷ Such "longstanding practice of congressional acquiescence" was not present with the power the president was attempting to exercise in *Medellin*.¹⁵⁸ Instead, the Court found the president's act to be an infringement of the federal Executive Branch on traditional state police power and control of criminal procedure.¹⁵⁹ In light of these constitutional considerations, the Court found there to be a legal limitation on giving full effect to the ICJ's order – namely, state limitations on *habeas* petitions barred by procedural-default rules.¹⁶⁰ The procedural-default rule is the principle that claims in a *habeas corpus* petition that were not raised at the appropriate time at any level of state court proceedings cannot later be reviewed on the merits in federal court.¹⁶¹ While the ICJ asked that its *Avena* order be given effect despite procedural-default rules, the U.S. Supreme Court found that the order did not have the force to trump state procedural rules:

In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a

¹⁵¹ *Id.* at 527 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 530; *see also Youngstown*, 343 U.S. at 637-38.

¹⁵⁵ *Id.* at 531-32.

¹⁵⁶ *Id.* 531.

¹⁵⁷ *See id.* at 531-32; *see also Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981).

¹⁵⁸ *Id.* (quoting *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 415 (2003)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 523-26.

¹⁶¹ Ernst Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L. J. 1143, 1166 (2005); *see, e.g., Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977) (discussing the state procedural default rule in the context of admissibility of inculpatory statements).

Don't Mess With Texas

contrary conclusion would be extraordinary, given the basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules.¹⁶²

The Court found that, without the requisite self-executing treaty or legislation by Congress, the president's memorandum was insufficient to invoke the Supremacy Clause such that the ICJ's order could be given legal effect.¹⁶³

However, an alternative approach was offered in Justice Breyer's dissent. In the case of *Medellin*, President Bush sought to implement a treaty in which the United States agrees that the ICJ judgment is binding with respect to the *Avena* parties.¹⁶⁴ Therefore, his actions drew upon the president's constitutional authority in the arena of foreign affairs.¹⁶⁵ In this sense, his memorandum falls within the middle range of presidential authority where Congress has neither specifically authorized nor specifically forbidden the presidential action.¹⁶⁶

In *Garcia*'s case, the president was arguably acting with even greater authority because the Solicitor General's amicus brief was written and submitted against a background of imminent legislation implementing the requirements of the *Avena* judgment. No longer was Congress silent on the subject, but they had provided an affirmative indication of passing legislation to implement the *Avena* judgment as domestic law. This points to a tangential problem created by the *Garcia* holding, one that stems from the Court's repeated diminishing of the president's authority over foreign relations. In two instances, the Court was presented with consistent requests by the president to grant a motion to stay execution such that the United States may come into compliance with its international obligations.¹⁶⁷ By giving minimal deference to these requests from the Executive, the Court has whittled away at the constitutional authority of the president and contributed to the substantial ambiguity surrounding the balance of power existing between these branches in the area of international relations.¹⁶⁸

C. Legislative Efforts to Implement *Avena*

Following the Supreme Court opinion on July 14, 2008, members of the House of Representatives introduced legislation to give the *Avena* judgment domestic legal effect.¹⁶⁹ The *Avena* Case Implementation Act of 2008 would have granted foreign nationals such as *Garcia* a right to judicial review of their convictions and sentences to the extent that there existed Vienna Convention viola-

¹⁶² *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 522-23 (2008).

¹⁶³ *Id.* at 532.

¹⁶⁴ *Id.* at 565 (2008) (Breyer, J., dissenting).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *Youngstown*, 343 U.S. at 637 (1952)).

¹⁶⁷ *Id.* at 501 (2008); *Garcia v. Texas*, 131 S.Ct. 2866, 2868 (2011).

¹⁶⁸ Joshua Newcomer, *Messing With Texas? Why President Bush's Memorandum Order Trumps State Criminal Procedure*, 79 TEMP. L. REV. 1029, 1074 (2006).

¹⁶⁹ See *Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong., 2d Sess. (2008) (referred to committee, July 14, 2008).

Don't Mess With Texas

tions.¹⁷⁰ However, introduced late in the congressional term and during a presidential election year, the bill failed to pass.¹⁷¹ On July 29, 2010, the Senate Appropriations Committee included legislative language to implement the *Avena* judgment as part of the Department of State Foreign Operations and Related Programs Appropriation Act for Fiscal Year 2011.¹⁷² This bill would have provided federal courts with jurisdiction to review the merits of Garcia's Vienna Convention claim.¹⁷³ Upon a finding of actual prejudice from the violation of Garcia's consular rights, the bill would have required the court to fashion "appropriate relief, including ordering a new trial or sentence proceeding."¹⁷⁴ Again, the bill failed to pass.¹⁷⁵

Most recently, on June 14, 2011, Senator Patrick Leahy introduced the Consular Notification Compliance Act, which would grant Garcia access to the judicial process required by *Avena*.¹⁷⁶ The new legislation has the full support of the U.S. Departments of Justice and State – a fact that distinguishes this legislation from previous congressional efforts.¹⁷⁷ Significantly, the legislation provides that a petition alleging a violation of Article 36 shall not "be considered a second or successive habeas application or subjected to any bars to relief based on pre-enactment proceedings other than specified in paragraph (2) of this subsection."¹⁷⁸ The legislation has drawn broad support from a bipartisan array of former diplomats, business leaders, retired military leaders, and organizations representing the millions of Americans who live, work, and travel abroad.¹⁷⁹

True, as of the time that Garcia's case was decided, this landmark legislation had not passed – nor has it yet.¹⁸⁰ However, the fact that it was pending at the time the Solicitor General filed his brief lends further credence to the views enumerated on behalf of the Executive. No longer was the Executive Branch acting against a background of congressional silence. Now, Congress has effectively expressed its support for legislation that would have called for reconsideration of

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Foreign Operations, and Related Programs Appropriations Act, S. 3676, 111th Cong., 2d Sess., § 7082(a) (2010), available at <http://www.opencongress.org/bill/111-s3676/text>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, *Garcia v. The State of Texas*, 2011 WL 2743200, *6 (June 28, 2011). "In December 2010, Congress adopted a continuing resolution in lieu of an omnibus appropriations bill. As a result, the appropriations bill and all legislative initiatives attached to the bill - including the *Avena* implementing legislation - failed to pass."

¹⁷⁶ Consular Notification Compliance Act, S. 1194, 112th Cong., 1st Sess., § 4(a)(1) (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1194is/pdf/BILLS-112s1194is.pdf>. The proposed bill specifically authorized federal courts:

to review the merits of a petition claiming a violation of Article 36(1) (b) and (c) of the Vienna Convention on Consular Relations, or a comparable provision of a bilateral agreement addressing consular notification and access, filed by a person convicted and sentenced to death by any federal or state court prior to the date of enactment of this Act.

¹⁷⁷ 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy).

¹⁷⁸ Consular Notification Compliance Act, *supra* note 176, § 4(a) (4).

¹⁷⁹ U.S. Brief as Amicus Curiae, *supra* note 9, at 18.

¹⁸⁰ *Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

Garcia's case. The majority in *Garcia* gave short rift to this point, prematurely giving ultimate deference to its previous holding in *Medellin I* without consideration for the change in circumstances by the time Garcia's application was being considered.

Viewed in a vacuum, the cases of Jose Medellin and Humberto Garcia are identical in fact, disposition, and outcome. Both defendants met their demise at the hands of a Texas warden despite never being appraised of their right to contact the Mexican consulate. In both cases, the Supreme Court adhered to a strict interpretation of U.S. international obligations under the Vienna Convention and the treaties underlying the ICJ. In both cases, the Supreme Court's interpretation departed from prior notions of interpretation, instead favoring a narrow interpretation. And in both cases, the Supreme Court gave Texas state criminal law a higher priority than the nation's obligations to the international community. At least for the time being, the laws of a single state have become the law of the land.

V. Impact

The holding in *Garcia v. Texas* represents a departure from both the international treaty obligations of the United States as well as a weakening of the president's authority over matters affecting foreign affairs. In the former area of law, the Supreme Court's holding detracts from the United States' status in the international community and reinforces the unreasonably high bar set for implementing international treaty obligations as U.S. law established in *Medellin I*. In the latter area, the holding and ultimate execution of Garcia may have yet-to-be realized detrimental effects on the diplomatic relations between the United States and Mexico.

A. Uncertainty Over Who Governs Foreign Affairs

By virtue of the high standard for creating domestic treaty obligations, the Supreme Court has created a seemingly insurmountable hurdle for federal compliance, especially where compliance requires cooperation between federal and state governments. The bar was raised further in the *Garcia* case because of the Court's consistent disregard of efforts by the Executive Branch to implement and comply with the Vienna Convention's reciprocal obligations. On the one hand, the Court has recognized the power of the president to unilaterally take action that may conflict with traditional areas of state deference with the goal of producing uniformity in dealings with foreign governments.¹⁸¹ For example, in *American Insurance Association v. Garamendi*, the Supreme Court held that valid executive agreements can preempt state law, even in areas of "traditional competence," where state action impedes the exercise of the president's authority over foreign affairs.¹⁸² On the other hand, however, the *Garcia* majority again ne-

¹⁸¹ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415-16 (2003) (finding that nationwide uniformity in dealings with foreign affairs may require states to yield to national government action).

¹⁸² *Id.* at 413-14.

Don't Mess With Texas

glected executive action demanding compliance with the *Avena* judgment, a unilateral presidential act deriving legitimacy from the Constitution.

Arguably, President Bush's Memorandum demanding the States "discharge [U.S.] international obligations under [the *Avena* Case]" still applied to Garcia's case by the time it reached the Supreme Court, yet the Court similarly neglected it. Though congressional silence would have been sufficient to indicate its tacit approval of the Executive's view, Congress had expressed an unambiguous indication of the importance of U.S. compliance with both the Vienna Convention and the *Avena* judgment.¹⁸³ Executive action in this case seems particularly important as it pertains to these obligations because the failure of only one state to comply would leave the union of all the states in breach of a federal obligation to the international community.¹⁸⁴

The most consistent barrier to compliance is the Supreme Court's ongoing refusal to find that federal action may trump state criminal procedural default rules. In *Sanchez-Llamas v. Oregon*, the Court affirmed that state procedural default rules essentially bar reconsideration of a fully exhausted criminal verdict, even where violations of the Vienna Convention are involved.¹⁸⁵ However, both Congress and the Executive have tentatively expressed that this doctrine does not apply to the named foreign nationals of the *Avena* judgment, an expression consistently ignored by the Supreme Court.¹⁸⁶ For the time being, therefore, the *Garcia* case creates an uncertain precedent, as it does not conform with basic principles that date back to Justice Jackson's concurrence in the *Steel Seizure Cases*, nor can it be reconciled with a modern understanding of the president's role in foreign affairs.¹⁸⁷

B. Damage to Mexico-U.S. Relations

Article 36 of the Vienna Convention recognizes the crucial role a consulate may play in the defense of its citizens abroad.¹⁸⁸ The United States has consistently emphasized the importance of allowing detained or arrested foreign nationals access to their consulates.¹⁸⁹ Consular officers may provide legal assistance

¹⁸³ See Consular Notification and Compliance Act, *supra* note 176; see also Congressional Record, *supra* note 177.

¹⁸⁴ See Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, ¶ 120-22 (Mar. 31) (noting that each foreign national – detained, convicted, and sentenced across many states – were entitled to reconsideration).

¹⁸⁵ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2673 (2006) (affirming application of state procedural default rules to the Vienna Convention, even where the state of Oregon conceded that police violated the Convention's consular notification provisions).

¹⁸⁶ Kevin D. Klagge, *Transnational Constitutional Law—Proposed Legislation With Executive Support To Enact International Court's Decision Does Not Justify Stay Of Execution—Garcia V. Texas*, 131 S. Ct. 2866 (2011), 35 SUFFOLK TRANSNAT'L L. REV. 233, 240-42 (2012) (discussing the various expressions of Congressional and Executive support for staying an execution in view of Vienna Convention violations and their respective rejection by the Supreme Court).

¹⁸⁷ Newcomer, *supra* note 168, at 1057.

¹⁸⁸ Vienna Convention, *supra* note 13, art. 36(1) (a)-(c).

¹⁸⁹ Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solution*, 40 MCGEORGE L. REV. 179, 184-85 (2009).

Don't Mess With Texas

in addition to minimizing the challenges raised by differences in culture, language, and the varying legal systems.¹⁹⁰

To be sure, some countries pour a great deal of resources and effort into the defense of their nationals in the United States. For example, Mexico makes extensive assistance available to Mexican nationals detained in the United States.¹⁹¹ In capital cases like that of Humberto Garcia, the government of Mexico funds the Mexican Capital Legal Assistance Program which provides assistance to defense counsel for Mexican nationals by providing sample briefs and references to experts.¹⁹² Additionally, Mexico has greater access to information about their nationals and can assist a defendant by researching mitigating circumstances more thoroughly than domestic defense counsel.¹⁹³

In addition to upholding domestic principles of justice, the United States has a strong international interest in complying with its Article 36 obligations in order to maintain international integrity and to protect its citizens abroad. As a general matter, a treaty “depends for enforcement of its provisions on the interest and honor of the governments which are parties to it.”¹⁹⁴ There are 173 parties to the Vienna Convention, all with the expectation that Article 36 creates a reciprocal relationship.¹⁹⁵ The United States has an interest in protecting its citizens to the fullest extent possible in the face of a law that it deems unacceptable.

Most Americans would be justifiably appalled if a U.S. citizen in a foreign country were charged, convicted, and executed for a capital crime without being advised of a right to contact the U.S. embassy for help. Such was the case of Billy Hayes, who openly protested Garcia’s execution.¹⁹⁶ His terrifying experience in a Turkish prison gave rise to the book and subsequent film “Midnight Express.”¹⁹⁷ In a letter to the Texas Board of Pardons and Paroles, he highlighted the vulnerability of Americans detained overseas and asked the Board to grant a stay of the execution so that Congress can address “this vitally important concern.”¹⁹⁸ In both the account of his days in a Turkish prison and his letter, he

¹⁹⁰ U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS MANUAL, at 31 (3d ed. 2010), available at http://travel.state.gov/law/consular/consular_753.html (click on link to the 3rd Edition of the Manual).

¹⁹¹ U.S. Brief as Amicus Curiae, *supra* note 9, at 23 (2008).

¹⁹² *Foreign Nationals: Mexican Capital Legal Assistance Program (MCLAP)*, INT’L JUSTICE PROJECT, <http://www.internationaljusticeproject.org/nationalsResources.cfm> (last visited Mar. 8, 2012).

¹⁹³ Nancy Alexander, *Saved By the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon’s Rescue*, 15 LEWIS & CLARK L. REV. 819, 823 (2011).

¹⁹⁴ *Medellin v. Texas (Medellin I)*, 552 U.S. 491, 508-09 (2008) (quoting *Edye v. Robinson (“Head Money Cases”)*, 112 U.S. 580, 598 (1884)).

¹⁹⁵ *Multilateral Treaties Deposited with the Secretary-General*, U.N. TREATY COLLECTION, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Mar. 15, 2012) (click on ch. 3, and § 8 to see a full list of signing countries); Vienna Convention, *supra* note 13, art. 36.

¹⁹⁶ Amended Petition for Writ of Habeas Corpus at 18-19, *Garcia v. Thaler*, No. 5:11-cv-482-OLG (W.D. Texas, June 16, 2011).

¹⁹⁷ Bill Mears and Nick Valencia, *One Mexican’s Death Row Case Spills Far Beyond Border of Texas*, CNN JUSTICE, July 3, 2011, http://articles.cnn.com/2011-07-03/justice/texas.death.row_1_mexican-consulate-death-row-mexican-officials?_s=PM:CRIME.

¹⁹⁸ Amended Petition for Writ of Habeas Corpus, *supra* note 196, at 19.

repeatedly reinforced how U.S. consular assistance was critical to his ability to obtain legal counsel.¹⁹⁹

An indication of Mexico's apprehension with respect to the U.S. implementation of the Vienna Convention's reciprocal obligations has been clearly voiced.²⁰⁰ With respect to Garcia's defense, the Mexican government made explicit a longstanding tradition of extending consular services to its nationals, particularly where that national faces capital punishment.²⁰¹ The United States' neighbor to the south further forecasted that Garcia's execution "would seriously jeopardize the ability of the government of Mexico to continue working collaboratively with the United States on a number of joint ventures including extraditions, mutual judicial assistance, and our efforts to strengthen our common border."²⁰² If it was an articulation of the potential damage to foreign relations that may result from Garcia's demise, the *Garcia* majority needed to look no further than this statement. Considering the recent nature of this decision, the fallout for the United States is yet to be realized in many ways.

One thing remains clear: availability of a judicial remedy is essential to the American legal system – however, such a judicial remedy is not readily available to a foreign national whose rights have been violated under the Vienna Convention.²⁰³

VI. Conclusion

The principles of treaty interpretation gleaned from the *Medellin* cases and affirmed in *Garcia v. Texas* are a temporary resolution of debates that will last well beyond the term of the current Supreme Court. However, the holding of *Garcia v. Texas* puts the United States in violation of its international obligations under the Vienna Convention and represents a clear disregard for the obligations created by the ICJ decision in *Avena*. Moreover, the Court has further diminished the President's constitutional authority over foreign relations and may have irreparably harmed U.S. relations with Mexico. Flowing from this case is the notion that each individual state – like Texas – has the ultimate responsibility for bringing the United States into compliance with the Vienna Convention.²⁰⁴

¹⁹⁹ *Id.*

²⁰⁰ U.S. Brief as Amicus Curiae, *supra* note 9, at 23.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Lyons, *supra* note 146, at 77.

²⁰⁴ In fact, certain States have recognized the importance of complying with the *Avena* judgment. For example, the Oklahoma Court of Criminal Appeals stayed execution of a named Mexican national and ordered an evidentiary hearing on whether actual prejudice had resulted from the lack of consular notification. *Torres v. Oklahoma*, 2004 WL 3711623 (Okla. Crim. App. 2004). On the same day, the Governor of Oklahoma reduced Torres' death sentence to life without the possibility of parole. See *Oklahoma Governor Grants Clemency to Mexican Foreign National*, DEATH PENALTY INFO CTR, <http://www.deathpenaltyinfo.org/node/492> (last visited Mar. 15, 2012). Additionally, Oregon has taken steps to ensure that Oregon police are aware of their duties under the Vienna Convention and have passed legislation requiring state police officers to be aware of and understand the Vienna Convention rights. Alexander, *supra* note 193, at 842.

