

# THE PROBLEMS OF SELF-EXECUTION: *MEDELLÍN v. TEXAS*

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## I. INTRODUCTION

On March 28, 2008, in a case that has involved an international tribunal's decision,<sup>1</sup> three habeas petitions,<sup>2</sup> two writ petitions to the Supreme Court,<sup>3</sup> a writ dismissed as improvidently granted,<sup>4</sup> and a Presidential Memorandum to the Attorney General,<sup>5</sup> the Supreme Court rejected a decision of the International Court of Justice ("ICJ").<sup>6</sup> In *Medellín v. Texas*, the Supreme Court held that the ICJ's ruling in *Avena and other Mexican Nationals*<sup>7</sup> does not have automatic, directly-enforceable effect in domestic courts because none of the treaties at issue were self-executing and because the President of the United States does not have the authority to implement the *Avena* judgment domestically by writing a memorandum to the Attorney General.<sup>8</sup>

Because the Court so narrowly defined the holding in *Medellín* and refused to grant the power to enforce the *Avena* decision to

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1. *Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

2. Brief for Petitioner at 7, 11, 13, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984). To simplify citations, I will use the short form "*Medellín*" to refer to the Supreme Court decision. Any other case in which *Medellín* was involved will always be cited by the full case name.

3. Petition for Writ of Certiorari, *Medellín*, 128 S. Ct. 1346 (No. 06-984) [hereinafter Petition for Certiorari I]; Petition for Writ of Certiorari, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) [hereinafter Petition for Certiorari II].

4. *Medellín v. Dretke*, 544 U.S. at 662 ("Th[e] state court proceeding may provide *Medellín* with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding. . . . [W]e dismiss the writ as improvidently granted.").

5. Memorandum for the Attorney General on Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

6. *Medellín*, 128 S. Ct. at 1346.

7. *Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

8. *Medellín*, 128 S. Ct. at 1363, 1371.

either the ICJ or to the President,<sup>9</sup> *Medellín* will have little domestic effect. It will, however, create significant international ripples—in fact, it already has.<sup>10</sup>

#### A. *The Beginning of the End: The Legal Path to Medellín*

At its core, *Medellín* centers on the requirements of one Article in the Vienna Convention on Consular Rights (“Vienna Convention”): Article 36(1).<sup>11</sup> Although the Vienna Convention’s requirements are fairly innocuous,<sup>12</sup> Article 36(1) has been the source of increasing tension between the United States and the ICJ,<sup>13</sup> particularly because the Supreme Court and the ICJ have reached irreconcilable conclusions about the Article’s meaning and its domestic implications.<sup>14</sup> This divergence has only increased with time.

The ICJ and the Supreme Court’s disagreement began when the Supreme Court ruled in *Breard v. Greene* that state procedural default rules bar an Article 36(1) claim if the defendant failed to raise that claim at trial, even if the defendant argued that the state violated a *treaty* right.<sup>15</sup> The Court determined that, regardless of the Vienna

9. See *id.* at 1367 n.13 (noting that “the questions here are . . . far more limited ones”).

10. See Unofficial Press Release, International Court of Justice, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), July 16, 2008, available at <http://www.icj-cij.org/docket/files/139/14637.pdf?PHPSESSID=75b6f75992c068e2fb48a80ddccac988>.

11. Article 36(1) requires that a State inform a non-citizen arrested or detained within that State’s borders that the non-citizen has a right to inform the consulate of his own country of his status and to request legal aid from that consulate. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

12. Article 36(1) requires only that the arresting State inform the non-citizen of the rights granted by Article 36; after the State informs the non-citizen of the Vienna Convention rights, the non-citizen must then request that the arresting State inform the non-citizen’s consulate. *Id.* One of the main sources of contention between the United States and the ICJ has been the interpretation of Section 2 of the Vienna Convention. This Section allows a State to choose the means by which it will domestically implement the rights in Section 1 of the Vienna Convention, but requires that any implementation give “full effect . . . to the purposes for which the rights accorded under this Article are intended.” *Id.*; see also *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam) (examining the meaning of “full effect”).

13. See Curtis Bradley, Lori Fisher Damrosch & Martin Flaherty, Discussion, *Medellín v. Dretke: Federalism and International Law* (Feb. 21, 2005), 43 COLUM. J. TRANSNAT’L L. 667, 672 (2005).

14. Compare *Breard*, 523 U.S. at 375 (holding that state procedural default rules apply to Article 36(1) claims) with *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 497–98 (June 27) (holding that applying state procedural default rules to Article 36(1) claims breaches the Vienna Convention).

15. *Breard*, 523 U.S. at 375. Under state procedural rules, a federal habeas petitioner is barred from raising a claim on collateral review that the petitioner did not raise in state court or on direct appeal, unless the petitioner can show both cause and prejudice. See *Sanchez-Llamas*

Convention's constitutional status, Article 36(1) rights are subject to the same constraints as any other domestic right<sup>16</sup> because "the procedural rules of the forum State govern the implementation of [a] treaty in that State."<sup>17</sup>

The ICJ reached the opposite conclusion in *LaGrand*, in which it held that when the United States allowed the procedural default rule to prevent a defendant from asserting an Article 36(1) claim, the United States breached its treaty obligation to give "full effect" to Article 36(1) rights.<sup>18</sup> The ICJ interpreted "full effect" to mean that the United States should review the merits of all Article 36(1) claims, regardless of any procedural problems.<sup>19</sup>

Three years later, in *Avena*, the ICJ again found that the United States had breached its Vienna Convention treaty obligations.<sup>20</sup> To remedy this breach, the ICJ ordered the United States to "review and reconsider" all of the cases that Mexico had identified.<sup>21</sup> Review and reconsideration, according to the ICJ, "guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."<sup>22</sup> The Supreme Court and the ICJ both acknowledged that the United States had breached its treaty obligations, but the two differed on the meaning of "full effect."

The Supreme Court specifically addressed this difference in *Sanchez-Llamas v. Oregon*.<sup>23</sup> There, the Court held that the ICJ's interpretation of "full effect," which required the United States to overrule its procedural default rules, should be granted deference, but that the ICJ could not dictate the Court's own interpretation of "full effect."<sup>24</sup> Procedural default rules apply the same to treaty-based

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v. Oregon, 548 U.S. 331, 350, 355–57 (2006) (explaining procedural default rules and the rationale behind them).

16. *Beard*, 523 U.S. at 375.

17. *Id.*

18. *LaGrand*, 2001 I.C.J. at 497–98. The treaty states: "[The receiving State] must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention, *supra* note 11, 21 U.S.T. at 91, 596 U.N.T.S. at 275.

19. Because the brothers on whose behalf Germany brought the case were executed prior to the ICJ's decision, the ICJ only generally mentioned the remedy for a breach of the treaty. *LaGrand*, 2001 I.C.J. at 513–14; *see also* *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 59 (Mar. 31) (describing the ICJ's decision in the *LaGrand* case).

20. *Avena*, 2004 I.C.J. at 65.

21. *Id.* at 72–73. Mexico had brought the claim on behalf of fifty-one Mexicans and requested a remedy for the United States' breach of the treaty. *Id.* at 59.

22. *Id.* at 65.

23. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

24. *Id.* at 351.

claims as they do to other claims, according to the Court, first, because the Supreme Court, not the ICJ, ultimately interprets United States federal law;<sup>25</sup> second, because ICJ decisions are not binding on even the ICJ beyond the particular case in question;<sup>26</sup> third, because the executive branch had expressed its disagreement with the decision in *Avena*;<sup>27</sup> and fourth, because procedural default rules are an important part of the United States' domestic legal system to which even Constitutional rights are subject.<sup>28</sup>

Medellín took advantage of one of these factors—that ICJ decisions are not binding—to slip through a loophole in the reasoning of *Sanchez-Llamas*: he argued that because he was one of the fifty-one Mexicans named in *Avena*, the United States was therefore bound by treaty to effectuate the *Avena* judgment.<sup>29</sup>

### *B. The Manipulations of the Medellín Case: Procedural Postures and Facts*

The underlying facts of *Medellín* are compelling and brutal but factored minimally within the Court's decision. Medellín confessed in writing that he had participated in the gang-rape and murder of two teenage girls, and a Texas jury convicted him of murder during the commission of a sexual assault and sentenced him to death.<sup>30</sup> After unsuccessfully appealing to the highest level of the state court system,

25. *Id.* at 353 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

26. *Id.* at 354.

27. *Id.* at 355. The United States withdrew from the compulsory jurisdiction of the ICJ for disputes related to breaches of the Vienna Convention as a result of the decision in this case. Multilateral Treaties Deposited with the Secretary General, pt. 1, chap. III, § 8, *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp> (providing an updated list of all parties to the treaty and noting the United States' withdrawal from that treaty); see also *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes*, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (describing the obligations of signatory countries and the means by which countries can withdraw from the Protocol).

28. *Sanchez-Llamas*, 548 U.S. at 357–58. The Court also noted that allowing this broad interpretation of “full effect” to trump state procedural default rules could also be used to trump other important rules, such as the statute of limitations. *Id.* at 257; see also *Medellín v. Texas*, 128 S. Ct. 1346, 1367 (2008) (agreeing with the Court's view in *Sanchez-Llamas* that allowing *Avena* to trump state law would be “extraordinary”).

29. Brief for Petitioner, *supra* note 2, at 22.

30. See *Medellín*, 128 S. Ct. at 1354; see also Brief for Respondent at 1, *Medellín*, 128 S. Ct. (No. 06-984) (detailing the grim facts of the case).

including a state habeas petition,<sup>31</sup> Medellín filed a federal habeas petition, which the federal district court denied.<sup>32</sup> The district court also refused his request for a certificate of appealability.<sup>33</sup> The Fifth Circuit Court of Appeals denied Medellín's appeal of the district court's ruling.<sup>34</sup>

Medellín then petitioned for, and the Supreme Court granted, certiorari to determine whether the United States was bound to reconsider the claims of the fifty-one Mexican nationals involved in the *Avena* case.<sup>35</sup> Medellín's case was pending before the Supreme Court when President Bush, in a memorandum to the Attorney General of the United States, ordered that "State courts [should] give

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31. Medellín's conviction was affirmed by the Texas Court of Criminal Appeals, Brief for Respondent, *supra* note 30, at 3–4, and his state petition for habeas corpus was denied in part because he procedurally defaulted on his Vienna Convention claim by failing to raise it at the trial level and in part because the court determined that he had not been prejudiced by the violation of his Vienna Convention right. *Ex Parte* Medellín, Order No. 675430-A (339th Dist. Ct. Jan. 22, 2001); *see also* Brief for Respondent, *supra* note 30, at 3–4 (describing Medellín's procedural history). Medellín chose to return to the state court rather than appeal to the United States Supreme Court for certiorari. *Medellín v. Cockrell*, Civ. Order No. H-01-4078 (S.D. Tex. June 25, 2003). The District Court also denied the Vienna Convention claim because it held that Medellín was essentially an American citizen (although Medellín was born in Mexico and retained his Mexican citizenship, he lived in the United States for almost his entire life, went to school in the United States, and was fluent in English) and that a private individual cannot enforce the Vienna Convention. *Ex Parte* Medellín, Order No. 50,191-01 (Tex. Crim. App. Oct. 3, 2001) (per curiam) (unpublished opinion); *see also* Brief for Respondent, *supra* note 30, at 3 (reviewing the district court's holding). The Texas Court of Criminal Appeals affirmed the denial. *Ex Parte* Medellín, Order No. 50,191-01; *see also* Brief for Respondent, *supra* note 30, at 4 (summarizing the court's holding).

32. The federal district court denied the petition for substantially the same reasons as the state court. Brief for Respondent, *supra* note 30, at 4–5.

33. *Medellín v. Cockrell*, Civ. Order No. H-01-4078; Brief for Respondent, *supra* note 30, at 4–5.

34. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004). The court held both that the Vienna Convention does not confer individually-enforceable rights and that the court was bound by *Breard's* determination that Vienna Convention rights were subject to procedural default rules, rather than by the ICJ's more recent, contrary decision in *Avena*. *Id.* at 279–80; *see also* *Medellín v. Texas*, 128 S. Ct. 1346, 1355 (2008) (discussing the Fifth Circuit's decision). Medellín's petition to the Fifth Circuit was pending when the ICJ decided *Avena*. Brief for Respondent, *supra* note 30, at 4–5.

35. Petition for Certiorari I, *supra* note 3; *see also* Brief for Respondent, *supra* note 30, at 6 (describing the issues presented in Medellín's first petition for certiorari). The issue presented in *Medellín* was different than that presented in *Sanchez-Llamas* because the Court was considering a judgment that was binding on the United States: the ICJ had specifically ordered the United States to review and reconsider the cases of the fifty-one Mexicans about whom the case was brought, one of whom was Medellín, and thus the United States was bound by the ICJ Statute to review Medellín's case. *Sanchez-Llamas* was not one of the Mexicans named in the *Avena* judgment and therefore the United States was not technically required to adhere to the ICJ's judgment in regards to *Sanchez-Llamas* as it was in regards to Medellín.

effect to the [*Avena*] decision in accordance with general principles of comity.”<sup>36</sup>

Citing the President’s memorandum, Medellín filed a second habeas petition in Texas state court.<sup>37</sup> The Supreme Court then dismissed Medellín’s writ as improvidently granted, stating that the Texas state court could provide the review that Medellín sought and obviate the need for Supreme Court review.<sup>38</sup>

Once again in the Texas Court of Criminal Appeals, Medellín argued that Texas’s habeas corpus statute, which in this case required that the legal basis for a second habeas petition be unavailable at the time of the original claim,<sup>39</sup> was satisfied by either the *Avena* judgment or the President’s memorandum.<sup>40</sup> The Texas Court of Criminal Appeals ruled that neither could serve as a basis for the second appeal: the Supreme Court’s decision in *Sanchez-Llamas* established that *Avena* did not trump contrary state laws,<sup>41</sup> and the President did not have independent authority sufficient to order the Texas state court to overrule its laws.<sup>42</sup>

Medellín disagreed with the Texas Court of Criminal Appeals and so he petitioned for, and the Supreme Court again granted, certiorari on the issues of whether the *Avena* decision was binding, directly-enforceable federal law and whether the President had the authority to implement the *Avena* decision into federal law and thus preempt state criminal procedural rules.<sup>43</sup>

36. Petition for Certiorari I, *supra* note 3, at 228. Effectively, the memorandum would have required that the state courts overlook the procedural default rule for the fifty-one cases at issue in *Avena*, and then consider the merits of each individual defendant’s claim that the violation of their Vienna Convention rights had negatively affected the trial. *See Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 57 (Mar. 31); *see also Torres v. State*, 120 P.3d 1184, 1187–88 (Okla. Crim. App. 2005) (following the ICJ’s directive and reviewing Torres’s claim of prejudice).

37. Brief for Respondent, *supra* note 30, at 6.

38. *Medellín v. Dretke*, 544 U.S. 660, 666 (2005).

39. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (2003); *Medellín v. Dretke*, 544 U.S. at 663–64; *see also* Brief for Respondent, *supra* note 30, at 6, 7 (describing the Texas habeas statute’s requirements).

40. *Ex Parte Medellín*, 223 S.W.3d 315, 330, 332 (Tex. Crim. App. 2006); *see also* Brief for Respondent, *supra* note 30, at 7 (noting Medellín’s arguments before the Texas court).

41. *Ex Parte Medellín*, 223 S.W.3d at 332 (noting the consequences of holding that Article 36 claims could overrule state procedural claims, one of which was that “‘Article 36 claims could trump . . . prohibitions against filing successive habeas petitions’” (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006))).

42. *Ex Parte Medellín*, 223 S.W.3d at 342.

43. *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008).

## II. THE OPINIONS

### A. *Majority Rules: The Court's Opinion*

#### 1. The Direct Effect of *Avena*

The Court, in an opinion by Chief Justice Roberts, held that *Avena* was not automatically enforceable domestic federal law. In doing so, the Court not only rejected Medellín's argument that the treaties that obligate the United States to abide by the decisions of the ICJ are self-executing, but also rejected Medellín's subsequent argument that any ICJ judgment issued according to those treaties must also be self-executing.<sup>44</sup>

Whether the treaties that Medellín identified were self-executing was thus central to the case and formed a substantial part of the Court's opinion. The Court therefore needed to define "self-executing" and to formulate a test for determining whether a treaty is self-executing. In a footnote, the Court laid out (though did not adopt) one definition: a self-executing treaty is one that "has automatic domestic effect as federal law upon ratification."<sup>45</sup> To determine whether a treaty has automatic domestic effect, the Court examined the treaty's text, negotiation history, and post-ratification understandings.<sup>46</sup>

The foundation of the Court's main argument—that ICJ judgments are not automatically domestically binding—was the text of the treaties Medellín identified. The Court found that none of these treaties (the Optional Protocol to the Vienna Convention, the United Nations Charter, and the ICJ Statute) were self-executing.

The first treaty, the Optional Protocol to the Vienna Convention, offers just a "bare grant of jurisdiction," as it requires only that

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44. Brief for Petitioner, *supra* note 2, at 20–22. Medellín relied on the Optional Protocol to the Vienna Convention, the United Nations Charter, and the ICJ Statute. *Id.*; *see also* Brief for Petitioner, *supra* note 2, at 19–20 (arguing that these three treaties obligated the United States to adhere to the *Avena* judgment). Congress had not passed any implementing legislation for any of these treaties. *Medellín*, 128 S. Ct. at 1357.

45. *Medellín*, 128 S. Ct. at 1356 n.2. The Court did not explicitly adopt this definition, but noted that an alternative construction would be that a self-executing treaty grants directly enforceable individual rights. *Id.* at 1357; *see also* Transcript of Oral Argument at 30–31, *Medellín*, 128 S. Ct. (No. 06-984) (discussing the varied definitions of self-executing).

46. *Medellín*, 128 S. Ct. at 1357.

signatory nations submit disputes to the ICJ.<sup>47</sup> It does not also require that signatory nations enforce ICJ judgments.<sup>48</sup>

Rather, the power to enforce ICJ decisions stems from Article 94(1) of the United Nations Charter, which requires that States “undertake[] to comply” with any ICJ decision.<sup>49</sup> The Court, however, held that Article 94(1) lacks mandatory language and so interpreted the Article as a non-self-executing, solely contractual commitment.<sup>50</sup> Because the United States can veto any attempt to enforce an ICJ judgment under Article 94(1), the United States feasibly could never be bound by any judgment,<sup>51</sup> so the Court refused to hold that the United Nations Charter was self-executing.<sup>52</sup> A holding that the Charter was self-executing would require the Court to adopt the incongruous position that the United States would always be bound at the domestic level by an ICJ judgment, but might never be bound at the international level.<sup>53</sup> Common understanding at the time the Charter was ratified bolstered the Court’s conclusion: a country always had the option to choose *not* to comply with a judgment of the ICJ for political or diplomatic reasons. Automatic domestic enforcement would nullify that option.<sup>54</sup> These two reasons combined led the Court to hold that the United Nations Charter is not self-executing.

Nor is the ICJ Statute<sup>55</sup>: the Statute does not provide the requisite authority to force a United States’ court to obey an ICJ decision.<sup>56</sup> First, an ICJ decision binds only the parties involved and only as to that specific decision; and second, only states can be parties to cases in

47. *Id.* at 1358.

48. *Id.*

49. U.N. Charter art. 94, para. 1.

50. *Medellín*, 128 S. Ct. at 1358–59. The Government had intervened in the case to argue the Presidential Power Memorandum, but had only submitted an amicus brief arguing against the domestic effect of ICJ decisions. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Medellín*, 128 S. Ct. 1346 (No. 06-946) [hereinafter Brief for the United States].

51. *Medellín*, 128 S. Ct. at 1359. Under the United Nations Charter, the Security Council must first decide to enforce a judgment and then issue a resolution to that effect; the United States, as a permanent member of the Security Council, has a veto power over any such resolution. U.N. Charter art. 27, para. 3.

52. *Medellín*, 128 S. Ct. at 1360.

53. *Id.*

54. *Id.* at 1359.

55. The ICJ Statute establishes the basic structure and procedures of the ICJ. Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945). *See also* *Medellín*, 128 S. Ct. at 1353–54 (describing the ICJ and the ICJ Statute).

56. *Medellín*, 128 S. Ct. at 1360.

the ICJ, so Medellín was not a party to *Avena* and therefore cannot individually enforce the *Avena* decision.<sup>57</sup> This is true even if the case is brought by a State on behalf of an individual (as Mexico did in *Avena*).<sup>58</sup> Thus, the ICJ Statute is non-self-executing and cannot be used as a source of authority to directly enforce ICJ judgments in domestic courts.

Finally, the Executive Branch's consistent position that the treaties at issue are not self-executing also factored into the Court's determination because of the weight given to the Executive Branch on issues related to foreign affairs.<sup>59</sup> Based on the language of the treaties at issue, their ratification history, and Executive Branch policy, the Court held that ICJ judgments are not self-executing.

The Court then defended the test used to determine whether the treaties were self-executing and attacked the dissent's analysis.<sup>60</sup> The Court argued that it should utilize a blanket analysis—focused on the text of the treaty and congressional understanding of the treaty's meaning at the time of its ratification—that could be applied to any treaty.<sup>61</sup> Such an analysis not only followed precedent, but also recognized the careful procedure established by the United States Constitution's Framers.<sup>62</sup> In contrast, according to the majority, the dissent's analysis ignored the treaty's text and relied instead on a context-specific test that could make certain parts of a treaty self-executing, and other parts non-self-executing.<sup>63</sup> The Court feared that if the dissent's test were used, legislative power would shift from Congress to the judiciary<sup>64</sup>: a judge's ad-hoc decision, rather than the congressionally-approved language of a treaty, would determine whether a treaty was self-executing.

Next, the Court supported its conclusion with post-ratification understandings of the treaties at issue, general interpretive principles, and the consequences of holding that ICJ judgments are automatically binding.<sup>65</sup> Within these bolstering arguments, however,

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57. *Id.*

58. *Id.*

59. *Id.* at 1361.

60. *Id.* at 1362.

61. *Id.* at 1361–62.

62. *Id.* at 1362.

63. *Id.*

64. *Id.*

65. *Id.* at 1363–65. Of particular importance to the Court was that no other nation grants automatic domestic enforcement to a decision by the ICJ. *Id.* at 1363.

the Court was careful to specify that its holding applied only to ICJ judgments and only to the treaties considered—it was not a categorical determination that any judgment by an international tribunal is non-self-executing.<sup>66</sup> It also was not a categorical denial of all enforcement mechanisms—the Court noted that this specific judgment could still be enforced using political and diplomatic pressure, congressional action, and even a determination that the Vienna Convention itself is self-executing.<sup>67</sup> But, the Court held, the *Avena* judgment does not have automatic domestic effect by itself. Because of this determination, the Court then needed to determine whether the President could create that domestic effect with a memorandum to the Attorney General.

## 2. The President and his Memorandum

To analyze the exercise of government power, the Court began by considering whether the President had the authority to unilaterally implement the *Avena* decision.<sup>68</sup> Relying on the analysis of executive power in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube v. Sawyer*, the Court determined that the President does not.<sup>69</sup>

The United States intervened in the case to argue that the Presidential Memorandum constituted binding domestic law. The Government began by asserting that the President was within the first *Youngstown* category and therefore that there was a presumption that the President had the requisite authority to create domestic law.<sup>70</sup>

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66. *Id.* at 1365 (“Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements.”).

67. *Id.* at 1365–67. The Court has never addressed whether the Vienna Convention is self-executing, instead, it has always assumed that the Vienna Convention does grant directly-enforceable individual rights. *Id.* at 1357.

68. *Id.* at 1368.

69. *Id.* at 1371 (“[T]he Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect.”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637–38 (1952) (Jackson, J., concurring) (describing an analysis of presidential power).

70. Brief for the United States, *supra* note 50, at 10–11; see also *Medellín*, 128 S. Ct. at 1368 (noting the United States’ argument). Under the first category, the President is acting with maximum executive power, as he has both the power inherent to his position and any power that Congress has granted to him; there is a strong presumption that any presidential act under this category is permissible. *Youngstown*, 343 U.S. at 635. Under the second category, the President is acting in a “zone of twilight;” although he is acting only with the power inherent to his position, Congress has neither approved nor disapproved of his action, and thus congressional inaction can imply that a presidential act is permissible. *Id.* at 637. Under the third category, the President is acting at the “lowest ebb” of his power, as Congress has disapproved of his action, and so the President is acting only with “his own constitutional powers minus any

Because the Optional Protocol and the United Nations Charter were duly-ratified treaties, these two treaties implicitly authorized the President to implement obligations under these treaties.<sup>71</sup> The *Medellín* Court responded that the Senate approves and the President signs a non-self-executing treaty on the understanding that the treaty is not domestic law and cannot be transformed into domestic law without further congressional action.<sup>72</sup> This understanding does not grant to the President the power to unilaterally implement such treaties, it “implicitly prohibits him from doing so.”<sup>73</sup> Despite the President’s ability to quickly—and perhaps with a better understanding of the sensitive foreign policy issues at play<sup>74</sup>—determine whether an ICJ judgment should be enforced, the Court held that, under balance of powers, only Congress can implement a treaty.<sup>75</sup>

The Court then dismissed the United States’ arguments that “Congress has expressly authorized the President to direct all functions connected with the United States’ participation in the United Nations”<sup>76</sup> and that the President’s “authoritative role in litigation implicating foreign affairs”<sup>77</sup> provides the power necessary for the President to unilaterally implement a treaty.<sup>78</sup> Although the Court noted that the President has ample authority to ensure that the United States adheres to its international obligations,<sup>79</sup> the President’s authority does not extend to creating domestic law.<sup>80</sup>

The United States also argued that a long line of cases that acknowledged the President’s power to resolve foreign disputes should be interpreted as imputing to him the necessary authority to

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constitutional powers of Congress over the matter,” and thus any action that he takes must be carefully analyzed. *Id.* at 637–38.

71. Brief for the United States, *supra* note 50, at 10–11; *see also Medellín*, 128 S. Ct. at 1368 (noting the United States’ argument).

72. *Medellín*, 128 S. Ct. at 1369; *see also* Brief for Respondent, *supra* note 30, at 14 (“[U]nless the text of the treaty reflects an agreement between the President and the Senate to create domestic law, no such law is made.”).

73. *Medellín*, 128 S. Ct. at 1369.

74. *See* Brief for the United States, *supra* note 50, at 11–12 (arguing that “[t]he President is in the best position to make a determination on those issues” and noting “his ability to respond expeditiously” to “sensitive foreign policy issues implicated by an ICJ decision”).

75. *Medellín*, 128 S. Ct. at 1369–70.

76. Brief for the United States, *supra* note 50, at 16 (citing 22 U.S.C. 287, 287a).

77. *Id.* at 18.

78. *Medellín*, 128 S. Ct. at 1371.

79. *Id.*

80. *Id.*

enforce ICJ judgments.<sup>81</sup> Rejecting the United States' argument, the Court narrowly defined the authority in those cases as the authority to make "executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals,"<sup>82</sup> and noted the differences between that authority and the power to create domestic law.<sup>83</sup> The United States' acknowledgement that the memorandum was "unprecedented"<sup>84</sup> only bolstered the Court's holding.<sup>85</sup>

Thus, the Court concluded that the *Avena* decision does not have automatically-binding domestic effect and that the President does not have the authority to unilaterally transform an ICJ judgment into binding domestic law.

*B. The Test for Self-Execution and the Problem with Texas's Decision: Justice Stevens's Concurrence*

Justice Stevens's concurrence began by acknowledging the wisdom of the dissent's argument,<sup>86</sup> establishing a tone throughout his opinion that resonated more like a dissent than a concurrence. Though he was unwilling to go as far as the dissent in holding that the treaties at issue in this case are self-executing,<sup>87</sup> Justice Stevens strongly objected to the majority's implicit presumption against self-execution.<sup>88</sup> Despite his objection, Justice Stevens analyzed the treaties under a rubric that was substantially similar to the majority's reasoning.<sup>89</sup> He cautioned that under his analysis, the case "present[ed] a closer question than the Court's opinion allow[ed],"<sup>90</sup>

81. *Id.*; see also Brief for the United States, *supra* note 50, at 12–13 (arguing that, according to the Court's precedent, the President has the power to unilaterally implement treaties).

82. *Medellín*, 128 S. Ct. at 1371.

83. *Id.*

84. Brief for the United States as Amicus Curiae Supporting Respondents at 29–30, *Bustillo v. Johnson & Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 & 04-10566).

85. *Medellín*, 128 S. Ct. at 1372. The Court also briefly considered *Medellín's* argument that the President's "Take Care" powers under the Constitution (the President should "take Care that the Laws be faithfully executed," U.S. CONST., art II, § 3) provide sufficient authority for the memorandum to be enforceable. Brief for Petitioner, *supra* note 2, at 30–31. Because the Take Care powers revolve around executing laws rather than making them, the Court quickly rejected this argument based on its previous determination that the judgment is not domestic law, and that the President cannot execute something that is not law. *Medellín*, 128 S. Ct. at 1372.

86. *Medellín*, 128 S. Ct. at 1372 (Stevens, J., concurring in the judgment).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

but he ultimately agreed with the majority's determination that both the treaties and the *Avena* judgment are non-self-executing.

Justice Stevens also agreed with the majority's holding that the President cannot unilaterally implement a non-self-executing treaty,<sup>91</sup> but expressed a greater concern than the majority regarding the United States' general international obligation to adhere to treaties to which the United States is a party.<sup>92</sup> Justice Stevens also pointed out that because of the federalist structure of the United States' legal system, the burden of the obligation to adhere to the United States' international commitments fell on the Texas state courts; the Texas state courts' refusal to adhere to that obligation caused the case to progress this far and create such international strife.<sup>93</sup> Texas could have eased the international pressure surrounding the *Medellín* decision by choosing to follow the *Avena* decision.<sup>94</sup>

### C. *The Dissent's Seven Factors for Self-Execution*

In a dissent joined by Justices Souter and Ginsberg, Justice Breyer argued that the majority was too concerned with the treaty's text rather than with the means by which the United States implements treaties.<sup>95</sup> According to the dissent, the majority should have formulated its test from the long line of cases in which the Court had found that a treaty was self-executing.<sup>96</sup>

The dissent first asserted that considering just treaty language is insufficient.<sup>97</sup> Treaty language cannot reflect the vast differences between nations' legal systems; therefore, each domestic system must be the starting point for treaty interpretation.<sup>98</sup> Looking at the Court's precedent, the dissent argued that the Court had historically found a wide variety of treaties to be self-executing<sup>99</sup> and had relied on much

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91. *Id.* at 1374.

92. *Id.*

93. *Id.* at 1374–75 (pointing out that the Oklahoma judiciary had already accepted the decision of the ICJ and had reviewed the claims of one of the *Avena* nationals in its courts).

94. *Id.* at 1375. Texas eventually chose not to comply with the ICJ's judgment, and executed *Medellín* on August 5, 2008, without having given him the review and reconsideration demanded by the *Avena* opinion, Allan Turner & Rosanna Ruiz, *Medellín Executed for Rape, Murder of Houston Teens*, HOUS. CHRON. Aug. 6, 2008, <http://www.chron.com/disp/story.mpl/metropolitan/5924476.html>.

95. *Medellín*, 128 S. Ct. at 1377 (Breyer, J., dissenting).

96. *Id.*

97. *Id.*

98. *Id.* at 1378–80.

99. *Id.*

more than the “textual clarity” that the majority required.<sup>100</sup> From this precedent, the dissent formulated a seven-factor test for self-execution.<sup>101</sup>

First, the relevant treaties—the Optional Protocol and the United Nations Charter—are self-executing, according to the dissent,<sup>102</sup> because they contain mandatory, binding language, which the Court had previously found determinant when considering whether a treaty is self-executing.<sup>103</sup> The dissent countered the majority’s argument regarding the enforcement provision of the United Nations Charter by arguing that Article 94(1) is reserved for when a country chooses *not* to comply with a binding ICJ judgment, and thus that it should not dictate the procedural method used when a country chooses to comply with an ICJ judgment.<sup>104</sup>

Second, the dissent viewed the Vienna Convention itself as self-executing and the provision at issue as judicially-enforceable.<sup>105</sup> This led directly to the dissent’s third factor: that it would be incongruous for a judgment made binding by a self-executing treaty to not also be self-executing.<sup>106</sup> The dissenters interpreted *Sanchez-Llamas* to hold only that state procedural rules cannot be overridden by the Vienna Convention.<sup>107</sup> Because of this interpretation, they were able to argue that the *Avena* judgment, as a binding ICJ judgment that specifically dictated that the United States override state procedural rules, is sufficiently different from a general treaty obligation, that *Sanchez-Llamas* does not control.<sup>108</sup>

Fourth, the majority’s holding could result in negative practical implications. For example, there are numerous other treaties in which the United States has submitted to the jurisdiction of the ICJ to resolve disputes related to those treaties; it would be unrealistic to

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100. *Id.* at 1381. The dissent later noted that by seeking textual clarity with regard to whether a treaty is self-executing, the majority was “[h]unting for what the text cannot contain.” *Id.* at 1389.

101. *Id.* at 1383.

102. *Id.*

103. *Id.* The dissent relied on the term “compulsory jurisdiction” and a dictionary-based definition of “undertake to comply” to interpret the U.N. Charter’s requirement as a present-tense, mandatory obligation. *Id.* at 1384–85.

104. *Id.* at 1385.

105. *Id.*

106. *Id.* at 1386.

107. *Id.*

108. *Id.*

expect Congress to implement all of those ICJ judgments in order to resolve those disputes.<sup>109</sup>

Fifth, the remedy required by the ICJ—review and reconsideration of the judgments—is one that is clearly within the domain of the judiciary.<sup>110</sup>

Sixth, domestically enforcing the *Avena* judgment would not create a constitutional conflict.<sup>111</sup>

And seventh, neither the President nor Congress spoke against making this judgment automatically domestically enforceable.<sup>112</sup> For the dissent, the combination of these seven factors meant that the *Avena* judgment is self-executing and directly enforceable.<sup>113</sup>

Because the dissent found that the *Avena* judgment is directly enforceable, it then had to interpret the judgment and determine what “review and reconsideration” would require.<sup>114</sup> Several elements convinced the dissent that the case should have been remanded back to the Texas state courts to apply the *Avena* judgment: remand is the usual procedural step here; this case was focused in the Texas state courts, which would allow for post-conviction proceedings if Medellín could assert a claim that was unavailable at the time of trial;<sup>115</sup> and the President specifically directed the cases at issue in *Avena* back to the state courts.<sup>116</sup>

The dissent lastly stated that, contrary to the majority, it would proceed more carefully before asserting that the President can never override state law without congressional approval<sup>117</sup>: “silence . . . cannot be taken as agreement with the majority’s decision.”<sup>118</sup> The dissent concluded by noting that it was particularly concerned with the failure of the United States to uphold its international legal obligations.<sup>119</sup>

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109. *Id.* at 1387–88.

110. *Id.* at 1388.

111. *Id.*

112. *Id.* at 1389.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1389–90. *See also* Memorandum for the Attorney General on Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (dictating that the courts rehear the cases at issue in *Avena*).

117. *Id.* at 1390–91.

118. *Id.*

119. *Id.* at 1391–92.

### III. A HOLLOW VICTORY: *MEDELLÍN*'S IMPLICATIONS

At their core, the holdings in this case are simple answers to the questions presented: the *Avena* decision is not binding federal law just because the United States has an international obligation to abide by ICJ decisions;<sup>120</sup> and the President does not have the executive authority to implement the *Avena* decision domestically and thus overrule state laws.<sup>121</sup> These holdings by themselves are neither monumental nor unexpected.<sup>122</sup> Rather, the implications of the *Medellín* decision, and the Court's implicit assertions within it, will impact both the legal field surrounding the domestic implementation of treaties and the United States' international reputation, particularly in regards to the ICJ and the binding nature of its judgments.

The implications of the Court's analysis are fourfold, the most important of these implications being that related to self-executing treaties. First, the Court established an implicit presumption that all treaties are non-self-executing,<sup>123</sup> delineated a test for finding a treaty to be self-executing,<sup>124</sup> and placed the determination as to whether a treaty is non-self-executing firmly with the judiciary.<sup>125</sup> Second, there is the implication of the Court's continuing assumption that the Vienna Convention creates judicially-enforceable individual rights.<sup>126</sup> Third, the Court's decision did little to change the actual balance of power between the Court and the Executive,<sup>127</sup> and it left lingering questions regarding the President's role in determining whether the United States should adhere to its international obligations and how to implement those presidential determinations. Finally, the decision

120. *Id.* at 1361, 1363, 1365 (majority opinion). Note, however, that the Court's conclusion rests only on a consideration of the treaties that *Medellín* identified. *Id.* at 1364–65.

121. *Id.* at 1372 (Breyer, J., dissenting).

122. Kent Scheidegger, *Medellín: What Would Congressional Implementation of Avena Look Like?*, CRIME AND CONSEQUENCES, Mar. 27, 2008, [http://www.crimeandconsequences.com/2008/03/medellin\\_what\\_would\\_congressio\\_1.html](http://www.crimeandconsequences.com/2008/03/medellin_what_would_congressio_1.html); see also Ernie Young, *Medellín v. Texas: Another Set of Early Thoughts*, Mar. 25, 2008, <http://www.opiniojuris.org/posts/1206477292.shtml> (noting that the Court's holdings were unsurprising).

123. See *infra* notes 128, 129.

124. See *infra* Part III.B.

125. See *infra* Part III.C.

126. See *infra* Part III.A.

127. See Lyle Denniston, *States win Over President on Criminal Law Issue*, SCOTUS BLOG, Mar. 25, 2008, <http://www.scotusblog.com/wp/states-win-over-president-on-criminal-law-issue/> (asserting that the Court struck a heavy blow to the President).

could also have several important international ramifications for the United States.

A. *Non-Self-Execution: Presumptions*

The most important aspect of this case is its implicit presumption that all treaties are non-self-executing. Though the Court does not explicitly state as such, its decision clearly indicates acceptance of that presumption,<sup>128</sup> and both the concurrence and the dissent identify and express their disagreement with it.<sup>129</sup> Barring an explicit statement that the treaty is self-executing either in the treaty or during the ratification process, under *Medellín*'s holding, all treaties are presumed to be non-self-executing.<sup>130</sup>

This presumption will impact the United States' international actions to a greater extent than it will the United States' domestic actions,<sup>131</sup> in part because it is effectively what the United States already does domestically. Domestically, the presumption creates a two-step process in which the United States government must first ratify a treaty according to the United States Constitution,<sup>132</sup> and then, if necessary, implement any rights granted by that treaty via the legislative branch.<sup>133</sup> The Senate already frequently attaches reservations to treaties that state that the United States views the treaty as non-self-executing,<sup>134</sup> the Court's decision simply affirmed the legality of this process. Most treaties also operate only at the

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128. See, e.g., *Medellín*, 128 S. Ct. at 1357 (“[O]nly [i]f the treaty contains stipulations which are self-executing . . . [will] they have the force and effect of a legislative enactment.” (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)) (alterations in original)); *id.* at 1363–64 (“[O]ne would expect the ratifying parties to . . . have clearly stated their intent to give those judgments domestic effect . . . .”); *id.* at 1364 (holding that “treaties [are] self-executing when the textual provisions indicate that the President and the Senate intended for the agreement to have domestic effect.”).

129. See *Medellín*, 128 S. Ct. at 1372 (Stevens, J., concurring in the judgment); *id.* at 1380 (Breyer, J., dissenting).

130. *Id.* at 1363–64 (majority opinion).

131. Treaties become binding immediately upon ratification on the international plane, regardless of the domestic steps that a country may be required to take before its government could adhere to those obligations. BARRY E. CARTER ET AL., *INTERNATIONAL LAW* (4th ed. 2003).

132. U.S. CONST. art. II, § 2, cl. 2.

133. See *Medellín*, 128 S. Ct. at 1366.

134. CARTER ET AL., *supra* note 131; see also *Medellín*, 128 S. Ct. at 1373 n.2 (Stevens, J., concurring in the judgment) (citing to a treaty with a reservation making certain clauses non-self-executing).

international level and thus have little direct domestic impact, regardless of whether they are self-executing.<sup>135</sup>

The one area in which this presumption could impact the domestic actions of the United States would be those treaties, such as human rights treaties, that purport to grant rights to individuals.<sup>136</sup> With a presumption against self-execution, a United States citizen would be required to wait until Congress implemented a treaty before any of the individual rights granted in that treaty would legally attach to that citizen at a domestic level.<sup>137</sup> The Article 36(1) rights at issue in *Medellín* exemplify the potential impact of a presumption against self-execution: the Fifth Circuit found that Article 36(1) was not individually domestically enforceable and used that determination as an alternate means of denying Medellín the review he sought.<sup>138</sup>

### B. *Non-Self-Execution: A New Test*

The Court also did little to quash the confusion surrounding self-execution, its definition, and the test that should be used to determine whether a treaty is self-executing.<sup>139</sup>

Although the Court did not adopt a definition for self-execution, it did delineate a definition that it would use for the purposes of the case here.<sup>140</sup> The Court's definition of self-execution, noted in a footnote, is a treaty that "has automatic domestic effect as federal law upon ratification."<sup>141</sup> Key to this definition is what it does not include—direct effect. The term "self-execution" has been used interchangeably with "direct effect,"<sup>142</sup> something that the Court

135. CARTER, ET AL., *supra* note 131.

136. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3.

137. Additionally, because of the Court's delineation between self-execution and direct enforcement, a United States citizen would also have to wait until Congress created a judicially-enforceable cause of action.

138. *Medellín v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004). Note, however, that the ICJ has ruled that Article 36(1) does confer individually-enforceable rights. *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. (June 27).

139. *Medellín*, 128 S. Ct. at 1357.

140. *Id.* at 1356 n.2.

141. *Id.* Of course, the Court's implicit presumption is that treaties are non-self-executing and thus that they will not have this automatic domestic effect.

142. *See* Transcript of Oral Argument, *supra* note 45, at 30–31 ("[S]elf-executing is one of those words that people use to cover a lot of different meanings . . . [T]here's another meaning of 'self-executing,' or maybe it's a misuse of the term . . .") (statement of Solicitor General Paul Clement)). Direct effect means that the treaty confers on an individual the right to enforce the treaty in domestic courts—i.e., that the treaty itself creates a cause of action in a court of law.

ignored. Under the Court's carefully-worded definition of self-execution, the treaty itself would not serve to create a cause of action for a violation of any treaty rights, and would, in essence, be judicially unenforceable until Congress chose to make it enforceable.<sup>143</sup>

The Court also implicitly established a new test for self-execution,<sup>144</sup> but this will likely only further confuse the legal issues surrounding self-execution and its definition. This confusion results in part because the majority did not explicitly acknowledge that it was establishing a new test, and in part because the test that the majority chose was one of the principal sources of contention between the dissent and the majority.<sup>145</sup> Both the majority and the dissent pointed to cases in which its test was utilized, and then faulted the other's analysis.<sup>146</sup> By failing to explicitly adopt (or even to acknowledge) a new test for self-execution, the Court left lower courts with a choice between adopting the majority's test, relying on previous tests,<sup>147</sup> or using the dissent's test.<sup>148</sup> Although the reasons for the Court's refusal to explicitly adopt either a definition or a test are significant,<sup>149</sup> the continued lack of clarity only further confuses the issue.

Because the Court did little to change the manner in which treaties are already viewed, and maintained the confusion surrounding self-execution, the Court's definition and test of self-execution will have little domestic impact.

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143. A self-executing treaty would require that the United States adhere to the obligations within that treaty. Direct effect would mean that an individual citizen could enforce that obligation in a court. For example, if Article 36(1) were self-executing, police would be required, as a matter of domestic law, to inform non-citizens of their right to have their consul informed of their arrest. But only if Article 36(1) were also found to have direct effect could an individual sue a police officer for failing to inform the individual of that right.

144. *Medellín*, 128 S. Ct. at 1361–62.

145. *See id.* at 1373 (Stevens, J., concurring in the judgment). Although Justice Stevens agreed with the majority that the provisions at issue were not self-executing, he did so by relying on the language of the treaties.

146. *See, e.g., id.* at 1361–62 (majority opinion); *id.* at 1377 (Breyer, J., dissenting).

147. *See* Transcript of Oral Argument, *supra* note 45, at 31 (noting that self-execution has been defined as direct effect).

148. *See supra* Part II.C (describing the dissent's test).

149. The reasons were: that it will pin the Court to a definition it is not ready to adopt, that few other countries even consider allowing a treaty to be self-executing, and that treaties involve sensitive issues in which a flexible definition and test may be preferable. *Medellín*, 128 S. Ct. at 1356 n.2, 1363 (majority opinion).

### C. *Non-Self Execution: A Judicial Determination*

The Court's decision did, however, clearly place the power to determine whether a judgment is self-executing with the judiciary, not with Congress, which also served as another point of contention between the dissent and the majority.<sup>150</sup> The judiciary would, under the majority's test, examine the text and ratification history of the treaty to determine whether it was self-executing;<sup>151</sup> logically, then, Congress itself could dictate whether a treaty was self-executing merely by indicating its opinion regarding self-execution during the treaty drafting and ratification process. According to the dissent, however, the Court's opaque definition of self-execution could easily make a determination as to whether a treaty was self-executing unworkable if Congress, although it intended for a treaty to be self-executing, did not use the appropriate language.<sup>152</sup> The dissent's seven-factor test would serve to quell this potential problem, as it would rely on more than Congress inserting the magic self-executing words.<sup>153</sup>

### D. *Direct Effect: The Vienna Convention*

An additional impact of the Court's decision is the continued assumption that the rights granted by the Vienna Convention are individually judicially-enforceable.<sup>154</sup> The Court has never ruled on this issue, but has always assumed that the treaty creates a cause of action that the judiciary can enforce.<sup>155</sup> This case further solidifies that assumption within the Court's jurisprudence, and will make it increasingly harder for the Court to rule that Vienna Convention rights are not directly enforceable.

### E. *The Balance of Power*

The impact of *Medellín* on executive power and the balance of power between the Executive and the judiciary is fairly limited. Although the decision could be read as one in which the Court, by denying the Executive the ability to unilaterally implement a foreign judgment, asserted its power over the Executive, the actual holding is

150. *See, e.g., id.* at 1362.

151. *Id.*

152. *Id.* at 1388 (Breyer, J., dissenting).

153. *Id.*

154. *Id.* at 1357 n.4 (majority opinion).

155. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006); *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*).

quite narrow. In a footnote, the majority limited the impact of its decision to bind only cases that share almost the exact same circumstances: the President attempting to create federal law by himself based on the judgment of an international tribunal that was established by and is operating under non-self-executing treaties.<sup>156</sup>

In light of the footnote, the case does little to change the current balance of power between the courts and the President. Indeed, the Court may have been confined in its ability to rule otherwise: the Government made clear that although it disagreed with the decision in *Avena*, it wanted to enforce the judgment for diplomatic reasons, not because of any intrinsic belief in ICJ decisions, or even in the ICJ itself.<sup>157</sup> It would have been inconsistent for the Court to grant the President the power to domestically implement the judgment of an international court when the President clearly did not believe that the international court should have any domestic power.

The Court also chose to ignore several additional questions related to the President's memorandum. The informal nature of the memorandum was not addressed, only the President's authority to implement domestic law.<sup>158</sup> The implicit assumption is that had he been able to implement the *Avena* judgment, his memorandum would have been sufficient. This assumption presents enormous implications regarding what the President would be required to do (or not to do) to implement treaties into domestic law. The nature of the President's memorandum is not something that figured prominently in the case, but is an interesting sidenote about the procedural formality that would be required if the President did have the power to implement treaties into domestic law.

A final area in which the balance of power may have shifted concerns the President's ability to decide whether to comply with a decision by the ICJ. Given the United States' emphatic assertion that the President alone should decide whether to comply with ICJ decisions,<sup>159</sup> the Court's decision, which effectively placed that determination with the judiciary, could serve as a potential source of contention between the President and the Court.

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156. *Medellín*, 128 S. Ct at 1367 n.13.

157. See Brief for the United States, *supra* note 50, at 4. The United States' decision to pull out of the ICJ's compulsory jurisdiction for disputes related to Vienna Convention claims provides evidence of this lack of faith in ICJ decisions.

158. See *Ex Parte Medellín*, 223 S.W.3d 315, 333 (Tex. Crim. App. 2006).

159. *Medellín*, 128 S. Ct. at 1367.

### F. *The United States and the Rest of the World*

This decision will do little to help the increasingly negative world opinion of the United States and its ability to adhere to its international obligations.<sup>160</sup> The fight over the interpretation and domestic implementation of Article 36 of the Vienna Convention has caused a great deal of strife between the United States and Mexico, as well as between the United States and the ICJ. Mexico filed an additional petition in the ICJ in response to the Supreme Court's decision in this case, requesting that the ICJ define "review and reconsideration" and take steps to prevent the execution of any Mexican national involved in the *Avena* decision.<sup>161</sup> The request essentially confirms that appropriate review and reconsideration, particularly for Medellín, did not occur and that Medellín's execution placed the United States in breach of the Vienna Convention.<sup>162</sup> Regardless of this breach, the United States must defend the Court's decision that the *Avena* judgment is not directly binding on state courts because it is a Supreme Court decision; and the United States must also defend Texas's decision to execute Medellín because of federalism. This is a tenuous position at best.

The limited domestic implications of the case could be changed by the international ramifications of the decision. Mexico is fighting the United States at every turn in the ICJ, and the United States' clear dismissal of ICJ judgments is creating further tension both between the United States and Mexico and between the United States and the ICJ.<sup>163</sup> The United States is in breach of its treaty obligations according to the judgment of the tribunal established to interpret those treaties, the ICJ.<sup>164</sup> The House of Representatives recently proposed a bill to implement the *Avena* decision in response to the

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160. E.g., Frederic L. Kirgis, *Introductory Note to Bush Memorandum on Avena and U.S. Supreme Court Decisions in Medellín*, 44 INT'L LEGAL MATERIALS 961, 961 (2005).

161. Request for the Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (Mexico v. United States of America), Request for the Indication of Provisional Measures, available at <http://www.icj-cij.org/docket/files/139/14639.pdf?PHPSESSID=f33ed999d48709f6524e7df37a6de6dc>, p. 4-5. The Texas Court of Criminal Appeals set the date of Medellín's execution as August 5, 2008, and the Texas Court of Criminal Appeals denied a stay of execution, *Ex Parte Medellín*, Order No. WR-50191-03 (Tex. Crim. App. July 31, 2008) (per curiam) (unpublished order), as did the United State Supreme Court, *Medellín v. Texas*, 2008 WL 3821478 (Aug. 5, 2008).

162. Unofficial Press Release, *supra* note 10, at 12.

163. *Id.*

164. See *supra* text accompanying notes 16-24; see also *supra* note 55.

Supreme Court's decision in *Medellín*;<sup>165</sup> the House's action, however, did not influence Texas's decision to execute Medellín, and Texas's decision only created further tension between the United States and Mexico.

#### IV. CONCLUSION

The Supreme Court ruled that the *Avena* judgment was non-self-executing and that the President did not have the unilateral power to enforce the *Avena* judgment domestically. The Court's ruling had little domestic impact. The international impact, however, was much more significant. This difference elucidates quite nicely the affect that the *Medellín v. Texas* decision will have on the United States and on the international community: the United States will continue to enforce treaties domestically in the same way it has always done, often irrespective of the international community's unfavorable opinion, and the international community will continue its rumblings against the United States about those actions.

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165. H.R. 6481 (110th, 2nd session, introduced July 14, 2008).