EDITORIAL COMMENT

CORRECTING AMERICA'S CONTINUING FAILURE TO COMPLY WITH THE *AVENA* JUDGMENT

By Steve Charnovitz

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. "To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war." 3 Elliot's Debates 515.[1]

One year ago, the U.S. Supreme Court refused a request by the Obama administration to stay the lethal injection by Texas of a convicted prisoner even though that execution would violate a U.S. treaty obligation.[2] Instead, the Supreme Court deferred to contravening Texas state law and policy that denied the prisoner, Humberto Leal García, a hearing on the merits as to whether the government of Texas's failure to advise Leal of his right to meet with a consular representative prejudiced his criminal convictions in Texas courts. The State of Texas, which opposed the stay, carried out the execution hours after the Supreme Court stood down.

Texas's execution of Leal was promptly criticized by the UN High Commissioner for Human Rights, Navanethem Pillay, who declared: "The execution of Mr. Leal García places the US in breach of international law."[3] The "breach of international law" refers to the fact that in 2003, Mexico lodged the *Avena* case against the United States at the International Court of Justice (ICJ) about the failure of American law enforcement officials to comply with U.S. obligations under the Vienna Convention on Consular Relations (VCCR).[4] In March 2004, the ICJ held that the United States had breached its VCCR obligations. As a remedy, the ICJ directed the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" (on death row) who were the subject of the case.[5]

Nevertheless, neither federal nor Texas state courts provided Leal with an authoritative review before he was put to death by Texas officials. After Leal's death, Mexico issued a statement saying that it "deplores the decision of the State of Texas not to grant a reprieve of Mr. Leal

[1] United States v. Belmont, 301 U.S. 324, 331 (1937). The debates are available at http://teachingamericanhistory.org/ratification/elliot/.

[2] John R. Crook, Contemporary Practice of the United States, 105 AJIL 784 (2011); Leal Garcia v. Texas, 131 S.Ct. 2866 (2011).

[3] *US Execution of Mexican National Violates International Law—UN Rights Chief,* UN NEWS SERVICE, July 8, 2011.

[4] Vienna Convention on Consular Relations, Art. 36, Apr. 24, 1963, 21 UST 77.

[5] Avena (Mex. v. U.S.), 2004 ICJ REP. 12, para. 153(9) (Mar. 31).

García's execution to allow for U.S. compliance with the ruling by the ICJ, as requested by the Mexican Government, other foreign governments and the preeminent international human rights organizations and [nongovernmental organizations]."[6] The Inter-American Commission on Human Rights also condemned the execution as a violation of the precautionary measures that the commission had provisionally granted.[7]

Leal's execution by Texas was to some extent a replay of a similarly opprobrious episode in 2008, when the Supreme Court rejected the memorandum by then president George W. Bush that discharged U.S. obligations under the *Avena* judgment "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[8] In *Medellín v. Texas* (*Medellín I*), the Supreme Court refused to require Texas to comply with *Avena* and President's Bush's memorandum.[9] The Supreme Court reached its conclusion even while agreeing that "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 Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States."[10] Nevertheless, a few months later, the Supreme Court declined to stay the pending execution of Jose Ernesto Medellín, who was one of the Mexican nationals protected by *Avena*.[11] The Court refused to act even though under Article 94(1) of the UN Charter, the United States undertook to comply with any ICJ decision to which it is a party.

Like Medellín, Leal was one of the Mexican nationals covered by *Avena*. Indeed, in its most recent judgment on the VCCR, the ICJ made clear the continuing obligation of the United States not to execute Leal García (and the other Mexicans on death row) pending review and reconsideration as required by *Avena*.[12] The United States owed an obligation to Mexico (and perhaps also to other VCCR parties) not to carry out capital punishment on Leal unless such punishment was found to be justified following the "review and reconsideration" mandated by the ICJ.

The failure of the United States, once again, to comply with consular convention requirements will not propel the United States into war with Mexico.[13] Nevertheless, the United States can be justly charged with national "perfidy" for allowing state law to contravene U.S legal commitments to Mexico. Instead of assuring that U.S. treaty commitments are adhered to, the U.S. Supreme Court has glorified the supremacy of state laws vis-à-vis international obligations of the United States.

[6] Mexico Condemns Execution of Mr. Humberto Leal Garcia, Statement of the Embassy of Mexico, July 7, 2011.

[7] Press Release No. 67/11, Inter-Am. Comm'n on Human Rights, IACHR Condemns Execution of Leal García in the United States (July 8, 2011).

[8] Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), *at* http://www.asil.org/avena-memo-050308.cfm, *excerpted in* Contemporary Practice of the United States, 99 AJIL 489, 489 (2005).

[9] Medellín v. Texas, 552 U.S. 491 (2008) [hereinafter *Medellín I*].

[10] *Id.* at 504.

[11] Medellín v. Texas, 554 U.S. 759 (2008) [hereinafter *Medellín II*].

[12] 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)* (Mex. v. U.S.), 2009 ICJ REP. 3, para. 54 (Jan. 19).

[13] See the quotation from James Madison referred to in the epigraph taken from the *Belmont* decision.

Who is to blame for this embarrassing state of affairs? The Supreme Court, Texas, Congress, and the executive branch all share responsibility. Each will be discussed in turn.

The Supreme Court's decision in *Medellín I* received considerable criticism from legal scholars.[14] The Court's recent holding in *Leal Garcia v. Texas* has also been criticized for failing to grant a stay of execution despite the urging of the executive branch and four justices on the Court to do so.[15] The United States' brief explained that executing Leal would place the United States "in irreparable breach of its international-law obligation" and that this breach "would have 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."[16] But these concerns did not convince the Court's majority to halt the Texas law and policy that were infringing upon the external powers of the United States.

A key reason given by the Court for not granting the stay was that the United States had studiously refused to argue that Leal was prejudiced by the Vienna Convention violation. Yet the Court did not explain why it needed to hear that argument directly from the executive branch. Nor did the Court explain why, in a hypothetical case, an argument by the executive branch that there was prejudice (or no prejudice) should matter in fulfilling *Avena*'s mandate for a *judicial* determination. If the Court were truly looking for an independent validation of the possibility of actual prejudice on which to premise a stay, the Court could have given respectful consideration to the report of the Inter-American Commission on Human Rights, which concluded that the U.S. violation of the VCCR deprived "Messrs. Medellín, Ramírez Cardenas and Leal García . . . of a criminal process that satisfied the minimum standards of due process and a fair trial required" under the American Declaration of the Rights and Duties and Man.[17]

Four years after the *Medellín I* holding, the Court has not flinched from its jurisprudence that Congress, rather than the president or the federal judiciary, has the role of effectuating compliance with ICJ rulings in cases where subnational law puts the United States in violation of a treaty commitment. The current predicament is well capsulized in a concurring statement by Judge Tom Price in the decision of the Texas Court of Criminal Appeals to deny a stay of

[14] *See, e.g.*, Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations,* 24 CONN. J. INT'L L. 39 (2009); Martin S. Flaherty, *Surrendering the Rule of Law in Foreign Relations,* 32 FORDHAM INT'L L.J. 1154 (2009); Jesse Townsend, *Medellín Stands Alone: Common Law Nations Do Not Show a Shared Postratification Understanding of the ICJ,* 34 YALE J. INT'L L. 463 (2009); Carlos Manuel Vázquez, *Less Than Zero?*, 102 AJIL 563 (2008). A large literature in support of the *Medellín I* decision also exists.

[15] *See, e.g.*, Andrew Cohen, *Humberto Leal Garcia: The Supreme Court Makes a Bad Situation Worse,* ATLANTIC, July 8, 2011 ("It was one of the most ignoble acts by the Court in recent memory; a reminder, as if we needed one, of the hostility the current majority often expresses toward the workings of the real world."), *available at* http://www.theatlantic.com/politics/archive/2011/07/humberto-leal-garcia-the-supreme-court-makes-a-bad-situation-worse/241605.

[16] Brief for the United States as Amicus Curiae in Support of Applications for a Stay at 12, Leal Garcia v. Texas, 131 S.Ct. 2866 (2011) (Nos. 11-5001 & 11-5002), 2011 WL 2630156, at *5, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-11.pdf.

[17] Inter-American Commission on Human Rights, Report No. 90/09, para. 132 (Aug. 7, 2009), *at* http://www.cidh.oas.org/annualrep/2009eng/US12644eng.htm. The Supreme Court failed to mention the commission's report but did mention a 2007 decision by a federal district court in Texas holding that Leal did not suffer any actual prejudice. This district court ruling was vacated on procedural grounds in 2009 by the Fifth Circuit, with the further finding that Leal had no right to a federal hearing on whether there was prejudice. Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009).

execution for Leal: "Lamentably, the applicant [Leal] finds himself in possession of an apparent right under international law without an actual remedy under domestic law."[18]

Such a disconnection in the topology of rights and remedies should not exist in any country's law, but especially not in a country like the United States, whose Constitution and Supremacy Clause make clear that "all treaties made . . . shall be the supreme Law of the Land."[19] The Supreme Court's ruling majority fails to give due weight to Justice Stephen Johnson Field's holding in the *Chinese Exclusion* case that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[20] Instead, under the jurisprudence of *Medellín* and *Leal Garcia*, the United States is no longer one nation when it comes to honoring consular commitments because the rights received by a foreign national can depend on the state where the individual is apprehended.[21]

The United States may still be "one power" in world affairs, but the Supreme Court has diluted that power.[22] As a result of *Medellín I*, according to Thomas Franck, "there is no real incentive for other states to enter into treaties with us, as they would be exchanging their binding commitment for an essentially worthless promise by Washington to see what it can do to obtain the voluntary compliance of the fifty states of the Union."[23] Thus, the danger of subnational resistance to America's international obligations could impede U.S. treaty making. Oddly, the *Medellín I* majority marshaled a similar argument *against* the dissenting opinion that would have overruled Texas. To wit: "The dissent's approach risks the United States' involvement in international agreements. It is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. . . . This uncertainty could hobble the United States' efforts to negotiate and sign international agreements."[24]

For treaties that it classifies as non-self-executing, the Court strips away any domestic legal status earned through Senate passage of a resolution of ratification. As a result, the Court reads the executive out of U.S. decision making to comply with an adverse ruling of the ICJ. The Court also reads itself out of a role of remedying noncompliance. States like Texas are now free

[18] *Ex parte* Humberto Leal, 2011 WL 2581917 (Tex. Crim. App. June 27) (Price, J., concurring) (internal footnote omitted).

[19] U.S. CONST. Art. VI, cl. 2.

[20] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (*Chinese Exclusion*); *see also* Charles Cheney Hyde, *New Consular Conventions*, 15 AJIL 62, 64 (1921) (noting that consular rights in a treaty may abridge the operation of local statutes).

[21] For example, the Supreme Court of Massachusetts recently held that if an alien did not receive the notification required by Article 36 of the Vienna Convention, a challenge to the conviction may be made in a motion for a new trial. In so holding, the court "acknowledge[d] and accept[ed] the conclusion of the ICJ regarding the obligation that art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation." Commonwealth v. Gautreaux, 458 Mass. 741, 751 (2011).

[22] In 2008, after the *Medellín I* decision, Philip Alston, then the UN Human Rights Council special rapporteur on extrajudicial, summary or arbitrary executions, stated that the "present refusal by Texas to provide review undermines the role of the US in the international system." His press statement appears as an annex to a UN press release, *UN Special Rapporteur Calls on the U.S. to Take Steps to Avoid Unlawful Killings* (June 30, 2008), *at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8815&LangID=E.

[23] Thomas M. Franck, *The Future Relationship Between a New Administration and the International Court of Justice,* 15 ILSA J. INT'L & COMP. L. 315, 318 (2009).

[24] *Medellín I, supra* note 9, 552 U.S. at 515–16.

to opt out of key U.S. treaty commitments (such as Article 94 of the UN Charter) unless Congress orders those states to comply. This delineation of power is hard to reconcile with the language and intent of the Supremacy Clause.[25]

Other than the Supreme Court, the decision maker that deserves a large share of blame for maintaining America's scofflaw status is the State of Texas.[26] In his concurring opinion in *Medellín I*, Justice John Paul Stevens sagely suggested that since Texas had "already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another" by assuming the "cost" of complying with *Avena*.[27] Unfortunately, Texas officials declined to take responsibility for the injury that Texas had caused, and did not provide a new hearing to Medellín in 2008 or Leal in 2011. As the execution date for Leal approached in 2011, Texas officials were asked to exercise statesmanship and to have the execution delayed until courts were empowered to review Leal's conviction and capital sentence.[28] These requests were rejected,[29] and the subsequent execution of Leal drew the rebuke of the Inter-American Commission on Human Rights.[30]

We have always known about the possibility that a subnational government could cause a U.S. treaty violation by refusing to comply with America's international obligations.[31] What is new about the *Avena* affair is that such misbehavior can persist even in the face of an ICJ judgment against the United States. As a result, the reputation of the United States for being a law-abiding nation has been undermined.

The U.S. Supreme Court has promised to follow a new federal law implementing *Avena*,[32] but Congress has not passed such a law since *Medellín I* was handed down in March 2008. This

[25] *See* David L. Sloss, *Executing* Foster v. Neilson: *The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 136, 140 (2012) ("Whatever else the Supremacy Clause might mean, it must accomplish at least this much: if a treaty imposing non-discretionary duties on the nation did not create domestic legal duties for state officers who have the capacity to promote or hinder treaty performance, the statement that treaties are the 'supreme Law of the Land' would be utterly meaningless.") (footnote omitted).

[26] In criticizing the State of Texas, this Comment is not criticizing all Texans. Enlightened opinion in Texas has supported compliance with the Vienna Convention. *See, e.g.*, *The World Is Watching: Gov. Perry Should Halt the Medellín Execution*, DALLAS MORNING NEWS, July 29, 2008, at 12A; *Keeping Our Word: Scheduled Texas Execution Violates Treaty and Endangers Americans Abroad*, HOUSTON CHRON., June 22, 2011, at 6.

[27] *Medellín I*, 552 U.S. at 536–37 (Stevens, J., concurring).

[28] *U.N. Asks Perry to Commute Death Sentence* (July 1, 2011), *at* http://www.upi.com/Top_News/US/2011/07/01/UN-asks-Perry-to-commute-death-sentence/UPI-78041309543191/; *Stay of Execution for Mexican National Denied by Texas Board, Despite Obama and UN Push for Stay* (July 6, 2011), *at* http://www.hispanicallyspeakingnews.com/notitas-de-noticias/details/stay-of-execution-for-mexican-national-denied-by-texas-board-despite-o/8746/.

[29] *Leal Execution Puts U.S. at Risk*, Editorial, SAN ANTONIO EXPRESS NEWS, July 7, 2011, at 8B; Estelle Gonzales Walgreen, *Execution of Mexican Humberto Leal Highlights Texas as 'Lone' State & Gov Perry's Limitations* (July 8, 2011), *at* http://www.hispanicallyspeakingnews.com/por-que/details/execution-of-mexican-humberto-leal-highlights-texas-lone-state-mentali/8783/; Michael Graczyk, *Texas Governor Defends Mexican's Execution*, State News Service, July 8, 2011, *at* http://abcnews.go.com/US/wireStory?id=14024854#.T-qK2LWIBrM; Toby Harnden, *No Mercy as Texas Looks to Presidency*, SUNDAY TELEGRAPH (London), July 10, 2011, News, at 32.

[30] *See supra* note 7 and accompanying text.

[31] Recall one classic treatise:

> State actions (or inactions) can violate the obligations of the United States under international law, as when they "deny justice" or fail to provide basic protections to aliens. States and state officials may fail to carry out obligations to foreign countries or their citizens, may deny aliens treaty rights or fail to prevent private persons from invading them. And federal remedies—principally through the federal courts—may not be available or effective, or take inordinately long.

LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 247 (1972).

[32] Leal Garcia v. Texas, 131 S.Ct. at 2868 ("we will follow the law as written by Congress").

failure is the fault of the U.S. Congress and seems likely to persist. Consider, for example, the prediction of Senator Charles Grassley (R-Iowa): "It is clear there is no chance this Congress would pass a law that retroactively allowed foreign nationals who face lawful death penalties another round of judicial review based upon the Vienna Convention."[33]

The difficulty of getting Congress to implement *Avena* should lead the Supreme Court majority to reflect on whether the Court was correct in holding that attaining subnational compliance is exclusively a congressional responsibility. In *Medellín I* the Court seemed to recognize "that the President's constitutional role 'uniquely qualifies' him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and 'to do so expeditiously.' "[34] Nevertheless, the Court assigned the role of resolving this sensitive VCCR dispute to Congress without explaining how Congress would expeditiously accomplish a task for which the president is uniquely qualified. In *Leal Garcia v. Texas*, the Court observed:

> It has now been seven years since the ICJ ruling and three years since our decision in Medellín I, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.[35]

This tautology begs the question of how the United States will be able to implement ICJ decisions when doing so is not a political priority for Congress. In view of the president's constitutional primacy in foreign affairs, along with the Supreme Court's traditional respect for that, I have written that in *Medellín I* the Court erred in not treating the president's decision to comply as a decisive justification for overruling Texas.[36] The Court opined in *Medellín I* that "Congress is up to the task of implementing non-self-executing treaties."[37] Yet the subsequent four years have shown the Court's confidence to be misplaced.

Although Leal's petition to the Supreme Court contended that "[f]or the past three years, Congress has been moving steadily toward the passage of legislation to implement the *Avena* Judgment,"[38] that claim was exaggerated. In fact, Congress had done little to pass implementing legislation. Credit should be given to Congressman Howard Berman (D-CA), who introduced a bill in the House shortly before Medellín's execution,[39] and to Senator Patrick Leahy (D-VT), who proposed implementing legislation in 2010[40] and 2011.[41] Sadly, as of May 2012, none of the other ninety-nine senators has signed on to be cosponsors of Leahy's bill.

A few weeks after Leal's execution, Senator Leahy, who is chairman of the Senate Judiciary Committee, convened a hearing on his bill and received supportive testimony from two

[33] 157 CONG. REC. S4637 (daily ed. July 18, 2011) (statement of Sen. Charles Grassley).

[34] *Medellín I,* 552 U.S. at 523–24.

[35] 131 S.Ct. at 2868.

[36] Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AJIL 551, 552–59 (2008).

[37] *Medellín I,* 552 U.S. at 521.

[38] Petition for Writ of Certiorari to the Court of Criminal Appeals in Texas at 14 (June 27, 2001), 2011 WL 2743200, at *12, *available at* http://www.deathpenaltyinfo.org/files/Cert%20Petition%202011-06-27.pdf.

[39] Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008). The bill gained only three cosponsors.

[40] In July 2010, the Senate Appropriations Committee reported an appropriations bill that contained a provision (Title VII, sec. 7082) that would have granted federal court jurisdiction to review petitions alleging a violation of certain consular rights. S. REP. NO. 111-237, at 81 (2010). The provision was buried in the bill, S. 3676, without transparency by the authoring subcommittee (chaired by Senator Leahy). The bill was not finalized by the Senate.

[41] Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011).

Obama administration officials. Most notably, Deputy Assistant Attorney General Bruce Swartz declared: "We strongly urge passage of this bill because it protects American citizens abroad while preserving our interests in maintaining critical law enforcement cooperation with foreign allies and seeing justice done in capital cases."[42]

Senator Leahy's bill, the Consular Notification Compliance Act, provides for judicial review and reconsideration in federal courts of the conviction and sentence of foreign nationals who had been sentenced to death as of the time of the bill's enactment and who had not received timely consular notification. In doing so, the bill is designed both to bring the United States into compliance with *Avena* (which applies only to Mexican defendants on death row) and to extend those same rights to similarly situated foreign nationals. Other provisions of the bill are prospective only and would provide aliens charged with capital crimes the right to seek a postponement of judicial proceedings in order to allow consular access.

Congress has many options for bringing the United States into compliance with the VCCR. The proposed Consular Notification Compliance Act would utilize federal courts (rather than state courts) to vindicate the rights of foreign nationals. Unlike the *Avena*-specific bill introduced in the House a few years ago, the new Senate bill refrains from even mentioning the ICJ decision. This omission is puzzling as it strips away a key rationale for public support. Another option to secure U.S. compliance with *Avena* is for the federal government to reward states for compliance. One variant, suggested by Edward Duffy, is for Congress to require states, as a condition of receiving federal aid, to grant hearings to aliens who were denied their consular rights.[43]

In my view, Congress should center corrective legislation on the ICJ rather than the VCCR. Such legislation could take the form of a framework statute to facilitate U.S. compliance with an adverse ICJ decision when such compliance requires federal legislation. This framework statute could provide a fast-track legislative process for Congress to consider implementing legislation, submitted by the president, to bring the United States into compliance with an ICJ decision. Were such a process in place today, the administration could secure an up-or-down congressional vote on the Consular Notification Compliance Act within a prescribed period of time.[44] The idea of a framework law was given a boost when the American Bar Association House of Delegates recommended new federal legislation for expedited implementation of U.S. treaty commitments. This expedited treatment would be triggered by the president's report to Congress that binding measures are necessary to avoid the imminent risk of breach by the United States.[45]

[42] *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Judiciary Comm.*, 112th Cong., Statement of Bruce C. Swartz, Deputy Assistant Att'y Gen. and Counselor for International Affairs 12 (July 27, 2011), *at* http://www.judiciary.senate.gov/pdf/11-7-27%20Swartz%20Testimony.pdf.

[43] Edward W. Duffy, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After* Medellín, 98 GEO. L.J. 795, 809–10 (2010). Duffy proposes conditionality on Justice Assistance Grants.

[44] Before bills in Congress are brought to a vote, it is easy for opponents to mischaracterize the level of congressional support or opposition. For example, in July 2011, Senator Grassley stretched the truth in contending that there had already been "a considered decision of Congress not to pass that [Leahy] legislation." Because Senator Leahy's legislation had been introduced only four days earlier. a "considered decision" seems unlikely. 157 CONG. REC. S4637 (daily ed. July 18, 2011) (statement of Sen. Charles Grassley).

[45] ABA House of Delegates, Res. 108C (2010). This resolution grew out of the recommendations of the Joint Task Force between the American Society of International Law and the ABA. *See* ABA/ASIL Joint Task Force on Treaties in U.S. Law, Report, at 13–18, Annex B (Mar. 16, 2009), *at* http://www.asil.org/files/TreatiesTaskForceReport.pdf.

Another option would be for Congress to grant advance authority to the president to implement an ICJ decision directing the United States to take remedial action. Indeed, such an *ex ante* approach to implementing judgments of an international tribunal was specifically contemplated by the Supreme Court (in *Medellín I*) when it explained that "Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent . . .) through implementing legislation, as it regularly has."[46] Such implementing legislation could grant the president authority to provide a private right of action for individuals seeking to obtain the injunctive relief contemplated in an ICJ ruling against the United States.

The executive branch deserves a mix of credit and blame for the actions that have been taken since *Avena*. Although he delayed eleven months after the *Avena* judgment to issue his memorandum to the states, President Bush should be commended for this act of leadership. After losing at the Supreme Court, Bush could have followed up the suggestion in the opinions of the Texas Court of Criminal Appeals to seek an executive agreement with Mexico to settle the *Avena* dispute.[47] But President Bush did not do so before the *Medellín I* judgment. Nor did Bush do so afterward, perhaps because the Court in *Medellín I* expressed a narrow view of presidential claim-settlement authority.[48]

In March 2005, a year after the *Avena* judgment but years before *Medellín I*, the Bush administration arguably took a misstep by withdrawing the United States from the Optional Protocol to the VCCR. As a party to the Optional Protocol, the United States had the right to bring cases to the ICJ against other parties for breaches of the Convention. The United States surrendered that right in 2005 in order to prevent other countries from bringing new cases against the United States. According to John Bellinger III, then Department of State legal adviser, President Bush "made this decision in order to protect the U.S. against future ICJ judgments that might similarly interpret the VCCR in ways that might interfere with the U.S. criminal justice system."[49] Yet by running away from the ICJ, the Bush administration undermined its pro-compliance arguments before the Supreme Court. Indeed, in August 2008, when the Court denied Medellín's petition for a stay of execution, the Court explained that the inaction in Congress to enact implementing legislation "is consistent with the President's decision in 2005 to withdraw the United States' accession to jurisdiction of the ICJ with regard to matters arising under the Convention."[50]

[46] *Medellín I*, 552 U.S. at 520.

[47] *Ex parte* Medellín, 223 S.W.3d 315, 342 ("The President has not entered into any . . . agreement with Mexico relating to the Mexican nationals named in the *Avena* decision. There has been no settlement."), 343 ("The President's ability to negotiate and enter into an executive agreement to settle a dispute with a foreign nation remains. In this case, however, the President failed to avail himself of that mechanism to settle this nation's dispute with Mexico."), 344 ("The absence of an executive agreement between the United States and Mexico is central to our determination that the President has exceeded his inherent foreign affairs power by ordering us to comply with *Avena*.") (Tex. Crim. App. 2006).

[48] *Medellín I*, 552 U.S. at 530–32; Anne E. Nelson, *From Muddled to* Medellín: *A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1059–65 (2009). Of course, the Court's holding occurred in the absence of an actual agreement with Mexico to settle the claims.

[49] *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Judiciary Comm.*, 112th Cong., Statement of John B. Bellinger III, at 5 (July 27, 2011), *at* http://www.judiciary.senate.gov/pdf/11-7-27%20BellingerTestimony.pdf.

[50] *Medellín II*, *supra* note 11, at 760.

In its January 2009 judgment on Mexico's request for interpretation of *Avena*, the ICJ observed that "[a] choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result."[51] Since a new U.S. administration was coming into office the very next day, it was an auspicious time to launch the initiatives required to implement *Avena*.

Unfortunately, President Barack Obama did not seize the moment to seek legislation from the Congress. This omission was noted at Chairman Leahy's hearing in late July 2011, when Bellinger remarked: "I was surprised that the Obama Administration did not make compliance with this international obligation [*Avena*] a higher priority during its first two years, but it is right to support the proposed legislation now."[52] Moreover, the Obama administration missed an opportunity to demonstrate the importance of the ICJ role by reversing the Bush administration's act of withdrawing from the VCCR's Optional Protocol.[53]

What the administration has done is to support Senator Leahy's bill and to spearhead an amendment to Rule 5 of the Federal Rules of Criminal Procedure to require that when a defendant in federal custody is not a U.S. citizen, a government attorney or a federal law enforcement officer will notify the defendant's consulate if the defendant so requests.[54] This action would not help retroactively with the *Avena* group. But going forward, it should work to prevent future violations of the rights of foreign nationals in federal—though not state—custody.

In summary, the main responsibility for the continuing violation of *Avena* lies with the Supreme Court, Texas (that is, its governor, legislature, and courts), and Congress. Yet in casting all those stones, one needs to recognize that a continued U.S. resistance to compliance may not be especially troubling to the American public[55] and that, because the *Avena* defendants have been convicted of heinous crimes, a further delay of punishment may lead to demagoguery.

Gaining democratic support for implementing *Avena* requires explaining to the public why the VCCR and ICJ are important, and why failing to comply threatens the liberty of U.S. citizens working or traveling abroad. Secretary of State Hillary Clinton is making this case,[56] but such efforts need to be ramped up. The U.S. president is in the best position to educate the

[51] 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)*, *supra* note 12, para. 47.

[52] Statement of John B. Bellinger III, *supra* note 49, at 8.

[53] *See* 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 (2009). In private correspondence (on file with author), Quigley argues that retracting the withdrawal would not require an express consent by the U.S. Senate.

[54] *See* Memorandum from the Advisory Committee on Federal Rules of Criminal Procedure to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 2–4 [362–64], [455–56] (May 12, 2011), *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2011.pdf. The new rule was approved by the Judicial Conference in September 2011. The reports of the federal rules committees are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx.

[55] *See, e.g.*, Ilya Shapiro, Medellín v. Texas *and the Ultimate Law School Exam*, CATO SUP. CT. REV. 63, 102–03 (2008) ("While elite opinion around the world expressed shock that one renegade political subdivision could thwart the will of both the World Court and the president, here in the United States we take our federalism seriously.").

[56] For example, in a written statement submitted to the Senate Judiciary Committee, Secretary Clinton explained:

> This protective system of consular assistance depends on mutual compliance with these obligations by the United States and our treaty partners. If the United States fails to honor our legal obligations toward foreign

public about the importance of implementing *Avena*. So far, President Obama has not done so. Indeed, in public speeches, Obama has not even mentioned the *Avena* case, the VCCR, or the ICJ.

In the lead article of this *Journal*'s inaugural issue in 1907—"The Need for Popular Understanding of International Law"—U.S. Secretary of State Elihu Root explained that "[t]he more clearly and universally the people of a country realize the international obligations and duties of their country, the less likely they will be to resent the just demands of other countries that those obligations and duties be observed."[57] In my view, the pockets of public (and elite) opinion in the United States resenting *Avena* reflect a weak popular understanding of why international law matters to the United States. Government officials, nongovernmental organizations, and schools and universities all have a role to play in better educating the public. As the Supreme Court once noted, "Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses . . . ."[58]

Some new thinking is needed on how best to integrate international law into congressional decision making. Although the House and the Senate have hundreds of committees and subcommittees, none of them have *international law* in their names. Moreover, Congress does not have the internal rules needed to assure that a solution for *Avena* can be voted and enacted in a timely fashion. More broadly, Congress lacks any method to set an agenda for its own foreign affairs responsibilities. The Senate's special role in consenting to treaties may be a source of resentment or even conflict—and a key reason behind the insufficient cooperation between the House and Senate.

The controversy over implementing *Avena* is one theater in the struggle over the role and status of international law in the United States. On some issues, the United States' national interests and its international obligations might diverge, but the implementation of *Avena* is not such an issue. Congress should rapidly implement the *Avena* judgment so as to bring the United States into compliance with the rule of law.

nationals in our custody, the fabric of this protective system is torn, and ultimately it is Americans who are harmed.

Consular Notification Compliance Act: Hearing on S. 1194 Before the S. Judiciary Comm., 112th Cong, Statement of Hillary Rodham Clinton, Secretary of State, at 12 (July 27, 2011), *at* http://judiciary.senate.gov/pdf/11-7-27%20Kennedy%20Testimony.pdf (appended to statement of Patrick F. Kennedy).

[57] Elihu Root, *The Need of Popular Understanding of International Law*, 1 AJIL 1, 2 (1907).

[58] Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).