

STUDENT NOTES/COMMENTS

Leal Garcia v. Texas: A Foreign National's Fight With Federalism

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I. INTRODUCTION

“A rule that nullifies treaties as domestic law allows the United States to sign international agreements and purport to support individual rights, while simultaneously divesting those agreements of any ability to actually give rights to individuals.”¹ Over the past one hundred years, the United States has established itself as an international superpower; this is due in part to victory in two World Wars, and signing onto numerous international treaties including the Vienna Convention on Consular Relations.² Since 2010, the international community’s views on the United States are even more positive than in years past.³ Would domestic citizens and international countries believe the United States to be a reputable country that abides by its international obligations—with a judiciary that faithfully upholds the laws of the land—if they knew the United States Supreme Court allowed the United States government to renege on its international obligation while simultaneously sentencing a detained foreign national to death?⁴ The Court placed the United States’ reputation

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1. Aya Gruber, *An Unintended Casualty of the War on Terror*, 27 GA. ST. U. L. REV. 299, 313 (2011).

2. See generally Samuel P. Huntington, *The Lonely Superpower*, 78 FOREIGN AFF. 35, 37 (1999) (“The United States, of course, is the sole state with preeminence in every domain of power—economic, military, diplomatic, ideological, technological, and cultural—with the reach and capabilities to promote its interests in virtually every part of the world.”).

3. *Global Views of United States Improve While Other Countries Decline*, WORLDPUBLICOPINION.ORG (Apr. 18, 2010), http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/660.php.

4. See *Leal Garcia v. Texas*, 131 S. Ct. 2866 (2011) (Breyer, J. dissenting)

on the line when it did just that by denying Humberto Leal Garcia's *habeas corpus* petition in July 2011—despite available remedies that could have saved the man.⁵

As a Vienna Convention signatory since 1969, the United States' obligation to inform detained foreign nationals of their international right to contact their home country's consulate, as required by Article 36 of the Convention, was clear.⁶ Despite this obligation, in 2004 Mexico brought suit against the United States in the International Court of Justice (hereinafter "ICJ") for failing to inform detained foreign nationals of their right to contact their consulate. This lawsuit likely resulted from the execution of several Mexican nationals in the late 1990's and early 2000's.⁷ The class action *Case Concerning Avena and Other Nationals*, involved fifty-two Mexican nationals who were tried, convicted, and sentenced to death in courts throughout the United States.⁸ Consular access was denied to every party and consequently, the ICJ determined that the United States had violated the Vienna Convention.⁹ The ICJ decision recognized this rights violation of the Mexican citizens and ordered the United States to hold hearings to review and reconsider their cases, thereby determining whether the lack of consular access affected outcomes in individual cases.¹⁰

In an attempt to satisfy the ICJ ruling, then-President Bush issued the "President's Memorandum" ordering state courts to review and reconsider the cases of the *Avena* named parties.¹¹ The State of Texas refused to reconsider Medellin's case for consular access violations, claiming there was no obligation to follow the President's Memorandum.¹²

(arguing that Leal's execution would place the United States in irreparable breach of its obligations under international law).

5. *See id.*

6. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (entered into force with respect to the United States of America December 24, 1969) [hereinafter Vienna Convention].

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

8. *Id.* at 23.

9. *Id.* at 71.

10. *Id.* The ICJ ruling did not state if any cases should be reviewed posthumously for any defendants who may have died or been executed during the pendency of the case.

11. Memorandum from President George W. Bush to the U.S. Att'y Gen. (Feb. 28, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>.

12. *See Medellin v. Texas*, 552 U.S. 491, 504 (2008) ("In the [Texas Court of Criminal Appeals'] view, neither the *Avena* decision nor the President's Memorandum was 'binding federal law.'").

The United States Supreme Court affirmed Texas's refusal.¹³ In its 2008 *Medellin v. Texas* decision, the Supreme Court deemed rulings handed down from the ICJ as inapplicable in state courts absent Congressional legislation.¹⁴ The Court concluded that the Vienna Convention ratified by the United States in 1969, was a non-self-executing treaty and accordingly required enactment of Congressional legislation to compel state compliance with the ICJ decision.¹⁵ The Court also specifically removed Presidential authority to force state court compliance with the ICJ's ruling in *Avena*.¹⁶ According to the Supreme Court's ruling, in order to require state court action, Congress needed to take affirmative steps and enact legislation making the ICJ ruling binding on domestic courts.¹⁷ At the time *Medellin's* case was argued in 2008, Congress spoke through silence.¹⁸

Two years later, Congress ended its silence.¹⁹ Following *Medellin*, Vermont Senator Patrick Leahy introduced legislation to bind state courts with ICJ decisions.²⁰ Subsequent to the bill's introduction, Leal, another Mexican national named in the *Avena* decision, petitioned the Supreme Court for a stay of execution. He asked the court to allow him to live until Congress decided whether to pass the bill.²¹ The court denied the stay of execution in a 5-4 decision, effectively dismissing concerns about irreparable harm to the United States' international relations with Mexico.²² The majority based their opinion on the stance that the Court's job is to issue judgments based on what the law is, not what the law eventually may be.²³ The majority descriptor ignored a legal remedy that would have enabled the Court to stay Leal's execution.²⁴ The four dissenting justices wished to stay the execution for a spe-

13. *Id.*

14. *Id.* at 508. Jose Ernesto Medellin was a party named in the *Avena* decision. *Id.* at 498.

15. *Id.* at 504-19 (analyzing both the enforceability of ICJ rulings and the Vienna Convention in Section II of the Court's opinion).

16. *Id.* at 523-32 (analyzing the President's authority to preempt state laws without Congressional legislation in Section III of the Court's opinion).

17. *Id.*

18. *Id.*

19. See Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011), GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1194> (last visited Oct. 13, 2011) [hereinafter Consular Notification Compliance Act].

20. See *id.*

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

22. *Id.*

23. *Id.*

24. *Id.* (Breyer, J. dissenting).

cific amount of time to give Congress time to pass the pending legislation.²⁵ The dissent recognized the imminent harm to the United States' foreign relations with Mexico, and stated the Court should take steps to protect its potential jurisdiction.²⁶ This comment discusses why the dissenting justices should have prevailed and why the majority's death sentence harmed the United States' foreign relations with Mexico.

28 U.S.C. § 1651(a), "the All Writs Act" and its subsequent case law creates a line of precedent allowing the Court to issue writs to protect its potential jurisdiction, offering an avenue for the Court to issue the stay on Leal's execution.²⁷ Specifically, if Senator Leahy's bill passes, the ICJ's ruling becomes binding on the States; the Texas Courts will be required to review Leal's conviction.²⁸ Any refusal to do so will be a violation of Federal law and Leal will have a remedy in the Federal courts.²⁹ According to Leal's submitted briefs, consular access would have weighed heavily on his post-arrest actions.³⁰ The Court's ability to protect its potential jurisdiction "is in the nature of appellate jurisdictions of the appellate court where an appeal is not pending, but may later be perfected."³¹ In this case, the Court's failure to protect its potential jurisdiction led to Leal's death.³² The United States Supreme Court allowed the State of Texas to execute Medellin due to Congressional silence.³³ Yet, the Supreme Court executed Leal *while* Congress was finding its voice.³⁴ The Supreme Court's inconsistency, along with its failure to utilize all options available to it, has the potential to irreparably harm international relations between the United States and Mexico.³⁵

Multiple international law and federalism considerations led

25. *Id.*

26. See Gruber, *supra* note 1, at 310.

27. See generally Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 433-34 (1999).

28. See Consular Notification Compliance Act, S.1194, 112th Cong. (2011), GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1194> (last visited Oct. 13, 2011).

29. See generally *id.*

30. Brief for the Gov't. of the United Mex. States as Amicus Curiae Supporting Petitioner, *Leal Garcia v. Texas*, 131 S. Ct. 2866 (2011) (Nos. 11-5001 (11A1), 11-5002 (11A2), and 11-5081 (11A21)) 2011 WL 2581860 at *23.

31. *Fed. Trade Comm'n. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (quoting *Ex parte Crane*, 5 Pet. 190, 193 (1832)).

32. See *Leal Garcia v. Texas*, 131 S. Ct. 2866, 2866 (2011).

33. See *Medellin v. Texas*, 552 U.S. 491, 492, 507 (2008).

34. See *Leal*, 131 S. Ct. at 2866.

35. Brief for the Gov't. of the United Mex. States, *supra* note 30, at *23.

to the death of Humberto Leal-Garcia—this comment outlines the history of all the factors in play. This comment is divided into five parts—Part I provides a brief description of the issues at play; Part II discusses international law, including the Vienna Convention as a non-self-executing treaty and the *Case Concerning Avena and Other Mexican Nationals*; Part III analyzes domestic actions, including “The President’s Memorandum,” *Medellin v. Texas* and *Leal v. Texas*; and Part IV will discuss Mexican foreign relations with both the United States and the State of Texas. The Comment will end with Part V’s analysis of why the Court should have issued a writ for potential jurisdiction staying Leal’s execution.

II. INTERNATIONAL LAW

The United States has reputedly established itself internationally and is at the forefront of many international issues.³⁶ The actions of the United States have worldwide impact, largely due to victory in World Wars I and II and the devastation these wars left upon the worldwide economy, leading to America possessing one of the highest growing gross domestic products in the world.³⁷ This economic power placed the United States at the forefront of many post-war international issues.³⁸ Accordingly, many foreign nations have entered into treaties with the United States, naturally assuming that all agreed upon obligations will be enforced/met/upheld.³⁹ However, as decisions discussed herein show, this is not always the case.

A. *The Vienna Convention on Consular Relations as a Non-Self Executing Treaty*

The Vienna Convention imposed a strict requirement on both federal and state governments that all arrested foreign nationals

36. See generally *Global Views of United States Improve While Other Countries Decline*, *supra* note 3, at 1.

37. See generally *Treaty of Versailles, 1919* UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005425> (last visited Apr. 7, 2012); see also Richard Overy, *World War Two: How the Allies Won*, BBC HISTORY (Nov. 02, 2011) http://www.bbc.co.uk/history/worldwars/wwtwo/how_the_allies_won_01.shtml (last visited Apr. 7, 2012); *GDP (current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries?display=graph> (last visited Apr. 7, 2012).

38. See generally *Global Views of United States Improve While Other Countries Decline*, *supra* note 3.

39. See generally *Treaties in Force [TIF]*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/t/treaty/tif/index.htm> (last visited Apr. 7, 2012).

have consular access after arrest.⁴⁰ When signing a treaty, it is recognized that, “[e]very signatory nation to a treaty must grapple with the extent to which it will incorporate international law into its national legal system.”⁴¹ The Vienna Convention forced individual states to determine how to incorporate the consular access rule into their policing procedures.⁴² The United States’ legislative system is internationally atypical, particularly when dealing with international treaties, because of the Supremacy Clause of the United States Constitution,⁴³ as evidenced by *Askura v. City of Seattle*, in which the Supreme Court concluded that, “the Supremacy Clause gives treaties the status of federal statutory law.”⁴⁴ Ultimately, the Court found that the Constitution made treaties part of “our law.”⁴⁵

American legislation relies on the intent of the drafter and the language provided to determine whether a treaty automatically becomes federal law (known as a self-executing treaty) or whether it requires Congressional enactment of legislation to become effective (a non-self-executing treaty).⁴⁶ In the United States, the type of treaty enacted has a direct effect on how it is incorporated into the laws of the United States.⁴⁷ Thus, this self-execution doctrine neatly divides American treaties into two

40. Vienna Convention, *supra* note 6, art. 36(1)(a) (“consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals sending State shall have the same freedom with respect to communication with and access to consular officers to the sending state. . .”); *See id.*, *supra* note 6, at art. 36(1)(b) (“if he so requests the component authorities of the receiving State shall, without delay, inform the consular post of the sending State, if within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.”).

41. *See* Gruber, *supra* note 1, at 310.

42. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32390, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS (2004), at CRS5 (“[T]he State Department has attempted to ensure state and local compliance with Article 36 by regularly distributing manuals, pocket cards, and training resources to state and local officials concerning the consular notification obligations owed under the Vienna Convention. These materials characterize Vienna Convention obligations as “binding on federal, state, and local government officials to the extent that they pertain to matters within such officials’ competence,” and stress that “*in all cases, the [arrested or detained] foreign national must be told of the right of consular notification and access.*”).

43. *See* Gruber, *supra* note 1, at 311.

44. *Asukura v. City of Seattle*, 265 U.S. 332, 341-42 (1924); *see also* Gruber, *supra* note 1, at 311.

45. Gruber, *supra* note 1, at 311.

46. *Id.*

47. *Id.*

groups: those that are self-executing and those that are not.⁴⁸ Self-executing treaties are automatically ratified upon Presidential signature, while non-self-executing treaties require ratifying legislation to be enforceable.⁴⁹ “When ‘parties [engage] to perform a particular act. . .the legislature must execute the contract before it can become a rule for the Court.’”⁵⁰

Both the United States and the United Mexican States agreed to the binding terms of the Vienna Convention, the United States ratifying in 1969.⁵¹

In 1963, the United States signed the Vienna Convention on Consular Relations, a United Nations treaty designed to codify existing international customary law with regard to consular ‘relations, privileges and immunities.’ Though the preamble to the treaty specifically states that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,’ Article 36(1)(b) nonetheless provides that an individual foreign national arrested in a signatory state has the right to free communication with and access to his consulate.⁵²

“The United States has a strong interest in complying with its Article 36 obligations in order to maintain international integrity and to protect its citizen abroad.”⁵³

When the United States violated the Vienna Convention by denying detained Mexican nationals consular access, Mexico’s only option was to file suit in the International Court of Justice, expecting a binding ICJ ruling.⁵⁴ Both the United States and Mex-

48. *Id.*

49. See Gruber, *supra* note 1, at 314 (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1820)).

50. *Id.* at 314.

51. See Vienna Convention, *supra* note 6.

52. Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1734 (2003); see Stephanie L. Metz, Note, *Medellin v. Dretke and Medellin v. Texas: International Law Can’t Mess With Texas*, 36 CAP. U. L. REV. 1131, 1134 (2007) (“Article 36 states that its purpose is to facilitate consular function, not to benefit individuals: the provision is to be construed ‘with a view to facilitating the exercise of consular functions relating to nationals of the sending State.’”).

53. Nancy Alexander, Comment, *Saved by the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon’s Rescue*, 15 LEWIS & CLARK L. REV. 819, 825 (2011).

54. See Vienna Convention on Consular Relations and Optional Protocol on Disputes, T.I.A.S. No. 6820, 21 U.S.T. 77, 1969 WL 97928 (U.S. Treaty 1969) (establishing the ICJ as the jurisdiction for disputes arising between signatories) (hereinafter “Optional Protocol.”)

ico also ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, which gives the ICJ jurisdiction over disputes “arising out of the interpretation or application” of the Vienna Convention.⁵⁵ Under this framework, parties provide the ICJ the authority to hear cases arising under the treaty. Without it, the ICJ would not have compulsory jurisdiction over the Consular Convention claims.⁵⁶ When the Vienna Convention was submitted for ratification, according to the Senate’s report, the treaty was “entirely self-executive” and did not require additional legislation to become effective.⁵⁷ However, the Supreme Court, in *Medellin v. Texas*, discussed *infra* Section III.B, concluded that the Vienna Convention was non-self-executing.⁵⁸

B. *Case Concerning Avena and Other Mexican Nationals*

Mexico successfully sued the United States for violations of consular access in the ICJ as a result of their frustration with the United States’ disregard for necessary consular access.⁵⁹ The ICJ ultimately ruled in Mexico’s favor, determining that the United States’ ignorance of consular access was inexcusable. All signatories to the Vienna Convention are expected to abide by the consular access requirement, which ensures that detained foreign nationals are treated fairly in an unknown legal system, understand their legal rights, and understand any agreements they enter into with foreign governments.⁶⁰ Consular officials are brought into the diplomatic landscape to “provide governmental

55. See Metz, *supra* note 52, at 1135. The United States has since pulled out of the Optional Protocol; however, it was a signatory when the ICJ issued its ruling and therefore, is still bound by the agreement in light of the *Avena* decision.

56. See Metz, *supra* note 52, at 1135.

57. See Ray, *supra* note 52, at 1736; see also Reynaldo Anaya Valencia et al., *Avena and the World Court’s Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas’s Independence from the World*, 23 YALE L. & POL’Y REV. 455, 498-99 (2005) (“Since its ratification, the State Department has regarded the Vienna Convention as self-executing.”).

58. 522 U.S. 491, 499 (2008).

59. See Vienna Convention on Consular Relations and Optional Protocol on Disputes, *supra* note 55, at Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1 (establishing the ICJ as the jurisdiction for disputes between signatories in regards to the interpretation or application of the Convention); see also Case Concerning *Avena and Other Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 1, 153 (Mar. 31).

60. See Vienna Convention on Consular Relations and Optional Protocol on Disputes, *supra* note 55 (establishing the ICJ as the jurisdiction for disputes arising between signatories).

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representation in commercial and individual matters in foreign countries, and to handle other matters of national interests that might not rise to the level of matters of state.”⁶¹

The United States government was surely aware that both federal and *state* officials must inform detained foreign nationals of their right to consular assistance, per the Vienna Convention.⁶² “Nevertheless, sending nations, including Mexico, have found it difficult to obtain remedies for imprisoned foreign nationals, particularly in death penalty cases, through the U.S. court system.”⁶³ In its *amicus* brief on behalf of Leal, the Government of the United Mexican States argued, “When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably and constructively . . . Both countries have benefited from peaceful judicial settlement of their disputes.”⁶⁴

In 2003, Mexico brought suit in the ICJ following the execution of three Mexican nationals—all three cases involving failure to notify of the right to consular access.⁶⁵ Mexico’s formal complaint accused the United States of the following:

. . . arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row . . . violat[ing] its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36(1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36(1) (a) and (c) of the Convention⁶⁶

The Court’s pertinent findings were:

(1) “that, by not informing, without delay upon their detention, the 51 Mexican nationals . . . of their rights under Article 36, paragraph 1 (b), of the Vienna Convention . . . the United States of America breached the obligations

61. See Valencia, *supra* note 57, at 476.

62. See Valencia, *supra* note 57, at 477-78 (emphasis added).

63. See Valencia, *supra* note 57, at 478.

64. Brief for the Gov’t of the United Mex. States, *supra* note 30, at 9-10.

65. See Valencia, *supra* note 57, at 487-88.

66. Case Concerning Avena and Other Nationals (Mex. v. U.S.), 2004 I.C.J. 12 at ¶ 14 (Mar. 31).

incumbent upon it . . .”,⁶⁷

(2) “that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals . . . and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached its obligations incumbent upon it . . .”,⁶⁸

(3) “the United States of America deprived the United Mexican States of the right, in a timely fashion, to communication with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent on it . . .”,⁶⁹ and

(4) “that, in relation to the 34 Mexican nationals . . . the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it.”⁷⁰

The ICJ issued the following orders:

(1) “that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals . . . by taking account both of the violation of the rights . . .”,⁷¹

(2) the ICJ “[t]akes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under . . . the Vienna Convention; and finds that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition”;⁷² and

(3) “that, should Mexican nationals nonetheless be sentenced to severe penalties, without their right under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Conven-

67. *Id.* at ¶ 153.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

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tion”⁷³

The ICJ reiterated that the United States had breached its independently undertaken international obligations.⁷⁴ The United States ratified the Vienna Convention with full knowledge that detained foreign nationals were to be given access to consular aid following any arrest.⁷⁵ The United States breached its international obligations in four different types of circumstances, affecting the lives of at least fifty Mexican nationals and their families.⁷⁶

III. DOMESTIC ACTIONS

A. *The President’s Memorandum*

“Under the U.N. Charter and Restatement of Foreign Law, the United States is bound to comply with the decisions of the ICJ.”⁷⁷ Following the *Avena* decision, President Bush issued a memorandum, entitled “The President’s Memorandum,” in which he ordered states to reconsider the convictions of defendants named in the *Avena* judgment.⁷⁸ In an effort to discharge the United States’ international obligation under the *Avena* judgment, the President ordered that the “[s]tate [] 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.”⁷⁹ The President’s Memorandum attempted to compel states to comply with the ICJ’s ruling.⁸⁰ Texas, however, refused to comply with the President’s Memorandum, and likewise refused to reconsider the cases of Mexican nationals sentenced to death in Texas.⁸¹ The President’s Memorandum ultimately sparked international controversy and put federalism at odds with foreign relations.⁸²

73. *Id.*

74. *Id.*

75. See Vienna Convention for Consular Relations, *supra* note 6, at art. 36.

76. See *Avena (Mex. v. U.S.)*, 2004 I.C.J. at ¶ 153 (asserting that the United States violated the rights of detained foreign nationals by not informing the detainees about their right to consular access, by not informing the consular officials that Mexican nationals were detained, by delaying the consulate access to the detainees, and by delaying the assignment of legal counsel to the detainees).

77. Ray, *supra* note 52, at 1769.

78. See Memorandum from President George W. Bush to the U.S. Att’y Gen., *supra* note 11.

79. *Id.*

80. *Id.*

81. See *Medellin v. Texas*, 552 U.S. 491, 504 (2008).

82. See *id.* at 491.

B. Medellin v. Texas

This federalism versus international relations tension reached a boiling point when the Supreme Court granted *certiorari* to hear *Medellin v. Texas*.⁸³ Prior to the ICJ's *Avena* decision, José Ernesto Medellin, a Mexican national, was convicted of and sentenced to death for participating in the gang rape and murder of two teenage girls.⁸⁴ After his conviction, he claimed the state had violated his right to contact the Mexican consulate in violation of the Vienna Convention.⁸⁵ In *Medellin v. Dretke*, he petitioned the Supreme Court for *habeas corpus*.⁸⁶ In its 5-4 decision, the Court concluded Medellin still had state court appeals available to him and remanded the case for further consideration.⁸⁷ His case returned to the Texas Court of Criminal Appeals, where he argued for reconsideration of his conviction in light of the 2004 *Avena* decision.⁸⁸ He argued that the Vienna Convention granted him an individual right that must be respected by the state courts, a proposition the Supreme Court had yet to decide on following *Sanchez-Lamas v. Oregon*, a 2006 decision involving the extent to which the Supreme Court had power to impose certain remedies on state courts under the Vienna Convention.⁸⁹

Medellin also argued that the Court was required to follow then-President Bush's "President's Memorandum" instructing state courts to comply with the ICJ ruling requiring states to rehear and reconsider the cases of the *Avena* parties, including Medellin.⁹⁰ Medellin claimed that the Constitution granted the President broad power to ensure that international treaties are enforced, and that such power extended to state court proceedings.⁹¹

Rejecting Medellin's assertions, in a 6-3 decision⁹² the Court held that the treaty was not self-executing, and accordingly, did

83. *Id.*

84. *Ex parte* Medellin, 223 S.W.3d 315, 321 (Tex. Crim. App. 2006).

85. *Medellin v. Dretke*, 371 F.3d 270, 274 (5th Cir. 2004).

86. *Medellin v. Dretke*, 544 U.S. 660, 662-64 (2005).

87. *Id.* at 666-67.

88. *Ex parte Medellin*, 223 S.W.3d at 321.

89. *Id.* at 330-331; *see also* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006); Mary D. Hallerman, *Medellin v. Texas: The Treaties that Bind*, 43 U. RICH. L. REV. 797, 802 (2009) (discussing *Sanchez*, asserting "the Court stated that ICJ judgments cannot dictate domestic court opinions and noted the importance of procedural defaults in the United States' judicial system").

90. *Medellin v. Texas*, 552 U.S. 491, 523 (2008).

91. *Id.*

92. *Id.*

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not bind state courts.⁹³ Generally, in order for treaties to bind state courts, Congress must pass enabling legislation and thus enact the treaty provisions into law.⁹⁴

“The Article is not a directive of domestic courts. It does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision, not indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, [t]he words of Article 94. . . call upon governments to take certain action.”⁹⁵

The court concluded that, “given the absence of congressional legislation, that the non-self-executing treaties at issue here did not ‘expressly or impliedly’ vest the President [with] unilateral authority to make them self-executing.”⁹⁶ The decision left many issues unclear or unresolved, including Congress’s options for giving domestic effect to the ICJ ruling.⁹⁷ The *Medellin* decision has been called the “case that launched a thousand law review articles,” indicating the profession’s general uncertainty over what exactly it was that the Court’s ruling meant for the various parties involved.⁹⁸ While the decision gave a blanket statement about the Vienna Convention, it provided no further direction as to where the legislature was headed next.⁹⁹ Congress was silent in *Medellin*’s case, but what constituted Congressional action? Where did the line start? Where did the line end? This gray area created by the *Medellin* majority led to a decidedly harsh dissent in 2011’s *Leal Garcia v. Texas*.¹⁰⁰

C. *Leal Garcia v. Texas*

If *Medellin* dented the United States’ international reputation and relations with Mexico, *Leal Garcia v. Texas* nearly destroyed relations completely. In 1995, Humberto Leal Garcia was convicted and sentenced to death by a Texas court for the brutal assault, rape, and murder of a teenage girl.¹⁰¹ Leal Garcia was

93. *Id.* at 526.

94. *Id.*

95. *Id.* at 508.

96. *Id.* at 527.

97. See Edward W. Duffy, Note, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After Medellin*, 98 GEO. L.J. 795, 796 (2010).

98. See Metz, *supra* note 52, at 1131.

99. See *Medellin*, 552 U.S. 491.

100. See *Leal Garcia v. Texas*, 131 S. Ct. 2866 (2011).

101. *Id.* at 2867.

questioned by police, subsequently providing two signed statements and consenting to a police search of his home.¹⁰² Throughout his entire time in custody, the Texas authorities failed to notify Leal Garcia of any right to contact the Mexican consulate.¹⁰³

In the sixteen years following his original conviction, Leal Garcia vigorously tried, by all legal means at his disposal, to prove his innocence in the Texas Courts, including filing several habeas corpus petitions.¹⁰⁴ In the midst of his federal habeas corpus petitions, Leal Garcia became a named party in the *Avena* litigation.¹⁰⁵ In his final petition to the Supreme Court, Leal Garcia sought a stay of execution, arguing that the United States Congress was considering legislation that would make the *Avena* decision binding on state courts.¹⁰⁶ Around this time, Senator Patrick Leahy introduced a bill, the Consular Notification and Compliance Act (“CNCA”) that would have forced state courts, including those in Texas, to reconsider Leal Garcia’s conviction in compliance with the *Avena* decision.¹⁰⁷ Both the United States and Mexico peti-

102. *Id.*

103. *See* Leal Garcia v. Thaler, 68 F. App’x 85 (5th Cir. 2011).

104. Brief in Opposition to Petition for Writ of Certiorari and Application for Stay of Execution, Leal Garcia v. Texas, 131 S. Ct. 2866 (2011) (Nos. 11-5001 (11A1)), 2011 WL 2743201, at *1 (“Since his conviction sixteen long years ago, Leal Garcia has filed a direct appeal to the Texas Court of Criminal Appeals, three state habeas applications, three federal habeas petitions, seven petitions for certiorari to review this Court, four appeals to the Fifth Circuit, a Chapter 64 proceeding in state court seeking to compel access to further DNA testing, a Section 1983 lawsuit in federal court, and a lawsuit in state court under the Texas Administrative Procedure Act (APA) challenging the Texas lethal-injection protocol. Furthermore, since his execution date was set in November 2010, Leal Garcia alone has filed numerous motions and pleadings to his Section 1983 suit, an appeal of that lawsuit, a Rule 60(b) motion seeking to reopen his second federal petition, an appeal of APA suit to the Texas Supreme Court, a third federal habeas petition, an appeal of the Fifth Circuit’s dismissal of that petition, and a petition for an original writ of habeas corpus—all in addition to the instant petition for certiorari.”).

105. *See* Case Concerning Avena and Other Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31); *see also* Leal Garcia, 68 F. App’x 85.

106. Leal Garcia v. Texas, 131 S. Ct. 2866, 2867 (2011). (Leal Garcia also contended “that the Due Process Clause prohibit[ed] Texas from executing him while such legislation is under consideration,” but the argument was quickly dismissed by Justice Scalia: “The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.”).

107. *Id.*; Consular Notification and Compliance Act, S. 1194, 112th Cong. (2011). The proposed legislation would have given federal courts jurisdiction to review the cases of death row inmates who were not afforded access to their country of origin’s consulate after their arrest, a right which they are guaranteed under the Vienna Convention. Permits an individual who is arrested, detained, or held for trial (but not yet convicted and sentenced) on a charge that would expose the individual to a capital sentence to raise a claim of a violation of the Convention or a comparable provision of

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tioned the Supreme Court on Leal Garcia's behalf, asking the Court to stay the execution.¹⁰⁸ The United States' *amicus* brief expressly asked the Court to stay the execution in support of "future jurisdiction to review the judgment in the proceeding."¹⁰⁹

In an unsigned 5-4 decision delivered by Justice Scalia, the Supreme Court rejected Leal Garcia's request, stating the Court's "task is to rule on what the law is, not what it might eventually be."¹¹⁰ The Court ignored the dissent's concerns of international consequences, instead asserting that "Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation, and we will follow the law as written by Congress."¹¹¹

The Justice Breyer-authored dissent starkly disagreed with the majority's decision to deny a stay of execution.¹¹² The dissent correctly forecasted that the majority's decision would destroy more than the life of a man; it would work to undermine over a hundred years of positive history, harming to a degree the post-war international respect the United States enjoyed with other countries.¹¹³ Justice Breyer, understanding the inevitable international consequences, wished to stay the execution until September, allowing Congress to do its job and preserving international relations with Mexico.¹¹⁴ Staying the execution for a specific period of time would force Congress to act quickly in deciding whether to enact legislation binding state courts with ICJ decisions.¹¹⁵ The dissent argued that Leal Garcia's conviction was never reconsidered at the state level to determine whether failure to contact the consulate on his behalf was in fact harmless error.¹¹⁶ The dissent also argued that the "international court made clear that Leal Garcia [was] entitled to a certain *procedure*, namely a hearing,"

a bilateral international agreement addressing consular notification and access, at a reasonable time after the individual becomes aware of the violation, before the court of jurisdiction. Requires: (1) notification of the appropriate consulate by the detaining authority and consular access to the individual, and (2) the court to postpone any proceedings if necessary to allow for consular access and assistance. Authorizes the court to conduct evidentiary hearings to resolve factual issues.").

108. *Leal Garcia*, 131 S. Ct. at 2867.

109. *Id.*

110. *Leal Garcia*, 131 S. Ct. at 2867.

111. *Id.* at 2868.

112. *Id.* (Breyer, J., dissenting). Justices Ginsburg, Sotomayor, and Kagan joined this dissent.

113. *See id.* at 2868-69.

114. *Id.* at 2870.

115. *Id.*

116. *Id.* at 2869.

which he had yet to receive and which would satisfy the United States' international obligations in light of the *Avena* decision.¹¹⁷

The Court normally gives deference to the Executive in foreign affairs matters and, "it has ordinarily given [the President's] view significant weight in such matters."¹¹⁸ The *Leal Garcia* majority claimed "[w]e have no apparent authority to stay an execution in light of an 'appeal of the President,' presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim."¹¹⁹ However, Justice Scalia's statement appears to be false—or at the very least an overly narrow interpretation of prior Court precedent. The dissent asserted that the All Writs Act gives the Court the power to take action to preserve its "potential jurisdiction," which it should have done in *Leal Garcia*'s case.¹²⁰ Issuance of the writ would have made the issue a federal one, thereby making the Vienna Convention binding on the Supreme Court. Accordingly, the Court would have been required to issue the stay and provide *Leal Garcia* the rehearing following the mandate prescribed by *Avena*.¹²¹

Had the Court asserted its potential jurisdiction, Congress would have been forced to make a decision regarding Senator Leahy's bill—either signing the bill into law or voting it down. Either way, the outcome of *Leal Garcia* would have been based on Congressional intent rather than the Court's divination of Congressional intent. The Court should have taken advantage of the All Writs Act and issued a writ, and in so doing, forced Congress to take an affirmative stance on the matter. By refusing to do so,

117. *Id.* (emphasis added).

118. *Id.* at 2870.

119. *Id.* at 2868 (internal citation omitted).

120. *Id.* at 2870. ("The All Writs Act empowers the federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.' The exercise of this power 'is in the nature of appellate jurisdiction' where direct to an inferior court, and extends to the potential jurisdiction of the appellate court where an appeal is not pending, but may later be perfected."); see also *Hoffman*, *supra* note 27, at 403 (noting that from 1990 through 1999, at least twenty federal courts have allowed use of the All Writs Act as an independent basis for removal); see also *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (Courts have consistently found that courts can issue commands under the All Writs Act "as may be necessary or appropriate" to prevent frustration of orders and is "designed to achieve the rational ends of law").

121. *Leal*, 131 S. Ct. at 2870; see also *Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 603 (holding that the exercise of power under the All Writs Act to issue all writs necessary or appropriate in aid of jurisdiction extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected).

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the Court supplanted the Executive's responsibility and asserted its own opinion as law.¹²²

IV. RELATIONS WITH MEXICO

A. *United States-Mexican Foreign Relations*

*"Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory."*¹²³

Mexico and the United States first formally established diplomatic relations on December 12, 1822, when the United States received Jose Manuel Zozaya, the Mexican Prime Minister, to the United States.¹²⁴ Mexico and the United States have collaborated for over thirty years; in May of 1977, then-United States President Jimmy Carter and then-Mexican President José López Portillo established the U.S. Mexico Consultative Mechanism. This eventually became the Binational Commission, a forum designed to facilitate bilateral meetings between cabinet-level officials from both countries.¹²⁵

Former Mexican President Felipe Calderón actively promoted international human rights and democracy, and sought to increase Mexico's participation in international affairs.¹²⁶ In 2007, then-United States President George W. Bush and then-Mexican President Calderón announced that the two nations would work alongside other Central American countries as part of the Merida Initiative seeking to combat crime in the region.¹²⁷ By the end of 2010, the United States had appropriated over \$1.5 billion for the Merida Initiative alone,¹²⁸ seeming evidence of the United States' commitment to relations with Mexico. A byproduct

122. *Id.*

123. See Brief for the Gov't. of the United Mex. States, *supra* note 30, at *3.

124. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Mexico*, U.S. DEPARTMENT OF STATE: OFFICE OF THE HISTORIAN, <http://history.state.gov/countries/mexico> (last visited Jan. 10, 2012).

125. *U.S.-Mexico Binational Commission*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/wha/ci/mx/c10787.htm> (last visited Jan. 7, 2012).

126. *Mexico: Government*, BROAD COLL. OF BUS., <http://globaledge.msu.edu/countries/mexico/government> (last visited Jan. 10, 2012).

127. *Id.*

128. See *id.*; see also Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me. . . What, Exactly: An Assessment of Economic, Social and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 64 (2007) ("In 1992, the year in which NAFTA began, the United States already purchased approximately three-fourths of Mexico's imports, or over \$35 billion.").

of this increased trade and interaction between the two nations has been a higher occurrence of cross-border legal disputes,¹²⁹ including on matters like consular representation.

A million American citizens live in Mexico and approximately ten million Americans visit Mexico every year.¹³⁰ Over a million people cross the United States-Mexican border on a daily basis.¹³¹ A 2,000 mile-long shared border requires the two governments to interact closely.¹³² The Border Liaison Mechanism was created in 1993 to aid the government in solving border-related issues.¹³³

Chaired by the U.S. and Mexican consuls, the Border Liaison Mechanism operates in ‘sister city’ pairs and have proven to be effective means of dealing with a variety of local issues including border infrastructure, accidental violation of sovereignty by law enforcement officials, charges of mistreatment of foreign nationals, and cooperation in public health matters.¹³⁴

Due to the high volume of people crossing each day, the United States and Mexico must continue working together to protect their specific domestic policies, and the security of the shared border. However, if the United States continues to refuse to uphold its treaty obligations to Mexico, the countries will be unable to work together. This split may have an adverse effect on both countries’ economies, as well as the United States influence in the international sphere. . .

B. Mexico and Texas Relations

Of the over 2000-mile border the United States and Mexico share, 1200 miles is the Texas-Mexico border.¹³⁵ While Texas is an individual state, Texas and Mexico have taken steps to formally recognize a relationship.¹³⁶ The “State of Texas Mexico Office” has existed within Mexico City since 1971.¹³⁷ The Office “works to strengthen trade, investment and tourism ties between Texas and

129. Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 INTER-AM. L. REV. 23, 24 (2000).

130. *U.S. Relations with Mexico*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/r/pa/ei/bgn/35749.htm> (last visited Jan. 10, 2012).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. See Valencia, *supra* note 57, at 460.

136. *Id.*

137. *Id.*

Mexico and ‘provides Texas businesses and communities with a voice in Mexico, as well as contacts to facilitate doing business in Mexico.’”¹³⁸ Texas justifies its place in Mexico City with the following reasons:

As Texas’ closest foreign neighbor and partner in the North America Free Trade Agreement, Mexico is the largest foreign market for Texas merchandise export. In 1998, Texas merchandise exports to Mexico totaled \$36.6 billion. Roughly one-third of all Texas exports are destined for Mexico. Moreover, Texas accounts for nearly half of total U.S. export[s] to Mexico. Texas’ transportation infrastructure serves as the principal conduit for trade between Mexican and U.S. economic centers, and the state’s relationship to Mexico is further strengthened by strong cultural and historical ties.¹³⁹

Further, the United States and Mexico often participate in “Border Governor Conferences” with Texas participating as one of the five states from the United States, and one of ten total participant states.¹⁴⁰

V. THE COURT SHOULD HAVE ISSUED A WRIT AND STAYED LEAL’S EXECUTION

Many government officials and citizens in Mexico strongly opposed the death penalty in the United States and, more specifically, its application to Mexican nationals.¹⁴¹ In *Aveda*, the Court had an available remedy that could have served the dual purposes of saving a man’s life and satisfying the ICJ’s ruling.¹⁴² Issuing a writ, well within the scope of the Supreme Court’s authority, would have saved a man’s life and preserved both the United States’ relations with Mexico and its worldwide reputation.¹⁴³

138. *Id.*

139. *Id.*

140. *Id.* at 461.

141. *See Valencia, supra* note 57, at 461.

142. *See generally* Brief for the Gov’t. of the United Mex. States, *supra* note 30, at *7 (noting that in the ICJ, the United States government ferociously demands consular access for its only citizens and implying that the United States would not stand for the failure to fulfill the ICJ’s ruling if it were in the same position as Mexico is in).

143. The United States has violated the Vienna Convention on Consular Relations several times with several different nations, thus affecting its worldwide reputation; *see Case Concerning Avena and Other Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).; *see also LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27) (Germany); *see also Vienna Convention on Consular Relations (Para. v. U.S.)* 1998 I.C.J. 426 (Nov.

Mexico has fully recognized the resulting double standard—the United States will no doubt demand full compliance with the Vienna Convention when Americans are detained without consular access in Mexico, but it will not provide the same right to Mexican citizens facing death in the United States.¹⁴⁴

In the days following the *Avena* decision, then-President Bush and then-Mexican President Vicente Fox had a seven-minute conversation, during which the two vowed to stay in close contact. The United States and Mexico rely heavily on one another for existence in today's modern world.¹⁴⁵ The United States' inability to provide Mexican citizens with what it calls "a basic human right" has the potential to seriously impair relations with both Mexico and the rest of the world.¹⁴⁶ The dissenters in the *Leal Garcia* case were correct in recognizing what may potentially unfold internationally.¹⁴⁷ Both the Mexican and the United States federal governments warned the Court about the potential negative consequences of its decision, but to no avail.¹⁴⁸

"As a general matter, a treaty 'depends for the enforcement of its provisions on the interest and the honor of governments which are parties to it.'"¹⁴⁹ The execution of a second Mexican national spreads the message that the United States has either little ability or little desire to follow the terms of its treaty obligations.¹⁵⁰ Mexico warned the United States of the repercussions it faces, yet the Court paid no mind.¹⁵¹ "Leal's imminent execution 'would seriously jeopardize the ability of the government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assis-

10) (Paraguay) (dismissed after the execution of the named defendant prior to a decision rendered).

144. See generally Valencia, *supra* note 57; see also Brief for the Gov't. of the United Mex. States, *supra* note 30, at *7.

145. See *U.S. Relations with Mexico*, *supra* note 130 ("U.S. relations with Mexico are important and complex. U.S. relations with Mexico have a direct impact on the lives and livelihoods of millions of Americans—whether the issue is trade and economic reform, homeland security, drug control, migration, or the environment.").

146. See generally *Leal Garcia v. Texas*, 131 S. Ct. 2866, 2866 (2011); see also Brief for the Gov't. of the United Mex. States, *supra* note 30, at *23.

147. See Brief for the Gov't. of the United Mex. States, *supra* note 30, at *23.

148. See *Leal Garcia*, 131 S. Ct. at 2867 (2011).

149. See Alexander, *supra* note 53, at 825 (quoting *Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) (citing *The Head Money Cases*, 112 U.S. 580, 598 (1884)).

150. See Brief for the Gov't. of the United Mex. States, *Leal Garcia v. Texas*, *supra* note 30, at *16.

151. See generally *id.*

tance, and [] efforts to strengthen the common border.”¹⁵² The threat of the death penalty being imposed upon Mexican nationals detained in the U.S. is an issue that frequently plagues relations between both countries and distracts from other pressing foreign relations matters.¹⁵³

“There is a panoply of public policy reasons why Texas should comply with the *Avena* decision. . . the significance of maintaining a strong Texas-Mexico relationship and the importance of fostering an international legal society.”¹⁵⁴ By signing onto the Vienna Convention and the Optional Protocol, the United States agreed to follow the rules of that forum.¹⁵⁵ In pulling out of the Optional Protocol, the United States is attempting to ignore its obligation, and the Supreme Court’s failure to remedy the situation further demonstrates the egregiousness of the United States’ dereliction of its international obligations.¹⁵⁶ Prior to the *Avena* decision, the ICJ “delivered clear judgments on consular notification[s] on two separate occasions, and the United States has either explicitly or implicitly accepted its obligations to adhere to both decisions.”¹⁵⁷

In the twenty-five years prior to the *Avena* decision, the United States executed five Mexican nationals, all of whom had been denied their right to consular assistance under the Vienna Convention.¹⁵⁸ When the Mexican Congress passed a joint resolution asking then-Texas Governor Rick Perry and then-President Bush to halt the 2002 execution of Javier Suarez Medina, sixteen foreign countries filed *amicus* briefs and requests for clemency for Medina.¹⁵⁹ In 2002, Oklahoma Governor Frank Keating denied executive clemency, calling the Vienna Convention violations in Gerardo Valdez’s (another Mexican national named in the *Avena* decision) case, “harmless,” prompting Mexico to commence suit in the ICJ on January 9, 2003.¹⁶⁰ Mexico called the Governor’s actions “‘contrary to international law’ and publicly vowed that it would ‘take all available legal action[] in the United States, as well as international tribunals . . . in order to preserve the life of [its] fellow citizen[s] and obtain clemency.’”¹⁶¹

152. *Garcia*, 131 S. Ct. at 2870 (Breyer, J., dissenting) (internal citations omitted).

153. See Valencia, *supra* note 57, at 462.

154. *Id.* at 460.

155. See *id.* at 495.

156. See *id.*

157. See *id.*

158. See Ray, *supra* note 52, at 1758.

159. *Id.*

160. *Id.*

161. *Id.*

As discussed, on June 14, 2011, Senator Patrick Leahy, a Democratic Senator from Vermont, introduced S.1194: Consular Notification Compliance Act of 2011.¹⁶² The Committee of the Judiciary held hearings regarding the bill on July 27, 2011.¹⁶³ Senator Leahy's bill facilitates compliance with Article 36 of the Vienna Convention for Consular Relations.¹⁶⁴ As proposed, the bill provides:

“[A]ny comparable provision of a bilateral international agreement addressing consular notification and access, if an individual who is not a national of the United States is detained or arrested by an officer or employee of the Federal Government or a State or local government, the arresting or detaining officer or employee, or other appropriate officer or employee of the Federal Government or a State or local government, shall notify the individual without delay that the individual may request that the consulate of the foreign state of which the individual is a national be notified of the detention or arrest.”¹⁶⁵

The goal of the act is to ensure the detained individual has the ongoing ability to communicate freely with and be visited by the consulate office.¹⁶⁶ Additionally, the Compliance Act gives federal courts jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention or a comparable provision of a bilateral international agreement addressing consular notification and access, filed by an individual convicted and sentenced to death by any federal or state court before the date of the enactment of the act.¹⁶⁷ “If the date for the execution of an individual. . . has been set, the court shall grant a stay of execution if necessary to allow the court to review a petition. . .”¹⁶⁸ However, a petitioner must show actual prejudice to their criminal conviction as a result of this violation in order to be successful.¹⁶⁹

Issuance of the writ would have allowed Leal to live while simultaneously pressuring Congress to deciding whether to pass

162. See Consular Notification Compliance Act of 2011, S.1194, 112th Cong. (2011), GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1194> (last visited October 13, 2011).

163. *Id.*

164. *Id.*

165. See *id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. See *id.*

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Senator Leahy's initiative. Several other nations have complained about, and even brought suit against, the United States for similar consular violations. By issuing the writ, the Court would have forced the Senate to determine their position on the matter once and for all: either satisfy the ICJ's ruling in *Avena* or have an international reputation as a world power that does not fulfill its treaty obligations. "Maintaining the status quo is a modest price to pay to ensure that the United States fulfills its international obligations and retains its position on the world stage as a desired treaty partner."¹⁷⁰

VI. CONCLUSION

In executing *Leal Garcia*, the United States has begun its descent down a very slippery slope. The Supreme Court's failure to issue a writ under the All Writs Act enables the United States to sign treaties and essentially hide behind its Constitution when it does not wish to follow the rules. Undoubtedly, the United States remains the world's hegemonic super power. However, continued intransigence by the United States regarding its international commitments, both treaty-based and otherwise, will not only undermine foreign relations with Mexico, but may also severely impact the credibility and influence that define successful foreign relations with all other nations.

170. See Brief for the Gov't. of the United Mex. States, *supra* note 30, at *23.

