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Broadening Executive Power in the Wake of Avena: An American Interpretation of Pacta Sunt Servanda

Houston A. Stokes

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Broadening Executive Power in the Wake of *Avena*: An American Interpretation of *Pacta Sunt Servanda*¹

Houston A. Stokes*

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1. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (1987) (explaining that *pacta sunt servanda* [pacts must be observed] "lies at the core of the law of international agreements and is perhaps the most important principle of international law"); see also *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (stating that "[g]reat nations, like great men [and women], should keep their word").

* Candidate for J.D., Washington and Lee University School of Law, May 2007; B.A., University of Michigan, 2004. I would like to thank Professor Melissa Waters, Travis Barham and Matthew Heaphy for their support, encouragement, and invaluable input throughout this process. I would also like to thank my family—Houston, Diana, and William Stokes—for always supporting me and believing in me.

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I. Introduction

Noting the sparse constitutional text articulating foreign affairs control,² many scholars believe the Framers preferred a system in which the Legislative and Executive branches struggle for control of foreign relations.³ Nevertheless, Supreme Court rulings during the post-Vietnam era have increasingly accepted the broadening of presidential foreign policy-making power.⁴ Given this fact, it

2. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 16 (2d ed. 1996) (discussing the significant lack of constitutional text on foreign relations).

3. See, e.g., *id.* at 84 ("That the Constitution is especially inarticulate in allocating foreign affairs powers . . . serve[s] and nurture[s] political forces inviting struggle."); MARK TUSHNET, *CENTRAL AMERICA AND THE LAW* 32 (1988) (arguing that the Framers "established a political system in which the President and Congress would fight each other for [foreign affairs] power"). But see Dick Cheney, *Congressional Overreaching in Foreign Policy*, in *FOREIGN POLICY AND THE CONSTITUTION* 102 (Robert A. Goldwin & Robert A. Licht eds., 1990) (citing disapprovingly EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 171 (4th rev. ed. 1957)) ("The Constitution does not really distribute powers at random; it is not simply an 'invitation to struggle.'").

4. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 134 (1990) (discussing the recent judicial trend toward favoring executive control of foreign affairs). Dean of Yale Law School, Harold Hongju Koh, notes: "Whether on the merits or on justiciability grounds, the courts have ruled for the president in these cases with astonishing regularity." *Id.* Reacting to this trend, Congress has confronted and challenged the President through legislation that achieves mixed results. See HENKIN, *supra* note 2, at 85 (commenting on the War Powers Resolution and presidents who "have challenged its constitutionality and have sometimes

is not surprising that Presidents steadily attempt to amass foreign policy-making power through unilateral executive action.⁵ In the wake of the International Court of Justice's (ICJ) final judgment in *Case Concerning Avena and Other Mexican Nationals (Avena)*,⁶ President George W. Bush asserted unprecedented control over foreign affairs through dual unilateral executive actions.⁷

In *Avena*, the ICJ held that the United States must afford fifty-one convicted Mexican nationals "review and reconsideration" because of Vienna Convention on Consular Relations (VCCR)⁸ violations.⁹ The Supreme Court intended to review the ICJ's finding in *Medellin v. Dretke*,¹⁰ however, before the Court could rule, President Bush took dual unilateral actions that caused a divided Court to dismiss the case.¹¹ First, President Bush issued a Memorandum to Attorney General Alberto Gonzalez announcing that the states should comply with the ICJ's ruling in only those cases implicated in *Avena*.¹² Second, Bush directed Secretary of State Condoleezza Rice to send a letter to the United Nations Secretary-General Kofi Annan stating that the United States withdrew from the Optional Protocol to the VCCR.¹³ By taking these unilateral steps, the Executive Branch created a number of separation of powers conflicts. Specifically, the Memorandum violates principles of federalism and creates conflict between the Executive Branch and the states.¹⁴ The Memorandum also

flouted its restrictions").

5. See CHARLES L. LOFGREN, *GOVERNMENT FROM REFLECTION AND CHOICE* 38 (1986) (discussing the history of unilateral executive action in foreign policy).

6. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), available at http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imus_judgment_20040331.pdf; see *infra* Part II.A (discussing *Avena*).

7. See *infra* Part II.B–C (explaining the dual unilateral executive actions); Part IV.A (discussing the strategy behind the unilateral actions).

8. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf#search=vienna%20convention%20on%20consular%20relations.

9. *Avena*, 2004 I.C.J. 128 ¶ 153(8).

10. *Medellin v. Dretke*, 544 U.S. 660 (2005); see *infra* Part II.D (explaining *Medellin*).

11. See *Medellin*, 544 U.S. at 666–67 (dismissing the case).

12. See Memorandum from the President of the United States (Feb. 28, 2005), available at <http://www.opiniojuris.org/posts/1109791080.shtml> (determining that the state courts will comply with *Avena*); see also *infra* Part II.B (explaining the Presidential Memorandum); Part IV.A.1 (analyzing the potential effect of the Memorandum).

13. See Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi A. Annan, U.N. Sec'y-Gen. (Mar. 7, 2005) (notifying the United Nations of withdrawal) (on file with the Washington and Lee Law Review); see also *infra* Part II.C (explaining withdrawal); Part IV.A.2 (analyzing the potential effect of withdrawal).

14. See Nicole L. Aeschleman, Comment, *The Vienna Convention on Consular Relations*:

engenders conflict between the Executive and Judicial Branches because it purports to mandate judicial compliance with the *Avena* judgment.¹⁵ In addition, the Memorandum creates conflict between the Executive and Legislative Branches because it acts contrary to the will of Congress.¹⁶ Finally, both unilateral actions create conflict between the Executive and Legislative Branches, because they "dramatically alter the course of U.S. foreign policy"¹⁷ without congressional involvement.¹⁸ Although many academic publications have commented on issues implicated in *Avena* and *Medellin*,¹⁹ this Note remains distinct because it proposes cooperation between the branches instead of executive ambitions favoring broader presidential foreign affairs power.

This Note argues that United States foreign policy throughout history supports the Administration's stance in the Presidential Memorandum.²⁰

Quo Vadas, America?, 45 SANTA CLARA L. REV. 937, 964 (2005) ("[B]ecause the order originates in the federal government and imposes requirements on the state courts, it infringes upon state sovereignty.").

15. See *id.* ("The conflict between the executive branch and the judicial branch exists because the Presidential Order requires the judiciary to review and reconsider the Mexican foreign nationals' claims, a decision typically within the realm of the courts.").

16. See Brief for the States of Alabama, et. al. as Amici Curiae Supporting Respondent at 3, Ex Parte *Medellin*, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (citing Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 353 U.S. 579, 648 (1952)). These states argued that:

[S]ince *Youngstown* the Supreme Court has recognized that the President's power is 'at its lowest ebb' when he acts contrary to the will of Congress . . . Here, the federal habeas corpus statute has carefully limited the situations under which federal authority will reopen state criminal convictions, and that statute plainly bars relief here.

Id.

17. VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* 166 (1991).

18. See *id.* ("In this situation, even assuming that the president has the support of Congress, he would be wise to obtain an affirmative endorsement of that policy from Congress in the form of a 'Consent-of-the-Congress' resolution, a joint resolution of Congress, or otherwise."); see also HENKIN, *supra* note 2, at 85 (discussing the need for cooperation between the political branches on foreign affairs).

19. See, e.g., Aeschleman, *supra* note 14, at 939 (2005) (proposing ways to eliminate future ICJ inquiries into United States VCCR violations); Sandra J. Weiland, Note, *The Vienna Convention on Consular Relations: Persuasive Force or Binding Law?*, 33 DENV. J. INT'L L. & POL'Y 675, 676 (2005) (arguing that "the United States should synthesize the Vienna Convention into its domestic law"); Laura A. Young, Note, *Setting Sail with The Charming Betsy: Enforcing the International Court of Justice's Avena Judgment in Federal Habeas Corpus Proceedings*, 89 MINN. L. REV. 890, 891 (2005) (arguing for the use of *The Charming Betsy* canon to avert potential collisions between the ICJ and domestic courts).

20. This Note does not take a stand on whether the President possesses the extralegal authority to mandate compliance with the *Avena* judgment. Rather, it points out the strong possibility that judicial hesitancy surrounding foreign affairs may leave the legality of the

Nevertheless, unilateral executive withdrawal from the Optional Protocol significantly harms the foreign policy interests of the United States. The policy reasons cited as the basis for the Presidential Memorandum do not support withdrawal from the Optional Protocol. Moreover, this Note argues that the Executive Branch's unilateral actions illustrate a situation that some scholars have termed legal, but nonetheless unconstitutional.²¹ Specifically, the President's actions may be technically legal; they are not, however, in the spirit of the shared foreign policy-making tradition enshrined in the American form of government. Finally, this Note proposes congressional involvement and judicial review as the most effective means to accomplish the United States' ultimate goal of a singular, cohesive foreign policy.²²

To accomplish the preceding goals, Part II provides necessary background on the *Avena* decision, both unilateral executive responses, and *Medellin*. Part III lays out the incongruence between the purpose of the Presidential Memorandum and the effects of withdrawal from the Optional Protocol. It details the issues involved and weighs the responsibilities of the President in light of the federalism concerns of the various states.²³ In contrast, Part IV surveys the forces contributing to the adoption of an incongruent and potentially detrimental foreign policy. It analyzes the ongoing battle between government branches concerning foreign policy control, notes the lack of congressional response, and comments on the reluctance of the Judicial Branch

Presidential Memorandum ambiguous. Further, this Note does not argue that the United States acknowledgment of and adherence to international law necessarily bolsters United States interests. Rather, this Note asserts that the United States should never demand treatment from foreign nations it is unwilling to accord itself.

21. KRAFT, *supra* note 17, at 162 (arguing that unilateral presidential exercise of foreign affairs power may reside "within the black letter of the law, but nonetheless is 'unconstitutional[]' in the sense that his action is wholly destructive of the norms of our constitutional scheme"). Kraft notes: "When that collective [foreign policy] decision making process is ignored by the president . . . then the consequent action is unconstitutional, even though it may not be technically illegal and even though . . . a legal remedy may not be available to redress the underlying wrong." *Id.*

22. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936) (noting that "[e]ven before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies"); THE FEDERALIST NO. 42, at 260 (James Madison) (Clinton Rossiter ed., 2003) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

23. See Brief for Former United States Diplomats as Amici Curiae Supporting Petitioner at 13, *Ex Parte Medellin*, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (No. WR-50,191-02) (stating that "the President has made a complex and delicate calculation taking into account the need of the United States to comply with its international obligations, to pursue its foreign policy interests, to enforce its laws effectively against foreign nationals in the United States, and to protect Americans abroad").

to resolve specific conflicts. Part V argues that the Bush administration's actions may be legal in a technical sense, but they remain ultimately unconstitutional. It explores the relationship between legality and constitutionality, shows that the Executive Branch tends to think of foreign policy decisions in strictly legal rather than constitutional terms, and discusses the negative effects of the unilateral executive responses to *Avena*.

II. *The Avena Decision and the Unilateral Executive Responses*

A. *Avena*

Three cases alleging that the United States violated VCCR consular notification requirements have reached the ICJ.²⁴ This consular notification requirement seeks to ensure that non-citizen defendants can alert their home country of pending criminal proceedings.²⁵ Signed by 166 countries, the VCCR obligates a country pursuing criminal charges against a foreign national to inform the detainee without delay of their right to notify the consulate of their home country.²⁶ If the detainee requests consular notification, the detaining authorities must inform the consulate and forward any communication the detained individual desires sent to the consulate.²⁷ Moreover, the VCCR grants the consular authorities the right to visit the detained individual, to continue correspondence with him or her, and to arrange legal representation for the person concerned.²⁸

In 1998, the Republic of Paraguay brought a claim to the ICJ alleging that the United States failed to notify Angel Francisco Breard of his VCCR rights

24. Application Instituting Proceedings Submitted by the Government of Mexico, (Mex. v. U.S.), (Jan. 9, 2003), available at http://www.icj-cij.org/icjwww/idocket/imus/imus_order/imus_iapplication_20030109.PDF; Application Instituting Proceedings Submitted by the Government of Paraguay (Para. v. U.S.) (Apr. 3, 1998) [hereinafter Paraguay Application], available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>; Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany (F.R.G. v. U.S.) (Mar. 2, 1999) [hereinafter Germany Application], available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (on file with the Washington and Lee Law Review).

25. See Frederic L. Kirgis, *President Bush's Determination Regarding Mexican National and Consular Convention Rights*, The American Society of International Law, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309.html> (discussing the purpose of the VCCR) (on file with the Washington and Lee Law Review).

26. See *id.* (explaining the requirements of the VCCR). VCCR requirements apply when the country detaining a foreign national and the detainee's home country are parties to the VCCR. *Id.*

27. See *id.* (explaining the requirements of the VCCR).

28. See *id.* (explaining the requirements of the VCCR).

after his arrest.²⁹ Six days after Paraguay initiated proceedings, the ICJ issued a provisional order asserting that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."³⁰ Despite this order, the United States Supreme Court denied Breard's application for a writ in *Breard v. Greene*.³¹ On April 14, 1998, before the ICJ produced a final judgment, the Commonwealth of Virginia executed Breard.³² On March 2, 1999, the Federal Republic of Germany (FRG) brought a claim to the ICJ alleging the United

29. See Paraguay Application, *supra* note 24 (reporting Paraguay's claim).

30. See Vienna Convention on Consular Relations, 1998 I.C.J. 246, 258 (Provisional Order of Apr. 9) available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> (ordering the United States to stay the execution pending the final judgment).

31. See *Breard v. Greene*, 523 U.S. 371, 378 (1998) (denying petition for habeas corpus, certiorari, and leave to file a bill of complaint on the petition alleging prejudice based on a failure to raise in state court the violation of rights under an international treaty). In *Breard*, the Supreme Court considered whether Breards' VCCR claim should get review in federal court because the treaty acts as the "'supreme law of the land' and thus trumps the procedural default doctrine." *Id.* at 375. At the time *Breard* was considered by the Court, Angel Francisco Breard was scheduled to be executed by the Commonwealth of Virginia. *Id.* at 372. Breard, 20 years old and a citizen of Paraguay, was convicted of attempted rape and murder in 1993. *Id.* On appeal, the Virginia Supreme Court affirmed Breard's convictions and sentence, and the Supreme Court denied certiorari; state collateral relief was subsequently denied as well. *Id.* In August of 1996, Breard filed a motion for habeas relief in Federal District Court alleging a VCCR violation. *Id.* The District Court held that this claim had no merit because of procedural default rules. *Id.* On April 3, 1998, Paraguay initiated proceedings against the United States at the ICJ, alleging that the United States violated the VCCR in respect to Breard. *Id.* at 374. On April 9, 1998, the ICJ released a provisional order requesting that the United States stay the execution. *Id.* Following this development, Breard filed a petition for an original writ of habeas corpus and a stay application with the Supreme Court in order to "enforce" the ICJ's provisional order. *Id.* The Supreme Court reasoned that Breard's claims do not trump the procedural default doctrine. *Id.* at 375. Although the VCCR has been in continuous effect since 1969, the Court pointed out that Congress had enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996; it provides that a habeas petitioner alleging that detention occurred in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." *Id.* at 376 (citing 28 U.S.C. §§ 2254(a), (e)(2) (Supp. IV 1994)). The Court found that this rule denied Breard the right to assert his claim that denial of his VCCR rights prejudiced him. *Id.* at 376. Finally, the Court articulated a level of dismay that the issue had to be heard when the ICJ was still considering a final holding; however, the Court found nothing in the existing case law that would allow it to require a stay of execution. *Id.* at 378. Justices Stevens, Breyer and Ginsburg all dissented, arguing that the court should grant the stay. *Id.* at 379-81. Consequently, the petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, and the petitions for certiorari were denied. *Id.* at 378.

32. See Amnesty International, *The Execution of Angel Breard: Apologies are Not Enough*, May 1, 1990, <http://web.amnesty.org/library/Index/engAMR510271998> (last visited May 31, 2006) (commenting on the execution of Breard) (on file with the Washington and Lee Law Review).

States violated the VCCR rights of Walter LaGrand.³³ The ICJ issued a provisional order asserting that the United States "should" stay LaGrand's execution pending a final judgment by the ICJ.³⁴ Despite this order, the Supreme Court denied the FRG and LaGrand's dual applications for a stay of execution and a writ.³⁵ On March 3, 1999, the state of Arizona executed LaGrand.³⁶

In *Avena*, Mexico alleged that the United States violated the VCCR with respect to fifty-one Mexican nationals facing the death penalty in various states.³⁷ The ICJ held that the United States had violated the VCCR by failing to inform Medellín and the other fifty Mexican nationals of their right to notify Mexican consular officials of their detention.³⁸ The ICJ found that the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals" to assess whether the violations "caused actual prejudice," without procedural default rules precluding such review.³⁹ Significantly, the ICJ dropped the passive wording of the provisional orders regarding Breard and LaGrand,⁴⁰ producing much more forceful language in *Avena*.⁴¹

The March 2004 *Avena* decision marked the second time the ICJ ruled against the United States in finding it violated VCCR obligations.⁴² The ICJ

33. See Germany Application, *supra* note 24 (detailing the claim filed by the FRG).

34. *LaGrand* (F.R.G. v. U.S.), 1999 I.C.J. 9, 16 (June 27).

35. See *F.R.G. v. U.S.*, 526 U.S. 111, 111 (1999) (denying motion of the FRG for leave to file a bill of complaint and motion for preliminary injunction against the United States and Arizona Governor Jane Dee Hull); *LaGrand v. Ariz.*, 526 U.S. 1001, 1001 (denying the application for stay of execution and the petition for a writ of certiorari). In both cases, Justices Breyer and Stevens dissented, arguing that the Court should grant a stay of execution. *F.R.G.*, 526 U.S. at 112–14; *LaGrand*, 526 U.S. at 1001.

36. See Wikipedia, *LaGrand case*, http://en.wikipedia.org/wiki/LaGrand_case (last visited May 31, 2006) (discussing the *LaGrand* case) (on file with the Washington and Lee Law Review).

37. See *Medellín v. Dretke*, 544 U.S. 660, 663 (2005) (detailing the allegations).

38. *Id.*

39. *Id.* (quoting Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶¶ 121–23, 153(8) (Mar. 31)).

40. See Vienna Convention on Consular Relations, 1998 I.C.J. 246, ¶ 41(I) (Provisional Order of Apr. 9) (stating that the United States "should take all measures at its disposal" to prevent the executions pending the final ICJ judgment); *LaGrand* (F.R.G. v. U.S.), 1999 I.C.J. 9, ¶ 29(I)(a) (Provisional Order of Mar. 3) (same).

41. See Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶ 153(9) (Mar. 31) available at http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf (stating that the United States "shall take all measures necessary" to prevent the executions of the fifty-one Mexican nationals).

42. *Id.* ¶ 153(4); see also *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 514–16 (June 21)

determined that the United States must provide "review and reconsideration" of the convictions and sentences of the Mexican nationals to determine whether they experienced prejudice because of the VCCR violations.⁴³ The ICJ holding in *Avena* elaborated that the remedy for the violations should come from greater judicial proceedings and not at a final clemency stage.⁴⁴ In many ways the *Avena* ruling demonstrates the ICJ's "attempt to find middle ground on this divisive issue."⁴⁵ Specifically, many academic publications have discussed the manner in which the *Avena* judgment allows domestic control over potential enforcement of ICJ holdings within the United States.⁴⁶

In order to comment on the executive responses, one must first understand the differing state responses to *Avena*. A spokesman for Texas Attorney General Greg Abbott concisely articulated the state's position concerning the *Avena* decision and the Presidential Memorandum: "The State of Texas believes no international court supersedes the laws of Texas or the laws of the United States. We respectfully believe the executive determination (Presidential Memorandum) exceeds the constitutional bounds of federal authority."⁴⁷ Despite the potent legal opposition Texas faced in the Texas Court of Criminal Appeals, the Attorney General decided to continue the legal battle.⁴⁸ In contrast, the state of Oklahoma approached the issue much

(holding that the United States breached LaGrand's Vienna Convention rights concerning consular notification). Notably, the ICJ's *LaGrand* ruling came after LaGrand had been executed by the state of Arizona.

43. See *Avena*, 2004 I.C.J. 128, ¶ 138–39, ¶ 153(11) (holding that proper review and reconsideration processes must mandate examination of the initial violation and resulting prejudice). *Avena* also held that "full weight is given to the violation of the rights set forth in the Vienna Convention" regardless of the "actual outcome of such review and reconsideration." *Id.*

44. *Id.* ¶ 141–43. In the ICJ's eyes, the clemency process failed in Breard's and LaGrand's cases.

45. See Young, *supra* note 19, at 896 (discussing *Avena*).

46. See, e.g., Hadar Harris, "We Are the World"—Or Are We? *The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions*, 12 HUM. RTS. BRIEF 5 (2005) (analyzing the domestic effects of *Avena*); Aeschleman, *supra* note 14 (same); Weiland, *supra* note 19 (same); Young, *supra* note 19 (same).

47. Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16; see also Weiland, *supra* note 19, at 685 (commenting on the state responses to *Avena*). Weiland argues: "This result indicates that federalism tensions arise when balancing the United States' compliance and commitment to international law with the autonomy of the state's separate criminal justice systems. Texas Governor Rick Perry stated that the International Court of Justice 'does not have jurisdiction in Texas.'" *Id.*

48. See Julian Ku, *Texas' Last Stand on Medellin*, *Opinio Juris*, Mar. 8, 2005, http://lawofnations.blogspot.com/2005_03_06_lawofnations_archive.html (last visited June 2, 2006) (discussing the legal team gathered to argue on Medellin's behalf) (on file with the Washington and Lee Law Review). Ku noted:

differently after *Avena* and *Torres v. Mullin*.⁴⁹ The Oklahoma Pardon and Parole Board's decision to order an indefinite stay of Torres's execution was in response to their concern about a possible "miscarriage of justice," and the subsequent grant of clemency from the Governor displays a level of uneasiness with VCCR violations. The Oklahoma governor's decision reflected a concern for human rights and reciprocity for American citizens abroad rather than deference to the ICJ. Nevertheless, the drastic differences in the responses from Oklahoma and Texas illustrate the lack of a consistent understanding of how states should interpret ICJ rulings pertaining to VCCR violations.⁵⁰

I am a bit surprised that Texas is going to continue to fight this because now it will not only have to fight Medellin's attorneys, Mexico's attorneys, but now also the attorneys for the U.S. government. This may not quite be a legal version of the Alamo, but it's getting close.

Id.

49. See Aeschleman, *supra* note 14, at 951–54, 955–56 (discussing the Oklahoma reaction to the ICJ holding concerning Osvaldo Torres); *Torres v. Mullin*, 540 U.S. 1035, 1035 (2003) (denying application for writ of certiorari). In *Torres*, the Supreme Court considered Osvaldo Torres's petition for a writ of certiorari to review his case in light of the conflict between the U.S. Supreme Court's ruling in *Breard* and the ICJ's ruling in *LaGrand*. Aeschleman, *supra* note 14, at 951. Torres, a Mexican national, was convicted of murder and sentenced to death in Oklahoma. *Id.* After exhausting his post-conviction remedies, Torres petitioned the federal court for habeas corpus relief. *Id.* Because Torres did not raise his VCCR claim in state court, the Federal District Court held that application of the procedural default doctrine denied Torres's writ for a certificate of appealability. *Id.* The Tenth Circuit affirmed. *Id.* Torres then petitioned the U.S. Supreme Court for a writ of certiorari. *Id.* The Supreme Court now had the chance to reconcile the conflict between the ruling in *Breard* and previous ICJ findings concerning VCCR violations within the United States. *Id.* Before the Supreme Court denied Torres's writ, Mexico filed the *Avena* case, which included Torres, with the ICJ. *Id.* at 952. Mexico then submitted a request to the U.S. Supreme Court requesting that the Court wait to rule on Torres's writ until after the ICJ ruled in *Avena*. *Id.* The Supreme Court denied Torres's writ. *Id.* Notably, Justice Breyer strongly dissented to the denial. *Id.* Breyer argued that the Court should wait until after the ICJ had ruled and that the Court needed further briefing on the precise international legal issues of the case. *Id.* The ICJ then granted a provisional measure to stay the execution of three Mexican nationals, including Torres, who faced execution in the imminent future. *Id.* at 952–53. "Oklahoma agreed to a temporary stay of execution for the protected foreign national on its death row, Torres." *Id.* at 953. On May 13, 2004, days before his scheduled execution, Oklahoma Governor Brad Henry then granted clemency for Torres. Death Penalty Information Center, *Oklahoma Governor Grants Clemency to Mexican Foreign National*, <http://www.deathpenaltyinfo.org/article.php?did=996&scid=64> (last visited June 2, 2006) (on file with the Washington and Lee Law Review). For Torres, the state of Oklahoma's reconsideration in light of the ICJ judgment saved his life, despite the Supreme Court's denial of certiorari.

50. See Aeschleman, *supra* note 14, at 971 ("[L]ower courts are still left without guidance on how to address future cases. If the situation remains the same, it is likely that courts will continue to be divided on whether to apply the procedural default doctrine to these cases.").

B. The Presidential Memorandum

On February 28, 2005, President George W. Bush signed a novel Memorandum,⁵¹ declaring:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), 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.⁵²

Thereafter, the Attorney General sent letters to the various state attorneys general, informing them of the President's determination and its implications.⁵³

As Governor of Texas, President Bush received numerous notices from the State Department stressing the extreme importance of reciprocal enforcement of the Vienna Convention on Consular Rights.⁵⁴ However, President Bush's Memorandum stands in stark contrast with the previous

51. See Ku, *supra* note 48 (discussing the unprecedented nature of the memorandum).

52. Memorandum from the President of the United States (Feb. 28, 2005).

53. See Letter from Alberto R. Gonzalez, U.S. Attorney Gen., to Honorable Greg Abbott, Tex. Attorney Gen. (Apr. 5, 2005) (explaining the position of the Executive Branch in relation to *Avena*, the presidential determination, withdrawal from the Optional Protocol, and the responsibilities of state courts affected by these events).

54. See Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT'L L. 367, 376 (2002) (quoting Secretary Albright's Nov. 27, 1998 letter to Governor Bush). Secretary Albright wrote:

As Secretary of State, ensuring the protection—of American citizens abroad—including over 300 imprisoned Texans last year—is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.

Id.

Administration's position on similar ICJ provisional measures.⁵⁵ In its amicus curiae brief in *Breard*, the United States stated that: "The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here."⁵⁶

Unlike the Bush administration, the Clinton administration did not have to consider a final ICJ ruling demanding "review and reconsideration."⁵⁷ Following Breard's execution, the United States government found itself in the embarrassing position of having to apologize to Paraguay for the VCCR violation.⁵⁸ The Clinton administration's predicament and the Supreme Court's ruling in *Breard* exemplify the difficulties facing the federal government with repeated state violations of the VCCR.

C. *Withdrawal from the Optional Protocol*

The United States ratified the Optional Protocol to the Vienna Convention in 1963.⁵⁹ Because the United States wanted to produce a body responsible for hearing alleged consular notification violations, "[b]oth the [Vienna] Convention [on Consular Relations] and the Optional Protocol . . . are substantially the product of U.S. leadership."⁶⁰ In fact, the United States actually voted "against a motion by the Yugoslav delegation that would have weakened the compulsory jurisdiction of the ICJ."⁶¹ The Protocol provides that

55. See Brief for the States, *supra* note 16, at 8 (discussing the Clinton administration's approach to a similar ICJ provisional measure).

56. Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 and 97-8214), *quoted in* Brief for the States, *supra* note 16, at 8.

57. See Vienna Convention on Consular Relations, 1998 I.C.J. 246, 258 (Provisional Order of Apr. 9) (ordering the United States to "not execute pending the final decision").

58. U.S. Dep't of State, Office of the Spokesman, Text of Statement Released in Asuncion, Para., (Nov. 4, 1998); see William J. Aceves, *Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 927 (1999) (commenting on the United States' response to the execution of Breard).

59. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 21, 1963, 21 U.S.T. 325.

60. See Brief for American Citizens Abroad (ACA) as Amicus Curiae Supporting Petitioner at 8, *Ex Parte Medellín*, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (discussing the diplomatic process that led to the Optional Protocol).

61. See *id.* at 11 (detailing the persistence of the United States diplomats in relation to the formation of the Optional Protocol). The Yugoslav delegation wished to add a section to the United States proposal stating that:

"[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."⁶² A party to the Optional Protocol can bring a dispute with another party to the Optional Protocol,⁶³ but the U.N. Security Council provides the only means for enforcing an ICJ judgment.⁶⁴ Because the United States sits as a permanent member on the Council with veto power, the United States can block any Security Council action aimed at mandating United States compliance.⁶⁵

In the past, the United States has depended on the ICJ as a forum for redress of international grievances.⁶⁶ Following the 1979 takeover of the United States embassy in Tehran, the United States initiated the first claim ever to utilize the ICJ's compulsory jurisdiction under the Optional Protocol.⁶⁷ That case led to the United States obtaining a favorable judgment ordering Iran to comply with the Vienna Convention.⁶⁸ After Iran's failure to comply with the ICJ ruling, the United States condemned Iran's position.⁶⁹ In response to Iran's refusal to abide with the ICJ's order to release the hostages, President Carter asserted that Iran was showing "contempt, not only for international law, but for

Any contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation.

See Report of the U.S. Delegation to the U.N. Conference on Consular Relations, Vienna, Austria, Mar. 4 to Apr. 22, 1963, *reprinted in* S. EXEC. DOC. E, 91st Cong., 1st Sess., May 8, 1969, at 72-73 (discussing the United States delegations' experiences at the United Nations Conference on Consular Relations).

62. Optional Protocol, *supra* note 59, at art. I.

63. *Id.*

64. See Aeschleman, *supra* note 14, at 975 (discussing ICJ judgment enforcement).

65. *Id.*; see Dr. Danesh D. Sarooshi, *Security Council*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/security/gensec.htm> (last visited June 2, 2006) (discussing the Security Council veto option) (on file with the Washington and Lee Law Review).

66. See Brief for Foreign Sovereigns as Amici Curiae Supporting Petitioner at 6, *Ex Parte Medellín*, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (noting cases the United States has commenced before the ICJ); International Court of Justice: List of Cases Brought Before the Court Since 1946, <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited June 4, 2006) (recording the cases heard by the ICJ since 1946) (on file with the Washington and Lee Law Review).

67. Brief for Foreign Sovereigns, *supra* note 66, at 6.

68. United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1980 I.C.J. 3, ¶ 95, Judgment, (May 24).

69. See Brief for Foreign Sovereigns, *supra* note 66, at 6 (noting the United States assertion that Iran must comply with an ICJ judgment) (citing *Muskie Issues a Plea on Hostages*, N. Y. TIMES, Aug. 30, 1980, at A3).

the entire international structure for securing the peaceful resolution of differences among nations."⁷⁰ United States diplomats have often called upon Iraq, Syria, North Korea, and China to comply with VCCR standards when detention of American citizens occurs in those countries.⁷¹ Moreover, the United States has been a party to more ICJ cases than any other nation, and has initiated ICJ proceedings more often than any other country.⁷²

On March 7, 2005, United States Secretary of State Condoleezza Rice notified the United Nations Secretary-General of the United States' withdrawal from the Optional Protocol:⁷³ "This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."⁷⁴ This letter effectively ended the potential for further ICJ rulings against the United States concerning VCCR violations because the Optional Protocol established the ICJ's jurisdiction to hear such cases.⁷⁵ It also effectively ended the United States' ability to initiate ICJ proceedings on behalf of American citizens detained abroad.

70. Philippe Sands, *An Execution Heard Around the World*, L.A. TIMES, Apr. 16, 1998, at B9 (quoting President Carter's statement concerning the Iran hostage crisis).

71. See *Transcript of State Dep't Regular Briefing*, FED. NEWS SERV., July 15, 1999 (commenting on the detention of a United States citizen, James Rubin, State Department Spokesman, stated: "We remind the government of North Korea of its obligation under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. Citizens"); *Transcript of State Dep't Regular Briefing*, FED. NEWS SERV., Aug. 19, 1999 (commenting on a request for access and immediate grant of access to U.S. citizen detained in China); *Iraqis Refuse Access to Americans for Second Day*, ASSOCIATED PRESS, Apr. 19, 1995 (quoting State Department spokesman: "Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We're disappointed because that is their legal obligation under the Vienna Convention"); S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 729 (1995) (documenting American agitation with notification delay).

72. See Brief of ACA at 11, Ex Parte Medellín, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (noting that the United States utilizes the ICJ more than any other nation).

73. See Letter from Condoleezza Rice, *supra* note 13 (informing of withdrawal from the Optional Protocol).

74. *Id.*

75. See *supra* note 24 and accompanying text (noting cases brought to the ICJ since 1998 pertaining to the United States' VCCR violations).

D. Medellín v. Dretke

Medellín, a Mexican national, confessed to partial involvement in the 1993 gang rape and murder of two girls in Texas.⁷⁶ The Texas Court of Criminal Appeals affirmed his conviction and sentence of death on direct appeal.⁷⁷ Medellín filed a state habeas corpus action, alleging for the first time that Texas had not notified him of his required VCCR rights.⁷⁸ Both the state trial court and the Texas Court of Criminal Appeals summarily affirmed.⁷⁹ In response, Medellín filed a federal habeas corpus petition, raising the VCCR claim.⁸⁰ While Medellín's application to the Court of Appeals for the Fifth Circuit was pending, the ICJ issued its decision in *Avena*.⁸¹ Based on Medellín's procedural default and previous holdings that the VCCR does not create individually enforceable rights, the Court of Appeals denied Medellín's application for a certificate of appealability.⁸² The Court of Appeals gave no dispositive effect to the ICJ's *Avena* judgment.⁸³ Instead, the Fifth Circuit held that previous Supreme Court precedent controlled despite the existence of an ICJ judgment that procedural default does not preclude raising the VCCR claim on appeal.⁸⁴

During the course of Supreme Court litigation, President Bush issued the Presidential Memorandum.⁸⁵ In response, Medellín filed a successive state application for a writ of habeas corpus based on the President's

76. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31); *see infra* Part II.A (examining the ICJ ruling in *Avena*).

82. *Medellín v. Dretke*, 544 U.S. 660, 663 (2005).

83. *Id.*

84. *See Medellín v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004) (holding that Supreme Court precedent controlled despite ICJ rulings in conflict). The Fifth Circuit stated: "Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims . . . [O]nly the Supreme Court may overrule a Supreme Court decision. The Supreme Court has not overruled *Breard*." *Id.*; *see also* Christopher J. Le Mon, *Post-Avena Application of the Vienna Convention on Consular Relations by United States Courts*, 18 LEIDEN J. OF INT'L L. 215, 230 n.89 (2005) (noting that the inclusion of this portion of the Fifth Circuit's opinion amounts to an invitation for the Supreme Court to grant certiorari).

85. *See* Memorandum, *supra* note 12; *see supra* Part II.B (examining the presidential memorandum).

memorandum and the *Avena* judgment.⁸⁶ In *Medellin v. Dretke*, the Supreme Court considered two questions:

[F]irst, whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider petitioner José Medellin's claims for relief under the Vienna Convention on Consular Relations . . . without regard to procedural default doctrines; and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment.⁸⁷

The Supreme Court noted that the "state proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that the ICJ required, and that Medellín now seeks in this proceeding."⁸⁸ Because of the pending successive state habeas corpus proceedings, and because of threshold procedural barriers that could foreclose the availability of federal habeas corpus relief, the Court dismissed the writ of certiorari as improvidently granted.⁸⁹

III. Incongruent Foreign Policy

Part III of this Note asserts that the Bush administration's dual unilateral responses to the *Avena* decision form an incongruent foreign policy. It details the historic foreign policy objectives offered by the administration in support of the Presidential Memorandum. Then, it examines the unconvincing foreign policy objectives offered by the Administration in support of the withdrawal from the Optional Protocol. Finally, it demonstrates that withdrawal works against the objectives offered in support of the Presidential Memorandum.

86. *Medellín v. Dretke*, 544 U.S. 660, 663–64 (2005); *see also* Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex Parte Medellin*, Trial Cause Nos. 67,5429 and 67,5430 (Tex. Crim. App.), at 13 (filed Mar. 24, 2005) ("President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law.").

87. *Medellin*, 544 U.S. at 661–62.

88. *Id.* at 662.

89. *See id.* at 666–67 (dismissing the writ as improvidently granted); *see also* *Ex Parte Jose Ernesto Medellin*, No. AP-75,207, 2006 Tex. Crim. App. LEXIS 2236, at *31, 45, 74 (2006) (holding that "*Avena* is not binding federal law," that the President's "unprecedented" memorandum exceeds "his constitutional authority by intruding into the independent powers of the judiciary" and "cannot be sustained under the power of the Executive to ensure that the laws are faithfully executed.") (citing *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006)).

A. *The Presidential Memorandum: Policy Considerations*

In the area of foreign affairs, the Department of Justice provides a significant portion of the legal analysis and representation of the Executive Branch.⁹⁰ Authoring an amicus curiae brief in the Court of Criminal Appeals of Texas, the Department of Justice argued that the issues raised in *Medellin* deal with critical foreign policy objectives.⁹¹ Along those lines, the brief asserted three important purposes served by the Presidential Memorandum.⁹² First, the President wants to "protect the interest of United States citizens abroad."⁹³ Second, he wants to promote "the effective conduct of foreign relations."⁹⁴ Third, compliance "underscores the United States' commitment in the international community to the rule of law."⁹⁵

1. *United States Citizens Abroad*

United States citizens traveling or living overseas can benefit from the assistance the United States government will provide them if they find themselves facing a foreign criminal justice system.⁹⁶ American Citizens Abroad,⁹⁷ a nonprofit,

90. See H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 538 (1999) (noting that the Department of Justice shares jurisdiction over legal issues involving foreign affairs with other legal analysts working for the Executive Branch).

91. See Brief for the United States as Amicus Curiae at 12–13, *Ex Parte Medellin*, No. AP-75,207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005) (articulating the administration's position).

92. See *id.* at 13 (discussing the reasons the President decided to attempt to mandate judicial compliance with the *Avena* decision).

93. *Id.*

94. *Id.*

95. *Id.*

96. See Brief for American Citizens Abroad, *supra* note 60, at 2 (discussing United States citizens facing criminal prosecution in other countries). The State Department reports that over 2,500 United States citizens are arrested abroad each year. OFFICE OF OVERSEAS CITIZENS SERV., U.S. DEP'T OF STATE, PUBL'N NO. 10252, OVERSEAS CITIZENS SERVICES (2004), available at www.internationalbenefits.com/travel-tips/overseas-citizens-services.htm (last visited June 6, 2006). The total that the State Department calculated does not include the United States citizens detained outside the official criminal justice process; the final calculation reveals that about 6,000 Americans are arrested or detained abroad every year. Kevin Herbert, *Threat to Citizens Overseas*, in *The Terrorist Threat to American Presence Abroad: A Report of a Consultation of the Critical Incident Analysis Group and The Institute for Global Policy Research* (Univ. of Virginia) Apr. 12–13, 1999 at Part II.2.

97. See American Citizens Abroad, <http://www.aca.ch/> (last visited Feb. 11, 2006) (defining the mission of American Citizens Abroad as providing assistance to the United States Government in "developing cohesive national policies dealing with Americans abroad") (on file with the Washington and Lee Law Review).

nonpartisan association dedicated to serving and defending the interests of individual United States citizens worldwide, explained the needs of United States citizens:

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.⁹⁸

The Framers understood that all nations share a mutual interest in defending the rights of their citizens while they spend time outside of their home country.⁹⁹ Moreover, the Constitution provides the Judicial Branch the authority to review cases concerning this issue.¹⁰⁰

The United States has a long history of using diplomatic channels to achieve the release of American citizens imprisoned overseas.¹⁰¹ Because numerous United States citizens were imprisoned in foreign nations without due process, Congress enacted the Protection of Citizens Abroad statute in 1868.¹⁰² Notably, President of the International Court of Justice, U.S. jurist Stephen M. Schwebel, commented that "the citizens of no State have a higher interest in the observance of those [consular notification] obligations than the peripatetic citizens of the United States."¹⁰³ The Supreme Court also

98. Brief for American Citizens Abroad, *supra* note 60, at 2.

99. See THE FEDERALIST NO. 80, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (discussing the "Powers of the Judiciary"). Hamilton stated:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or pervasion of justice by the sentences of courts, as well as in any other manner, is with reasons classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

Id. at 475.

100. See *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348–49 (1809) (noting that federal courts have been given Article III jurisdiction over treaty claims so that "all persons who have real claims under a treaty should have their causes decided by the national tribunals"); *cf.* *Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) ("Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law.").

101. See Brief for American Citizens Abroad, *supra* note 60, at 4 (discussing the history of the United States "exerting diplomatic efforts at the highest level to secure the release of American citizens unjustly imprisoned overseas"); see also *Meade v. United States*, 76 U.S. (9 Wall.) 691, 693 (1869) (noting that the imprisonment in Spain of American citizen Meade in 1816 came to an end when he was "finally released only by reason of the active interposition of the government of the United States in his behalf").

102. See 22 U.S.C. § 1732 (2000) (Protection of Citizens Abroad) (derived from act of July 27, 1868, ch. 249, Sec. 3, 15 Stat. 224) (detailing the responsibilities of the President when a United States citizen is detained abroad without due process).

103. Vienna Convention on Consular Relations (Para. v. U.S.), I.C.J. Reports 1998 (Order

recognized that the same rights afforded the United States by other countries should be reciprocally afforded to foreign countries.¹⁰⁴ In this vein, the Presidential Memorandum follows the historical policy of the United States in securing the rights of American citizens detained in foreign countries.¹⁰⁵

Continuing the longstanding American policy remains necessary because failing to enforce the VCCR within the United States may "have grave consequences for U.S. citizens abroad."¹⁰⁶ American Citizens Abroad spoke to this point when they stated:

In a legal system that has no independent enforcement mechanism, the integrity of the process depends on nothing less than the acceptance of mutually shared obligations. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. This notion of reciprocity is both an inescapable reality and the animating force to a bedrock principle of international law—*pacta sunt servanda* ("pacts must be observed")—which captures the requirement that nations must comply with their agreements in good faith.¹⁰⁷

The State Department estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."¹⁰⁸ Over a million United States citizens reside in Mexico, representing the largest expatriate American community in any country.¹⁰⁹ The protection of American citizens residing in Mexico must have contributed to President Bush's decision to authorize the Presidential Memorandum.

of Apr. 9), Declaration of President Schwebel.

104. See *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152, 168 (1821) (understanding that foreign nations must protect the rights of their citizens facing prosecution in the United States, the Court held that "[t]he long and universal usage of the Courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it").

105. See Brief for American Citizens Abroad, *supra* note 60, at 7 (noting that the Presidential Memorandum continues the "unbroken policy" of the United States concerning American citizens detained in a foreign country).

106. See *id.* at 13 (discussing the consequences of the United States not providing "[v]igorous and [r]obust [e]nforcement of the Vienna Convention").

107. *Id.*

108. BUREAU OF RES. MGMT., U.S. DEP'T OF STATE, 2003 PERFORMANCE AND ACCOUNTABILITY REPORT 141 (2003), available at <http://www.state.gov/documents/organization/29923.pdf> (last visited Sept. 22, 2006).

109. See Ass'n of Americans Resident Overseas, *Top 10 Countries Outside the U.S. Where Most Americans Live*, <http://www.aaro.org/map.html> (last visited June 7, 2006) (on file with the Washington and Lee Law Review) (documenting the top ten countries outside the U.S. where most Americans live). The Association of Americans Resident Overseas estimates 4.1 million Americans reside abroad. *Id.*

2. *The Effective Conduct of Foreign Relations*

Because states often did not abide by treaties under the Articles of Confederation,¹¹⁰ the Framers authored treaty power¹¹¹ to try to mandate state compliance.¹¹² Reassigning the treaty power became necessary when foreign skepticism of the Continental Congress's authority over the states resulted in the inability to finalize commercial treaties.¹¹³ Within a decade of the Constitution's ratification, the Supreme Court upheld the Framers' notion of national treaty power by enforcing the provisions of federal treaties.¹¹⁴ In 1942, the Court confirmed that:

If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.¹¹⁵

As recently as 2000, the Court noted that effective conduct of foreign relations relies upon the federal government providing a congruent foreign policy to the international community.¹¹⁶

José Ernesto Medellín represents the current face of human rights campaigns vehemently fighting against the United States' persistent practice of convicting, sentencing, and executing foreign nationals without the benefit of

110. See FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL, FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973) (detailing the motivations of the Constitutional Convention); David M. Grove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102-49 (2000) (describing the history of treaty making).

111. U.S. CONST. art. II, § 2, cl. 2.

112. See Brief for Former United States Diplomats, *supra* note 23, at 8-9 (describing the situation under the Articles of Confederation where the United States found itself "ultimately dependent on the good faith of the states to carry out" treaty obligations).

113. See SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 66 (4th ed. 1955) (describing the failure of "negotiations with other powers" because of "the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states").

114. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235, 239 (1796) (holding that under the Supremacy Clause, the Treaty of Peace trumped a conflicting Virginia statute). The Court noted that "a treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature [or constitution or court] can stand in its way." *Id.* at 236.

115. *United States v. Pink*, 315 U.S. 203, 232-33 (1942).

116. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000) ("Quite simply, if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence.")

consular assistance.¹¹⁷ Taking steps identical to those taken by United States diplomats on behalf of American citizens, foreign allies have repeatedly asserted that the United States must comply with the VCCR and the ICJ.¹¹⁸ President Bush has experienced the repercussions of alleged VCCR violations concerning Mexican nationals throughout his presidency.¹¹⁹ Both Canada and

117. See, e.g., Death Penalty Information Center, *Foreign Nationals: Earlier News From Human Rights Research*, <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579> (last visited June 7, 2006) (reporting the recent developments in the area of consular notification enforcement inside the United States) (on file with the Washington and Lee Law Review).

118. See, e.g., Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6 (detailing a call from President Vicente Fox of Mexico); Jonathan Tepperman, *Faulder: The Long-Term View*, NAT'L POST (Toronto), Dec. 11, 1998 (describing the efforts of the Canadian Foreign Affairs Minister and Ambassador on behalf of Canadian citizens); Laure LaFay, *World Court—U.S. to Halt Execution*, VIRGINIAN-PILOT, Apr. 10, 1998, at A1 (detailing protests by Mother Teresa, Pope John Paul II, and the Italian government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. TIMES, Dec. 23, 1997, at B5 (reporting the contents of a letter from Ecuadorian Consul General); David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, DALLAS MORNING NEWS, Feb. 22, 1999, at A1 (reporting requests from then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog urging clemency from President Clinton and Arizona Governor Hull).

119. See, e.g., *Mexico's Fox Cancels Meeting with Bush*, ASSOCIATED PRESS, Aug. 15, 2002, <http://www.foxnews.com/story/0,2933,60454,00.html> (last visited June 7, 2006) (reporting that Mexican President Vicente Fox canceled a scheduled visit to President Bush's Texas ranch because Texas proceeded with the execution of Javier Suarez Medina despite President Fox's assertion that Medina's VCCR rights were violated) (on file with the Washington and Lee Law Review). Fox News reported:

[T]he slight came as the once-warm relationship between the Fox and Bush administrations already was suffering from a series of disagreements. Fox had made several appeals to U.S. authorities to pardon Javier Suarez Medina, who he said was a Mexican national. He said Suarez was never told he could contact the Mexican consulate for help after his 1988 arrest, violating the 1963 Vienna Convention of Consular Relations

. . . .

Fox is the most pro-U.S. president in recent Mexican history, but his critics say U.S. officials still shrug off his requests and ignore Mexican interests on important issues.

. . . .

The execution—and the government's last-ditch efforts to stop it—dominated headlines across Mexico, where photographs of and interviews with the round-faced, innocuous-looking Suarez turned up in most newspapers and on major television stations.

Id.; BBC News, *Mexico's Fox Cancels Texas Trip*, Aug. 15, 2002, <http://news.bbc.co.uk/1/hi/world/americas/2194566.stm> (last visited June 7, 2006) (reporting that President Fox canceled his scheduled trip to Bush's Crawford ranch following a phone call to President Bush where the Mexican leader made "a last-ditch attempt to secure a stay of execution") (on file with the Washington and Lee Law Review).

Mexico have publicly stated that the inability of states to meet VCCR requirements has "strain[ed]" bilateral relations.¹²⁰

Although the United States government consistently asserts the importance of affording consular assistance rights within America,¹²¹ persistent state violations of VCCR requirements significantly harm the ability of the United States to form foreign policy alliances with other "governments and international organizations."¹²² Non-compliance with President Bush's Memorandum "would significantly impair the credibility of American diplomats in the international arena."¹²³ Resembling the noncompliant state actions the Framers sought to end, state violations of the VCCR pose a substantial threat to the effective conduct of foreign affairs.¹²⁴ Former United States diplomats note: "International disapproval of our noncompliance with the Vienna Convention has also deflected attention away from serious human rights abuses in other countries and has provided our adversaries with

120. See Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 30, 2000, at A20 (discussing the remarks of Jorge G. Castaneda, foreign policy advisor to Mexican President Fox); see also Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die for 1975 Killing*, BOSTON GLOBE, Dec. 10, 1998, at A2 (discussing the remarks of Canadian government officials in regards to the execution of Canadian citizen Stanley Faulder).

121. See *supra* Part III.A.1 (describing the need to afford foreign nationals VCCR rights within the United States in order to receive similar treatment of American citizens abroad).

122. See Brief for Former United States Diplomats, *supra* note 23, at 7 (detailing the hardships American diplomats experience because states ignore VCCR requirements). The former United States diplomats stated:

Texas's and other states' persistent practice of ignoring the Vienna Convention obligations has strained bilateral and multilateral relations, and has disrupted important national foreign policy interests by impairing the ability of diplomats to carry out critical initiatives with foreign governments and international organizations.

Id. The amici signatories served as "Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations." *Id.* at 3. Although the signatories do not agree on the possibility of lawful administration of the death penalty, the ICJ's interpretation of the Vienna Convention or the validity of President Bush's unilateral withdrawal from the Optional Protocol, all signatories agree that United States courts should abide by President Bush's Memorandum. *Id.* at 3-4.

123. See *id.* at 4 (asserting that non-compliance with the Presidential Memorandum would harm the ability of American diplomats to give their word).

124. See *Medellin v. Dretke*, 544 U.S. 660, 674 (2005) (O'Connor, J., dissenting) ("In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem . . . [which] may have considerable ramifications."); Brief for Former United States Diplomats, *supra* note 23, at 16-17 (arguing that persistent state noncompliance with VCCR requirements will result in alienation of foreign allies, "undermine America's credibility as a global leader and seriously hinder foreign policy objectives at a critical time in our nation's history").

diplomatic ammunition to raise doubts about the sincerity of our commitment to human rights."¹²⁵

Relations with adversarial nations do not represent the only area in which the conduct of effective foreign policy has suffered. Close allies often find themselves in a position where they must challenge the United States' actions rather than exert effort and time negotiating agreements beneficial to all parties.¹²⁶ Finally, diplomats overseas have even encountered threats to their physical wellbeing because the United States has executed foreign nationals who were denied consular assistance.¹²⁷ In sum, the historic goal of promoting effective foreign relations and the future goal of protecting American citizens support President Bush's memorandum.

3. *The Rule of Law in the International Community*

The United States remains a party to the United Nations Charter.¹²⁸ States that are parties to litigation under the Charter recognize its legitimacy by respecting the judgments of the ICJ.¹²⁹ Nations are able to publicize and resolve particularly contentious issues through use of the ICJ.¹³⁰ Compliance with the *Avena* judgment provides the international community with proof that the United States will reciprocate the treatment it demands of other nations.¹³¹

125. Brief for Former United States Diplomats, *supra* note 23, at 20–21.

126. *See id.* at 22 ("In *Amici's* experience, an inordinate proportion of important bilateral and multilateral meetings with our closest allies are now consumed with answering diplomatic demarches challenging these practices, diverting attention away from our core national foreign policy interests.").

127. *See id.* (describing "public hostility," "persistent criticism in the press and angry demonstrations in front of U.S. embassies abroad"). *Amici* further stated: "Such protests have not only seriously disrupted important diplomatic missions, but have even threatened the physical safety of our U.S. diplomats and embassy staff trying to work in these countries." *Id.*; *see also U.S. Boosts Security in Honduras as Tempers Flare*, REUTERS, Apr. 24, 1998 (describing public demonstrations in front of the U.S. embassy in Honduras requiring armed security).

128. U.N., *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations*, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapter1/treaty1.asp>. (last visited on Oct. 24, 2006) (on file with the Washington and Lee Law Review).

129. U.N. Charter, Article 94 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

130. *See supra* notes 67–70 and accompanying text (discussing the ICJ adjudication concerning United States hostages in Iran). When the United States military mistakenly downed an Iranian civilian airliner, killing 190 passengers and crew, despite strained diplomatic relations, Iran decided to use the peaceful method of bringing a suit to the ICJ. *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1989 I.C.J. 132 (Dec. 13).

131. *See* Brief for Foreign Sovereigns, *supra* note 66, at 4 (discussing the need for

In contrast, state violations of the VCCR repeatedly provided ammunition for other nations looking to question the United States' commitment to the rule of law in the international community.¹³² State failures to enforce the VCCR support the argument that the United States treats international law as an avenue solely for protecting American interests.¹³³ Moreover, international accusations of American "hypocrisy" gain credence from the current administration's public touting of the importance of international law.¹³⁴

Conflicts between the United States government's international law rhetoric and state violations of VCCR rights undermine the objective of signing international treaties.¹³⁵ If the United States intends to adhere to its

reciprocity in international treaty enforcement, amici commented that, "[i]n the long term, countries will not provide foreign nationals with consular notice under the Convention if the same protection is not accorded to their own citizens abroad").

132. See, e.g., Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, N.Y. TIMES, July 21, 2001, at A8 (quoting Mexican government officials stating that the execution of Mexican national denied VCCR rights "is contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirrs Anger*, N.Y. TIMES, Mar. 5, 1999, at A14 (quoting German Justice Minister stating that the execution of two German nationals denied VCCR rights "is barbaric and unworthy of a [nation] based on the rule of law"); David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper discussing the execution of Honduran national denied VCCR rights: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts").

133. See *Germany Sues U.S. for Breaking Law*, REUTERS, Sept. 16, 1999 (quoting German Justice Minister announcing *LaGrand* suit in the ICJ: "Respecting international laws cannot be a one-way street").

134. See *Transcript: Confirmation Hearing of Condoleezza Rice*, N.Y. TIMES, Jan. 18, 2005 (quoting Secretary of State Condoleezza Rice's statement that, "[t]he United States will . . . continue to work to support and uphold the system of international rules and treaties that allow us to take advantage of our freedom, to build our economies and to keep us safe and secure"); cf. Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, <http://web.amnesty.org/library/Index/engAMR510271998> (May 1, 1998) (last visited June 7, 2006) (reporting Paraguay's response to the execution of Breard). The Amnesty International report stated:

No other US death penalty case in recent memory more tellingly reveals the glaring double standard which exists between the United States' human rights rhetoric abroad and its own domestic practices. The US government portrays itself as a world leader in the protection of human rights and as a champion of international law. Yet, when confronted with a unanimous opinion from the world's highest court compelling its compliance, the United States chose instead to renege on its binding treaty obligations [I]n the eyes of many members of the international community of nations, any further attempt by the US government to boast about its deep commitment to human rights protection will undoubtedly be seen as little more than arrogant hypocrisy.

Id.

135. See Stephen Breyer & Antonin Scalia, *A Conversation on the Relevance of Foreign*

own righteous rhetoric concerning international law, the enforcement of the VCCR obligations provides a meaningful starting point. By enforcing the *Avena* decision in United States courts, the President reaffirms the position of America in the international legal community. He acknowledges not only the United States' obligations but also the consequences of not fulfilling them. Professor Henkin described the motivations of individual nations to comply with international law when he stated:

[S]tates (and their officials) have moral commitments, reflecting the ideology, the values, the "style" of their society, as well as some awareness of, and respect for, world opinion States develop the habit of compliance, and establish laws and institutions that make compliance normal and routine. States recognize that stability, law and order, reliability (and a warranted reputation for reliability) are in their national interest, and therefore that they have a more-or-less enlightened self-interest in compliance.¹³⁶

Based on this analysis, the Presidential Memorandum's attempt to compel compliance with the ICJ's judgment furthers the United States' commitment to international law and circumscribes the individual states' ability to undermine important international treaties and objectives.

B. Withdrawal from the Optional Protocol: Adopting Incongruence

Despite withdrawal from the Optional Protocol, the United States has not withdrawn from the VCCR.¹³⁷ State Department Spokeswoman Darla Jordan described the necessity for withdrawal by arguing that the United States intended to protect "against future International Court of Justice judgments that might similarly interpret the consular convention or disrupt [the United States']

Law for American Constitutional Adjudication at the American University School of Law (Jan. 13, 2005), <http://www.wcl.american.edu/secl/founders/2005/050113.cfm> (last visited June 7, 2006) (quoting Justice Scalia) (on file with the Washington and Lee Law Review). Justice Scalia stated:

[T]he object of a treaty being to come up with a text that is the same for all countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of agencies—that is to say if it's within the ballpark, if it's a reasonable interpretation, though not necessarily the very best.

Id.

136. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 49 (1995).

137. See Aeschleman, *supra* note 14, at 963 ("[T]he United States is still bound by its obligations under the Convention. The effect of the withdrawal from the Optional Protocol, therefore, is that the United States no longer avails itself of the ICJ's jurisdiction to interpret and apply the Vienna Convention.").

domestic criminal system in ways [the United States] did not anticipate when [it] joined the convention."¹³⁸ In addition, Department of State Deputy Spokesman Adam Ereli argued that:

[W]e're also saying in the future we're going to find other ways to resolve disputes that come under the Vienna Convention other than submitting them to the ICJ. We'll do something else. So we're still committed to the Vienna Convention. We're still committed to upholding its principles and fulfilling our obligations under that convention. What we are saying is when there are questions about that, we'll seek to resolve them in a venue other than the ICJ.¹³⁹

Despite the positive implications of the Presidential Memorandum, withdrawal from the Optional Protocol troubles many scholars who support the ICJ as an impartial international judicial body.¹⁴⁰ State Department officials noted that the Presidential Memorandum should ease the fears of other nations who believe the United States will no longer face accountability for consular assistance violations.¹⁴¹ However, the withdrawal seems to signify just that. Specifically, withdrawal means an end to the ability of foreign nations to implement ICJ suits alleging VCCR violations in order to challenge the United States' criminal justice system.¹⁴²

138. Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A01.

139. Dep't of State Daily Press Briefing (Mar. 10, 2005), <http://www.state.gov/r/pa/prs/dpb/2005/43225.htm> (last visited on Oct. 22, 2006) (on file with the Washington and Lee Law Review).

140. See Lane, *supra* note 138 (quoting Professor Frederic Kirgis as stating: "It's encouraging that the [P]resident wants to comply with the ICJ judgment [in the Mexicans' case]. But it's discouraging that it's now saying we're taking our marbles and going home"); *U.S. Withdrawals From World Court Protocol*, INT'L SEC. AND RELATIONS NETWORK, Mar. 14, 2005, <http://www.isn.ethz.ch/news/sw/details.cfm?ID=10927> (discussing the withdrawal) (last visited June 7, 2006) (on file with the Washington and Lee Law Review). The article notes:

Some legal experts have expressed concern over the move. The New York Times quoted Harold Hongju Koh, the dean of Yale's Law School, as saying that the Bush administration's strategy was counterproductive, while Peter Spiro, a law professor at the University of Georgia, characterized the withdrawal as "a sore-loser kind of move. If we can't win, we're not going to play."

Id.

141. See Lane, *supra* note 138 (quoting State Department Spokeswoman Darla Jordan). The *Post* reported: "Bush's decision to enforce the ICJ judgment in the case of the Mexicans 'should ensure that our withdrawal is not interpreted as an indication that we will not fulfill our international obligations,' said Jordan of the State Department." *Id.*

142. See Marty Lederman, *More on Medellin*, Mar. 9, 2005, http://www.scotusblog.com/movabletype/archives/2005/03/more_on_medelli.html (discussing withdraw from the Optional Protocol) (last visited June 7, 2006) (on file with the Washington and Lee Law Review). Lederman comments:

The recent use of the Optional Protocol to review allegations of VCCR violations in American death penalty cases did not sit well with the Bush administration.¹⁴³ The reasons offered for withdrawal, however, seem very contrived for a number of reasons. First, the interpretation of the convention offered by the ICJ should not have surprised the Administration because it remains consistent with the progression of judgments since the ratification of the Optional Protocol. The United States routinely has ignored rulings that simply request compliance. The ICJ responded by issuing provisional orders and judgments with increasingly stronger wording. If an American citizen experienced criminal prosecution similar to that experienced by Medellín, the United States government would agree with an ICJ judgment similar to *Avena* against the nation prosecuting such an American. Second, the disruption of United States courts remains minimal. The *Avena* judgment simply notes current VCCR rights violations by the states and allows domestic courts to decide what the "review and reconsideration" mandate deems necessary. This posture grants United States courts the opportunity to design an appropriate remedy. Third, the Security Council veto option affords the United States additional control over the ICJ adjudication process.¹⁴⁴ Finally, as expressed in the previous section the decision to withdraw from the Optional Protocol hinders the three historic purposes the State Department offered for the Presidential Memorandum.¹⁴⁵

This might effectively mean the end to common litigation in which foreign nationals convicted in state courts have challenged states' failure to provide them an opportunity to contact their nations' consulates, as required by the Vienna Convention itself. The . . . strategy last week in *Medellin* takes care of the 51 cases that the ICJ already has adjudicated, and the U.S.'s withdrawal from the treaty presumably would preclude all future ICJ-based claims.

Id.

143. See Harris, *supra* note 46, at 6 ("More recently, however, the Optional Protocol had been used as a tool to help fight against the death penalty by bringing cases before the ICJ asserting the rights of foreign nationals sentenced to death in the United States."); Liptak, *supra* note 47, at A16 (discussing the withdrawal from the Optional Protocol). Liptak reports: "The memorandum . . . puzzled state prosecutors, who said it seemed inconsistent with the administration's general hostility to international institutions and its support for the death penalty. The withdrawal announced yesterday helps explain the administration's position." *Id.*

144. See *supra* notes 64–65 and accompanying text (discussing the Security Council veto option).

145. See *supra* Part III.A (discussing the legitimacy of the Presidential Memorandum).

1. *Harming United States Citizens Abroad*

Large numbers of United States citizens will continue to spend time abroad.¹⁴⁶ Many of these Americans unfortunately will find themselves facing the criminal justice system of another nation.¹⁴⁷ Withdrawal from the Optional Protocol sharply contrasts with the historical United States policy of pursuing all potential methods of protecting the rights of American citizens while they spend time abroad.¹⁴⁸ Withdrawal from the Optional Protocol has eliminated the only method of bringing claims against foreign nations that detain United States citizens without affording VCCR rights.¹⁴⁹ This decision is striking because "in a time when the administration is concerned with national security, it seems incongruous to reject the one tribunal that can render a decision in Vienna Convention cases."¹⁵⁰ United States citizens traveling abroad could face foreign governments that copy the United States' conduct by trying American citizens, convicting them, and sentencing them to death without notifying the detained individual of their consular notification rights or notifying the United States government of the proceedings.¹⁵¹ Also, as stated previously, nations adhere to international treaties because of a mutual recognition of the importance of reciprocity.¹⁵² Persistent state violations of VCCR rights, combined with the inability of foreign nations to bring claims in the ICJ against the United States for VCCR violations, will make it less likely that foreign nations will honor the treaty, and, therefore, less likely that United States citizens will receive their VCCR rights while abroad.¹⁵³

146. See *supra* notes 108–09 and accompanying text (reporting on United States citizens abroad).

147. See *supra* notes 96, 98 & 100 (reporting on United States citizens arrested abroad).

148. See *supra* notes 101–03, 105 and accompanying text (discussing United States' history of protecting American citizens abroad).

149. See Aeschleman, *supra* note 14, at 963 ("The effect of the withdrawal from the Optional Protocol, therefore, is that the United States no longer avails itself of the ICJ's jurisdiction to interpret and apply the Vienna Convention.").

150. See *id.* at 974 (noting negative consequences of withdrawal from the Optional Protocol). Aeschleman also comments that the "effect of the U.S. withdrawal may be serious, because we can no longer avail ourselves of the ICJ's protections." *Id.* at 973; see also *supra* note 103 and accompanying text (noting United States citizens' interest in observation of consular notification obligations).

151. See Aeschleman, *supra* note 14, at 964 (noting worst case scenario for United States citizens facing criminal prosecution in foreign nations).

152. See *supra* note 107 and accompanying text (explaining how reciprocity upholds the integrity of international treaty schemes).

153. See Aeschleman, *supra* note 14, at 974 (noting that reciprocity, or lack thereof,

2. *The Ineffective Conduct of Foreign Relations*

Withdrawal highlights the hypocrisy of the United States' current position.¹⁵⁴ Rather than mandating state compliance with consular notification requirements, withdrawal notifies states that they will no longer face the burden of ICJ judgments condemning their persistent VCCR violations.¹⁵⁵ Withdrawal notifies foreign nations that the only course of action they now possess comes in the form of historically unsuccessful direct diplomatic channels.¹⁵⁶ Moreover, state violation of consular notification rights, without the possibility of ICJ review, will continue to harm the ability of American diplomats to pursue foreign policy objectives.¹⁵⁷ Withdrawal from the Optional Protocol only supports the growing international chorus condemning the recent human rights record of the United States.¹⁵⁸

3. *Abandoning the Rule of Law in the International Community*

Although the Presidential Memorandum attempts to mandate compliance with the *Avena* judgment, withdrawal indicates to the international community that the United States no longer views the ICJ as positively resolving consular notification controversies.¹⁵⁹ By rejecting the ICJ resolution process and persistently violating consular notification requirements at the state level, the United States tells the international community that it only values international law when it favors the United States.¹⁶⁰ Withdrawal from the Optional Protocol

provides nations a powerful tool for VCCR noncompliance); *see also supra* notes 99–100, 106–08 and accompanying text (discussing foreign nations refusing American citizens VCCR rights if the United States does not enforce the VCCR).

154. *See Aeschleman, supra* note 14, at 973 ("This shows the world that the United States wants the protections of the treaty, but that because of its consistent violations of the Convention and its unwillingness to create a long-lasting remedy for all claimants, it does not want to be under the jurisdiction of a court that can find such a violation.").

155. *See supra* notes 110–16 and accompanying text (noting effective foreign policy necessitates state compliance with international treaties).

156. *See supra* notes 118–20 and accompanying text (discussing unsuccessful diplomatic attempts by foreign governments to gain consular notification rights for their citizens).

157. *See supra* notes 122–24 and accompanying text (discussing difficulties American diplomats face because the United States lacks credibility in the area of VCCR compliance).

158. *See supra* note 134 (commenting on perceptions that the United States is not committed to human rights).

159. *See supra* notes 128–37 and accompanying text (discussing the role of the ICJ in the United Nations, past successes of ICJ adjudication, and positive effects of American compliance with *Avena*).

160. *See supra* notes 132–41 and accompanying text (noting repeated state VCCR

further reaffirms the lingering international perception that the United States does not respect the objectives of international agreements.¹⁶¹

In sum, this Part has explained why the policy reasons behind the Presidential Memorandum are incongruent with the implications of the withdrawal from the Optional Protocol. First, the Department of Justice outlined the historical and other legitimate policy considerations supporting the Presidential Memorandum. Second, the Department of Justice offered unconvincing reasoning to support withdrawal from the Optional Protocol. Third, the implications of withdrawal significantly harm the legitimate and historical policy considerations supporting the Presidential Memorandum. The dual unilateral executive responses to the *Avena* decision form a dangerous, disjointed, and hypocritical foreign policy.

IV. Political Factors: Contributing to the Incongruence

Part IV examines the actions taken, or lack thereof, by the three government branches that help form an incongruent foreign policy. First, it demonstrates that the unilateral actions of the Executive Branch strategically place the Administration in a position to broaden executive control over foreign policy. Second, it discusses the lack of congressional response to the Bush administration's unilateral actions. Third, it examines the Judicial Branch's reluctance to rule on constitutional issues involving executive foreign relations power.

A. The Battle over Foreign Affairs: Broadening Executive Power

The balance of power developed by the Framers and instituted by the Constitution places the Executive and Legislative Branches in a continuous struggle over the control of foreign affairs.¹⁶² Aware of this fact, the Bush administration's strategic responses to the *Avena* judgment attempt to enhance the President's foreign affairs power in two ways. The Presidential

violations and United States' rhetoric asserting preference for strong international law).

161. See *supra* notes 135–39 and accompanying text (explaining the objectives of signing treaties and the ideology nations possess when they honor commitments to the international community).

162. See TUSHNET, *supra* note 3, at 32 (discussing the struggle between the Executive and Legislative Branches over foreign affairs); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

Determination asserts that the President, serving in his capacity as head diplomat, possesses the constitutional authority to mandate compliance with the *Avena* judgment in state criminal courts.¹⁶³ Withdrawal from the Optional Protocol produces further "practice and precedent" seemingly affirming the President's power to unilaterally withdraw from treaties.¹⁶⁴ Although President Bush's actions seem novel in many respects, they fall within historical foreign policy tendencies that teach: "[W]hile Congress and others have debated, the Presidents have acted."¹⁶⁵

1. *The Presidential Memorandum's Potential Effect*

Although compliance with the *Avena* judgment appears to align with the historical goals of United States foreign policy,¹⁶⁶ accomplishment of this objective through the Presidential Memorandum must face scrutiny in order to uphold the "balanced power structure of our Republic."¹⁶⁷ Indeed, the Presidential Determination seeks to reverse the Clinton Administration's position, namely, that the President possesses the power to request, but not to mandate, state criminal court compliance with an ICJ holding.¹⁶⁸ Two distinct constitutional arguments conflict with the Presidential Memorandum.¹⁶⁹ First, "[n]o such power appears in Article II, and indeed the President's only unilateral power over criminal convictions—the Pardon Power—is carefully limited to *federal* crimes."¹⁷⁰ Second, "any

163. See Kirgis, *supra* note 25 (discussing implications of the Presidential Memorandum).

164. See DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 190–91 (1986) (discussing legal arguments made by the Executive Branch concerning unilateral treaty withdrawal despite the absence of constitutional text on the subject).

165. See LOFGREN, *supra* note 5, at 38 (noting historical executive actions in the area of foreign policy); see also Michael M. Uhlmann, *Reflections on the Role of the Judiciary in Foreign Policy*, in *FOREIGN POLICY AND THE CONSTITUTION* 45 (Robert A. Goldwin & Robert A. Licht eds., 1990) ("In short, the idea of the executive as set forth in the Constitution is not exactly an experiment but it is something close to it.").

166. See *supra* Part III.A (explaining the legitimate purpose of the Presidential Memorandum).

167. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (discussing the need to scrutinize power exercised to accomplish desirable results, not simply the end result alone).

168. See Brief for the United States, *supra* note 56, at 51 (examining measures the Executive Branch may take under the Constitution).

169. See Brief for the States, *supra* note 16, at 3–4 (noting two constitutional arguments against the Presidential Memorandum).

170. *Id.* at 3 (citing U.S. CONST. art. II, § 2). The Brief elaborated:

Moreover, since *Youngstown* the Supreme Court has recognized that the

federal order to reconsider Medellín's case would violate principles of state sovereignty by 'commandeering' the state courts."¹⁷¹ This argument stems from the fact that the Supreme Court has never held that the Federal Government can order state courts to hear federal claims despite the existence of state laws barring jurisdiction of federal and state claims alike.¹⁷²

Both state sovereignty and the Judicial Branch's authority to review the legal effect of ICJ judgments face the power-usurping threat of a mandatory reading of the Presidential Memorandum.¹⁷³ However, the Judicial Branch's position seems a bit more precarious. Multiple Supreme Court decisions have held that "[a]ny state action that conflicts with the express foreign policy of the federal government is pre-empted."¹⁷⁴ Because the decisions of state courts are deemed state action,¹⁷⁵ it would appear that the Texas Court of Criminal Appeals must comply with the Presidential Memorandum.¹⁷⁶ Further, if the Supreme Court finds that the Presidential Memorandum necessitates compliance with the *Avena* judgment, then the Executive Branch would achieve a novel and startling broadening of unilateral executive power.¹⁷⁷

President's power is "at its lowest ebb" when he acts contrary to the will of Congress. 343 U.S. at 648 (Jackson, J., concurring). Here, the federal habeas corpus statute has carefully limited the situations under which federal authority will reopen state criminal convictions, and that statute plainly bars relief here. A mandatory reading of the President's Memorandum would thus fly in the face of Congress's authority.

Id.

171. *Id.* at 4 (citing *Printz v. United States*, 521 U.S. 898 (1997)).

172. *See id.* at 27 (examining the anticommandeering doctrine). Because reviewing the anticommandeering doctrine deserves significant attention, this Note comments on the issue simply to alert the reader of hurdles the administration must surmount to achieve a mandatory reading of the Presidential Memorandum.

173. *See Kirgis, supra* note 25 (examining state sovereignty and the judiciary in the wake of a binding interpretation of the Presidential Memorandum).

174. *See id.* (discussing Supreme Court precedents that may allow the Presidential Memorandum to pre-empt decisions of the state courts); *see also* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (ruling that the express foreign policy of the United States may pre-empt state action); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (same); *Zscherig v. Miller*, 389 U.S. 429, 441 (1968) (same); *United States v. Pink*, 315 U.S. 203, 233-34 (1942) (same); *United States v. Belmont*, 301 U.S. 324, 336-37 (1937) (same).

175. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that the decisions of state courts are state actions).

176. *See Kirgis, supra* note 25 (examining the arguments in favor of mandatory state compliance with the Presidential Memorandum).

177. *See id.* (examining the Presidential Memorandum's potential effect on Judicial Branch). Professor Kirgis observed:

Finally, the Presidential Memorandum may confuse the legal analysis of the courts.¹⁷⁸ By authoring the Presidential Memorandum at the precise time he did,¹⁷⁹ President Bush afforded the courts the ability to rule in favor of compliance with the *Avena* judgment without basing such a ruling on an understanding that the ICJ can bind domestic criminal proceedings. Notably, the Presidential Memorandum determines that state courts should comply with an ICJ judgment "in accordance with general principles of comity." This wording becomes important because comity does not infer any legal obligation.¹⁸⁰ It appears the Presidential Memorandum seeks to bolster the foreign affairs power of the Executive Branch while simultaneously allowing the courts to rule that ICJ judgments do not bind domestic courts.

2. *Withdrawal from the Optional Protocol: Further Practice and Precedent*

The question of whether the President possesses the power to withdraw unilaterally from a treaty entered into with the advice and consent of the Senate remains undecided by the Supreme Court.¹⁸¹ Because of this

Perhaps he [Bush] meant that state courts are not legally required to give any ICJ judgment immediate effect in U.S. domestic law in the absence of a determination by the President. [If so], and if it is intended as a general statement extending beyond the facts of the present case, there would be a separation-of-powers question whether the President's foreign affairs authority under the Constitution extends to determining the direct legal effect of ICJ judgments on domestic judicial proceedings in the United States.

Id.

178. See Liptak, *supra* note 47 (discussing the integrated two-part strategy of the Bush administration). Harold Hongju Koh, dean of the Yale Law School, analyzed the strategy by saying: "Element . . . one was to take the bat out of the Supreme Court's hand." *Id.*

179. See *supra* note 85 and accompanying text (examining the Presidential Memorandum's timing).

180. See Kirgis, *supra* note 25 ("'Comity' denotes a willingness to act in accordance with good will and respect, but it does not denote a legal obligation to do what is contemplated."); BLACK'S LAW DICTIONARY 110 (8th ed. 2004) (defining judicial comity as the "respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and political decisions").

181. See *Kucinich v. Bush*, 236 F. Supp. 2d 1, 13 (2002) (noting that when the Supreme Court considered whether the President possesses the power to unilaterally terminate a treaty none of the Justices' opinions "obtained a majority of votes," and thus, "there was no obviously binding holding"). Despite the lack of a binding Supreme Court holding, many commentators observe a general acceptance of unilateral treaty withdrawal. See also HENKIN, *supra* note 2, at 214 ("At the end of the twentieth century, it is apparently accepted that the President has

judicial position, Democratic members of Congress challenged the Bush administration's unilateral withdrawal from the Anti-Ballistic Missile Treaty.¹⁸² The United States District Court for the District of Columbia dismissed this case, and it has not been appealed. Because the constitutionality of unilateral treaty withdrawal remains undecided, it makes strategic sense for the Executive Branch to continue accumulating a lengthy record of unilateral treaty withdrawal to provide support for their position in any future adjudication.¹⁸³

B. *The Lack of Congressional Response*

The Legislative Branch has not reacted officially to the unilateral Executive responses to the *Avena* judgment.¹⁸⁴ The reasons for the current lack of response are layered, and many of them necessarily involve political concerns outside the scope of this Note. Nevertheless, a few potent rationales must not be overlooked. The courts have not delivered a binding interpretation of the Presidential Memorandum: Its precise meaning and the validity of the Executive power behind the Memorandum have not been commented on by the Supreme Court.¹⁸⁵ Until the courts decide exactly what the Presidential Memorandum asserts and requires, the Legislative Branch will wait until action becomes necessary. In addition, deciding when and how to challenge the constitutional authority of the President to withdraw unilaterally from a treaty remains a delicate decision.¹⁸⁶ Finally, Republican congressional

authority under the Constitution to denounce or otherwise terminate a treaty . . .").

182. See *Kucinich*, 236 F. Supp. 2d at 18 (dismissing the complaint because plaintiffs did not have standing and the issue raised a nonjusticiable political question).

183. See Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309a.html> (examining unilateral withdrawal from the Optional Protocol) (last visited Oct. 23, 2006) (on file with the Washington and Lee Law Review). This Note comments on the unanswered question of treaty withdrawal under the domestic laws of the United States. However, the question of whether withdrawal from the Optional Protocol is valid under international law remains unanswered. *Id.* This significant question deserves more attention than this Note can afford. Thus, this Note does not comment on the validity of withdrawal under customary international law. See also *id.* (noting customary international laws and norms that may legitimize withdrawal from the Optional Protocol).

184. I have searched thoroughly for both official and unofficial congressional responses to the unilateral executive responses to *Avena*. Shockingly, my research in this area produced no meaningful results.

185. See *infra* note 201 (discussing the Supreme Court's agnostic position regarding the constitutionality of the Presidential Memorandum).

186. See *infra* Part IV.C.2 (examining the unanswered question of who possesses the

control makes a cohesive and effective response significantly more difficult. In order to mount an effective congressional response to unilateral executive action, congressional leaders must command the type of united front that does not seem possible in connection with the President's responses to *Avena*.

C. Judicial Reluctance

Persistent judicial reluctance to provide precedent-setting rulings on presidential foreign affairs power continues to vex those who oppose unilateral executive power.¹⁸⁷ However, judicial hesitancy to become involved in foreign affairs stems from numerous sources.¹⁸⁸ Primarily, many of the intelligence issues involving foreign relations remain unknown to the Judicial Branch.¹⁸⁹ In addition, the "training and experience" of Supreme Court Justices equip them to deal with domestic issues, not foreign policy disputes.¹⁹⁰ Further, foreign policy disputes tend to fall along partisan lines.¹⁹¹ Finally, foreign affairs disputes heighten the Judiciary's awareness of their own role in the "constitutional scheme."¹⁹²

constitutional authority to withdraw from a treaty).

187. See Uhlmann, *supra* note 165, at 42 ("The inhospitality of the courts, or at least of the Supreme Court, to actions arising under the Constitution's foreign relations powers frustrates many, especially professors and members of Congress in opposition to the president.").

188. See *id.* at 42-44 (noting reluctance in the Judicial Branch to rule on foreign affairs issues).

189. See *id.* at 43 (discussing intelligence issues). Uhlmann wrote:

[International relations] is a world ruled by King Contingency, where caprice, deceit, and passion dominate far more than order, honor, and reason. It is a world where "ignorant armies clash by night"; a world where accurate information is hard to come by and often secretly acquired; a world where the consequences of mistake are long-lived and frequently fatal.

Id.

190. See *id.* (noting the nature of cases judges consider before confronting foreign policy issues).

191. See *id.* ("[T]he more partisan, the more passionate, and the more passionate, the less susceptible to resolution by the main instrument of the courts' power, namely, reason.").

192. See *id.* (citing approvingly ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962)) ("In the field of foreign relations, those interests may have less to do with the assertion of power than with 'the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.'"); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 379 (1980) ("Nonetheless, since, as a functional matter, the political branches are fully capable of protecting their own vital constitutional interests, the Court will better secure its own critical constitutional role in our system by forcing them to do so.").

1. Avoidance of the Key Issues in *Medellín v. Dretke*

Dismissing *Medellín's* writ as improvidently granted allowed the Supreme Court to avoid producing a precedent-setting opinion.¹⁹³ Obviously, this did not sit well with all of the Justices.¹⁹⁴ The Supreme Court's five to four dismissal in *Medellín* does not address the problems regarding the *Avena* ruling and enforcement of the VCCR within the United States.¹⁹⁵ The brief per curiam opinion, one concurrence, and three dissents, illustrates the Court's inability to form a consensus on many of the issues relevant to *Medellín*.¹⁹⁶ The Court outlined five threshold issues that potentially restrict federal habeas relief for *Medellín*.¹⁹⁷ However, in an almost open-ended invitation for future review of the larger issues implicated, the Court noted:

Of course *Medellín*, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and other Mexican Nationals* . . . unencumbered by the issues that arise from the procedural posture of this action.¹⁹⁸

Although the Court positioned itself to revisit the authority of ICJ judgments and the Presidential Memorandum, the conflicting preferences of the Justices depict a Court divided on the proper method of adjudication.¹⁹⁹

In the portion of her concurrence joined by Justice Scalia, Justice Ginsburg noted that the "Texas courts are now positioned immediately to adjudicate" whether either the ICJ's *Avena* judgment or the Presidential Memorandum form a basis for relief.²⁰⁰ Justice O'Connor's dissent displayed

193. See *infra* note 207 (noting the "lingering issues" not decided by the Court's dismissal of the writ).

194. See *infra* notes 199, 201–07 and accompanying text (detailing the reservations of many Justices).

195. See Aeschleman, *supra* note 14, at 939 (noting that Supreme Court dismissal did not resolve the controversy surrounding *Avena* and persistent VCCR violations within the United States).

196. See *The Supreme Court, 2004 Term: Leading Cases*, 119 HARV. L. REV. 169, 331–37 (2005) (examining the lack of agreement between the Justices and the range of potential issues in *Medellín*).

197. See *id.* at 331 n.41 (noting the threshold issues discussed in the Supreme Court opinion); *Medellín v. Dretke*, 544 U.S. 660, 664–66 (2005) (articulating the majority's understanding of the threshold issues).

198. *Medellín*, 544 U.S. at 664 n.1.

199. See *id.* at 666–95 (articulating the concurring and dissenting Justices' positions); *The Supreme Court*, *supra* note 196, at 332 (discussing the concurrence and dissents).

200. *Medellín*, 544 U.S. at 672 (Ginsberg, J., concurring).

dissatisfaction with the Court's sidestepping of the underlying issues concerning foreign policy:

The Court dismisses the writ (and terminates federal proceedings) on the basis of speculation: Medellín *might* obtain relief in new state court proceedings—because of the President's recent memorandum about whose constitutionality the Court remains rightfully agnostic, or he *might* be unable to secure ultimate relief in federal court—because of questions about whose resolution the Court is likewise, rightfully, undecided. These tentative predictions are not, in my view, reason enough to avoid questions that are as compelling now as they were when we granted writ of certiorari, and that remain properly before this Court. It seems to me unsound to avoid questions of national importance when they are bound to recur.²⁰¹

Justice Souter's dissent expressed concern that the holding of the Texas courts could nullify the Court's chance to take up the questions on which certiorari was granted.²⁰² Additionally, he argued that Medellín's situation can be distinguished from *Breard*²⁰³ because Medellín "presented a Vienna Convention claim in the shadow of a final ICJ judgment."²⁰⁴ Finally, in a dissent joined by Justice Stevens, Justice Breyer emphasized that "Medellín's legal argument that 'American courts are bound to follow the ICJ's decision in *Avena*' is substantial."²⁰⁵ Clearly, the Court recognizes the importance and validity of the conflict between international law and the American judicial system.²⁰⁶ But the Court's dismissal of the writ provides yet another example

201. *Id.* at 673 (O'Connor, J., dissenting).

202. *Id.* at 691 (Souter, J., dissenting) Justice Souter's dissent stated:

Since action by the Texas courts could render moot the questions on which we granted certiorari (not to mention the subsidiary issues spotted in the *per curiam* and dissenting opinions), I think the best course for this Court would be to stay further action for a reasonable time as the Texas courts decide what to do; that way we would not wipe out the work done in this case so far, and we would not decide issues that may turn out to require no action. We would, however, remain in a position to address promptly the Nation's obligation under the judgment of the ICJ if that should prove necessary.

Id.

203. *See Breard v. Greene*, 523 U.S. 371, 378–79 (1998) (denying petition for habeas corpus, certiorari, and leave to file a bill of complaint on the petition alleging prejudice based on a failure to raise in state court the violation of rights under an international treaty).

204. *Medellín v. Dretke*, 544 U.S. 660, 692 (2005) (Souter, J., dissenting).

205. *Id.* at 693 (Breyer, J., dissenting) (quoting O'Connor, J., dissenting).

206. *See id.* at 673 (O'Connor, J., dissenting) (lamenting that the Court appears to "avoid questions of national importance" despite the fact that such issues will remain problematic in the future); *see also* Brief for the United States, *supra* note 91, at i ("This case involves novel and complex issues of international law, presidential authority, and federal preemption.").

of the Supreme Court's refusal to resolve complex foreign policy questions.²⁰⁷ *Medellin* presented the Court with the opportunity to voice their interpretation concerning many of the complex legal issues involved in the case. Nevertheless, these issues became obscured by the unique procedural posture of the case, combined with the timing of the dual unilateral executive actions. These developments created a situation in which the Court seems to invite another writ after the Texas adjudication. However, the Court obviously realizes that the Texas courts could very well negate the necessity to rehear the case.

2. *The Unanswered Treaty Withdrawal Question*

Despite the obvious importance of determining where the constitutional authority to withdraw from a treaty resides, the question remains unanswered. The Supreme Court remanded the issue in *Goldwater v. Carter*²⁰⁸ without

207. See Weiland, *supra* note 19, at 687 (discussing the need for a cohesive response to VCCR violations from the Supreme Court, the federal government, and the states). Weiland argues that:

The Supreme Court's voice must be heard regarding these lingering issues: (1) whether a petitioner's failure to raise Vienna Convention violations in previous appeals results in a procedural default; (2) whether an individually enforceable right is created by such violations; and (3) what is the scope [of] "review and reconsideration" for such violations.

Id.

208. See *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (granting certiorari, vacating the lower courts judgment and remanding with directions to dismiss the complaint). In *Goldwater*, the Supreme Court considered whether President Carter's action in unilaterally terminating the defense treaty with Taiwan deprived Members of Congress of their constitutional role with respect to a change in the supreme law of the land. *Id.* at 997-98. When the case was heard by the Supreme Court, Congress had taken no official action in response to the unilateral treaty termination of the Executive Branch. *Id.* at 998. The Court divided sharply on the propriety of judicial involvement in the case. Justice Powell concurred in the judgment, but filed a statement arguing that the issue was not ripe for review. *Goldwater*, 444 U.S. at 997. Powell reasoned that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority." *Id.* Justice Rehnquist, joined by three other Justices, concurred in the judgment, but filed a statement arguing that "the basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable." *Id.* at 1002. Justice Blackmun, joined by Justice White, dissented in the opinion, arguing: "I would set the case for oral argument and give it the plenary consideration it so obviously deserves." *Id.* at 1006. Finally, Justice Brennan dissented, arguing that the ruling of the Court of Appeals should be affirmed "insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from foreign governments." *Id.* The six Justices who agreed that the case should be dismissed could not agree on the reason for this conclusion. Consequently, the *Goldwater* Court granted certiorari, vacated the judgment of the lower court and remanded with directions to dismiss the complaint. *Id.*

producing a binding holding.²⁰⁹ *Goldwater* presented the Supreme Court with the issue of whether President Carter had the constitutional authority to unilaterally terminate a defense treaty with Taiwan. In a classic case of the Supreme Court avoiding the fray of foreign policy litigation, the case never went to oral argument and only one Justice expressed an opinion on the substantive issues.²¹⁰ Claiming the case raised a nonjusticiable political question, the plurality opinion got rid of the case without convincing enough Justices to form a majority.²¹¹ In his concurrence, Justice Powell laid out the political question doctrine: "[T]he doctrine incorporates three inquires: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"²¹²

Justice Powell chose to view the political question doctrine narrowly, arguing that "the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another."²¹³ Implementing a broad understanding of the doctrine in the plurality opinion, Justice Rehnquist found that the "case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."²¹⁴ Although

209. See *supra* note 181 (noting that the *Goldwater* Court did not provide a "binding holding").

210. See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 146–47 (1990) (discussing the *Goldwater* case).

211. See Uhlmann, *supra* note 165, at 51 (examining the Supreme Court's handling of *Goldwater*).

212. *Goldwater*, 444 U.S. at 998 (Powell, J., concurring) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Justice Powell found that "the answer to each of these inquires would require us to decide this case if it were ready for review." *Id.*

213. *Id.* at 1001.

214. *Id.* at 1002. In his dissent, Justice Brennan argued that Justice Rehnquist "profoundly misapprehends the political-question principle as it applies to matters of foreign relations." *Id.* at 1006 (Brennan, J., dissenting). Brennan stated:

Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decision making. The issue of decision making authority must be resolved as a matter of constitutional law, not political discretion.

Id. at 1006–07 (Brennan, J., dissenting) (citing *Baker v. Carr*, 369 U.S. 186, 211–13, 217

Justice Rehnquist's position obtained four votes, changes to the Court make it impossible to predict future review of treaty withdrawal under the political question doctrine.²¹⁵ Justice Powell concurred because he thought that the issue was not yet ripe.²¹⁶ He noted:

The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.²¹⁷

Powell's analysis of the ripeness issue displays substantial foresight when one considers the 2002 case of *Kucinich v. Bush*.²¹⁸

(1962); *Powell v. McCormack*, 395 U.S. 486, 519–21 (1969)).

215. See Uhlmann, *supra* note 165, at 51 ("[Although] Rehnquist's position . . . came one vote shy of commanding a majority of the Court, . . . [w]ith subsequent changes in membership on the Court, it will be interesting to see whether his view will enjoy a richer life.").

216. *Goldwater v. Carter*, 444 U.S. 996, 997 (1979).

217. *Id.* Testifying before the Foreign Relations Comm., Professor Andreas F. Lowenfeld described the potential for a constitutional impasse:

If, to take the strongest case, the Congress passed a joint resolution expressing its desire that a treaty should remain in effect, the President vetoed that resolution, and both Houses voted by two-third majorities to override the veto, I would think that the President could act in accordance with his original intention only at the risk of provoking a serious constitutional crisis.

Treaty Termination: Hearings on S. Res. 15 Before the Comm. on Foreign Relations, 96th Cong. 442 (1979) [hereinafter *Hearings*] (testimony of Prof. Andreas F. Lowenfeld).

218. See *Kucinich v. Bush*, 236 F. Supp. 2d 1, 18 (2002) (granting defendants' motion to dismiss or alternatively, their motion for summary judgment). In *Kucinich*, the United States District Court for the District of Columbia considered the constitutionality of President Bush's unilateral withdrawal from the Anti-Ballistic Missile Treaty (ABM) without congressional consent. *Id.* at 2. On Dec. 13, 2001, President Bush "gave Russia the requisite six-months notice of the intention of the United States to withdraw from the ABM Treaty." *Id.* at 2–3. "Before he withdrew from the Treaty, however, President Bush did not submit the question of treaty termination to the Senate or the House." *Id.* at 3. Thirty-two members of the House of Representatives brought a suit against President Bush, Secretary of State Colin Powell, and Secretary of Defense Donald H. Rumsfeld challenging the constitutionality of the unilateral termination. *Id.* at 2. The court noted that "[n]one of the opinions in *Goldwater* obtained a majority of votes, and hence no single rationale controls." *Id.* at 13. The Court held that the Congressmen did not have standing to bring the suit because "plaintiffs have alleged only an institutional injury to Congress, not injuries that are personal and particularized to themselves." *Id.* at 18 (citing *Raines v. Byrd*, 521 U.S. 811 (1997)). Further, the Court concluded that the "issue raised by these congressmen is a nonjusticiable political question." *Id.* Consequently, "the defendants' motion to dismiss or, in the alternative, for summary judgment is granted, and plaintiffs' motion for summary judgment is denied." *Id.*

In *Kucinich*, thirty-two Democratic Congressmen filed suit in federal district court challenging the constitutionality of President Bush's unilateral withdrawal from the Anti-Ballistic Missile Treaty (ABM).²¹⁹ In another well-timed maneuver, the Bush administration announced withdrawal from the ABM treaty a little over a year after the September 11th terrorist attacks, operating under the "well-developed convention that Congress does not oppose the [P]resident on strategic issues during wartime."²²⁰ Democratic Senator Russell Feingold introduced a nonbinding resolution asserting that the Senate did not approve the withdrawal and requiring Senate approval for withdrawal.²²¹ Republican Senator Orrin Hatch objected without offering an explanation, effectively blocking consideration of the resolution.²²² Notably, Senators Hatch, Jesse Helms, and Strom Thurmond signed a 1979 resolution authored by Senator Barry Goldwater opposing then-President Jimmy Carter's unilateral withdrawal from the mutual defense treaty with Taiwan.²²³ That resolution called Carter's action "a dangerous precedent for executive usurpation of Congress's historically and constitutionally based powers."²²⁴ Apparently, in 2002, Senators Hatch, Helms, and Thurmond no longer subscribed to that analysis.²²⁵ Despite Senators of both major parties

219. Peter Weiss, *Judge Bates' Decision in Kucinich v. Bush: Is the Glass Half Empty or Half Full?*, LAWYERS COMM. ON NUCLEAR POLICY, <http://lcnp.org/pubs/BASpring03/article5.htm> (last visited June 7, 2006) (on file with the Washington and Lee Law Review). President Bush did not consult with the Congressmen represented in the suit before termination of the ABM Treaty. *Id.* Peter Weiss served as lead counsel for plaintiffs in *Kucinich*. *Id.*

220. Craig Eisendrath, *Suing the President: Members of Congress Are Endeavoring to Prevent Pres. Bush from Abrogating Treaties without Congressional Consent*, USA TODAY (SOC'Y. FOR THE ADVANCEMENT OF EDUC.), May 2003, http://www.findarticles.com/p/articles/mi_m1272/is_2696_131/ai_101497542 (last visited Oct. 24, 2006) (on file with the Washington and Lee Law Review).

221. See David Ruppe, *ABM Treaty: U.S. Representatives Sue to Block Treaty Withdrawal*, GLOBAL SEC. NEWSWIRE, June 12, 2002, http://www.nti.org/d_newswire/issues/2002/6/12/9s.html (last visited June 7, 2006) (discussing the nonbinding resolution introduced by Senator Feingold) (on file with the Washington and Lee Law Review).

222. See *id.* (noting the response of Senator Hatch).

223. See *id.* (detailing the previous actions of Senators); see also *ABM Treaty Still Lives, Say Congressmen Who Sue to Undo its 'Unconstitutional' Knifing by Bush Without OK of Congress*, A WALL NEWS REPORT, June 21, 2002, <http://warandlaw.homestead.com/files/abmlives.htm> (last visited June 7, 2006) ("Senators Hatch, Helms, and Thurmond were plaintiffs in *Goldwater v. Carter* and still serve in the Senate today—but they support now what they opposed then.") (on file with the Washington and Lee Law Review). The WALL group helped initiate the movement that resulted in the *Kucinich* suit. *Id.*

224. See Ruppe, *supra* note 221 (reporting the text of the Goldwater resolution).

225. Noting the previous position of the Republican Senators should dispel the current administration's argument that only "liberal Democrats" try to abridge the "inherent Presidential power to act [unilaterally]." See Cheney, *supra* note 3, at 104–05, 119 (arguing in favor of substantial inherent presidential powers).

questioning the policy shift, no Senators joined the suit.²²⁶ Eventually, the District Court dismissed the suit, basing the decision on either the Congressmen's lack of standing or an implementation of the political question doctrine. In the wake of *Kucinich*, it makes no sense to challenge the constitutionality of withdrawal from the Optional Protocol. Congressional leaders would struggle to obtain standing; Powell's analysis in *Goldwater* suggests the current situation would not pass a ripeness inquiry, and the potential for a majority of the Court to apply the political question doctrine looms.

V. *Perhaps Legal, but Ultimately Unconstitutional*

The unilateral executive responses to the *Avena* judgment illustrate a situation where the President may have acted legally, but nonetheless unconstitutionally. First, this Part explores the relationship between constitutionality and legality. Second, it analyzes the tendency towards excessive legalism within the Executive Branch. Finally, it discusses the detrimental effects of departing from the constitutional scheme in regards to the unilateral executive responses to *Avena*.

A. *Constitutionality and Legality*

In his "Helvidius" letter, James Madison argued that "the president has the power to conduct foreign relations but not to make foreign policy."²²⁷ Despite the lack of direct constitutional text, careful analysis of the Framers' governmental scheme reveals preferential treatment of congressional participation in the formation of foreign policy.²²⁸ Numerous rationales support this position. Specifically, when Congress takes part in the formation of foreign policy, it fills the gap between the Executive Branch and the will of the citizens.²²⁹ In

226. See *ABM Treaty*, *supra* note 223 (discussing Congressional reaction to unilateral withdrawal from the ABM Treaty).

227. See HENKIN, *supra* note 2, at 43 (quoting James Madison) (examining the distribution of foreign affairs powers).

228. See KRAFT, *supra* note 17, at 160-62 (discussing "Congressional Consultation and the Logic of Democratic Theory"); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 *LAW & CONTEMP. PROBS.* 46-85 (Summer 1976) (discussing the American government scheme).

229. See FRANCIS O. WILCOX, *CONGRESS, THE EXECUTIVE AND FOREIGN POLICY* 12 (1971) ("Call it intuition, call it horse sense, call it sound political judgment—legislators are invaluable in helping to strike a tolerable balance between the idealistic and the practical, between the views of experts and those of the general public. They help bridge an otherwise unbridgeable

addition, the difficult process of garnering congressional consent assures the contemplation of differing views, the resolution of conflicting interests into coalitions, and the eventual formation of consensus.²³⁰ Congressional consultation also legitimizes executive decisions that occur within the "constitutional twilight zone."²³¹ Finally, the Framers did not envision an easy foreign policy-making relationship between the Executive and Legislative Branches;²³² instead, they designed a contentious partnership in which no individual or department of government possesses "exclusive authority to act on behalf of the nation" without explicit constitutional authority.²³³

Accepting that the Constitution presupposes foreign policy-making cooperation between branches and that the Judiciary remains reluctant to speak on the legality of unilateral executive action, scenarios emerge where the President can act "legally, that is, within the black letter of the law, but nonetheless unconstitutionally in the sense that his action is wholly destructive of the norms of our constitutional scheme."²³⁴ Two specific situations arise in which it appears a constitutional duty should preclude the President from acting unilaterally.²³⁵ First, when unilateral executive action will meet substantial opposition from congressional leaders,²³⁶ and second, when the President

gap in the formulation of our foreign policy."). Increasing congressional involvement also promotes the federal government's accountability to individual citizens. See BARRY GOLDWATER, *CHINA AND THE ABROGATION OF TREATIES*, 277-305 (1979) (discussing the advantages of reaching executive-legislative consensus on foreign affairs).

230. See Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 *LAW & CONTEMP. PROBS.* 1, 24-25 (Summer 1976) (noting the advantages of congressional consultation, and asserting that "[m]ost importantly, we gain some protection against arbitrary executive action"); see CHENEY, *supra* note 3, at 102 ("Congress was intended to be a collective, deliberative body. When working at its best, it would slow down decisions, improve their substantive content, subject them to compromise, and help build a consensus behind general rules before they were to be applied to the citizenry.").

231. See Gewirtz, *supra* note 228, at 80-83 (discussing congressional consultation in light of *Youngstown*). In his famous *Youngstown* concurrence, Justice Jackson states: "When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

232. See *supra* note 3 (examining the intentions of the Framers).

233. See KRAFT, *supra* note 17, at 159-60 (discussing "Congressional Consultation and the Logic of The Separation of Powers").

234. See *id.* at 162 (discussing constitutionality and legality).

235. See *id.* at 166 (discussing two scenarios where the President "has a constitutional duty" not to exercise power unilaterally).

236. See *id.* (discussing the President's constitutional duties). The Bush administration's now infamous "torture memo" and his unilateral authorization of the National Security Agency's warrantless wiretapping of American citizens illustrate situations where President Bush did not

knows unilateral executive action will "dramatically alter the course of U.S. foreign policy."²³⁷ The Presidential Memorandum and withdrawal from the Optional Protocol fall into the second category.

The novel Memorandum asserts that the President's constitutionally based foreign affairs powers authorize overriding state sovereignty, predetermining judicial decisions, and acting contrary to the will of Congress. Despite valid policy arguments, the Memorandum's unprecedented unilateral alteration of domestic treaty enforcement tramples on the constitutional scheme and history. Withdrawal from the Optional Protocol rejects the historic and "unbroken" foreign policy of the United States. Careful analysis of the unilateral withdrawal, in light of the policy arguments in favor of the Memorandum, reveals the creation of an unfamiliar and dangerously incoherent foreign policy. Finally, the Senate Judiciary Committee expressly rejected "[e]xecutive supremacy in the making of foreign policy" when it argued that "[t]he means of a democracy are its ends. When we set aside democratic procedures in making our foreign policy, we are undermining the purpose of that policy."²³⁸

B. "Can Do" Lawyers Within the Executive Branch

Telling one's client that he cannot do what he wishes to do is never pleasant and especially not when the client is a President or a Secretary of State or a Secretary of Defense. But given the various doctrines of standing, political questions, mootness, ripeness and so on that tend to limit judicial scrutiny of governmental acts in the international arena, I think it is important for the State Department's Legal Adviser, the Defense Department's General

fulfill his constitutional duty in the face of substantial, bi-partisan Congressional opposition. David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. C.R. & SOC. JUST. (forthcoming 2006) (discussing the wiretapping and torture controversies). Responding to the avalanche of criticism concerning these unilateral policies, the Administration uniformly sticks to novel legal interpretations of the President's Commander-in-Chief authority despite "contrary... constitutional text and history." *Id.* at 17.

237. See KRAFT, *supra* note 17, at 166 (discussing the President's constitutional duties).

238. S. Rep. No. 91-129, at 8-9 (1969); S. Rep. No. 90-797, at 7-8 (1967); see KRAFT, *supra* note 17, at 167 (highlighting the Senate Judiciary statement as "perhaps the most important lesson" of the controversy surrounding Carter's unilateral actions). *Cf.* Cole, *supra* note 236 (noting that the controversy surrounding the NSA wiretapping programs does not stem from the valid goal of intercepting Al Qaeda communications, but instead came from the "way the administration went about putting the program in place" and its implications on the "system of checks and balances so central to our constitutional democracy").

Counsel, and the Attorney General to appreciate their semi-judicial function in the foreign affairs field.²³⁹

In 1979, Andreas F. Lowenfeld, previously a five-year member of the Legal Advisor's Office in the State Department, made this statement before the Senate Committee on Foreign Relations.²⁴⁰ His insights into the role of Executive Branch legal analysts reveal a few key points. Thorough judicial review of foreign affairs decisions occurs infrequently.²⁴¹ Moreover, the lack of judicial review means that Executive Branch lawyers need "to take seriously their duties to interpret and carry out the Constitution . . . not to act as 'can do' lawyers."²⁴² Further, interpreting and carrying out the Constitution, the "semi-judicial function," requires Executive Branch lawyers to recognize that the constitutional scheme necessitates "consultation and accommodation among the several branches of government."²⁴³ Finally, acknowledging this constitutional duty does not seem particularly difficult; nevertheless, Executive Branch legal analysts persistently under-appreciate its importance.²⁴⁴

Legal analysts for the Bush administration routinely offer novel and controversial legal interpretations to validate unilateral executive action involving foreign affairs.²⁴⁵ Executive Branch legal analysts can offer such interpretations of presidential foreign affairs powers because the "Constitution confers authority over foreign affairs and national security,

239. *Hearings*, *supra* note 217, at 432–33 (testimony of Prof. Andreas F. Lowenfeld).

240. *Id.* at 430–43.

241. *See id.* at 432 ("[T]he likelihood of meaningful judicial review is much smaller with regard to governmental action in the foreign affairs area than with regard to other aspects of governmental activity."); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) ("[T]he decisions of the Court in [foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases.").

242. *Hearings*, *supra* note 217, at 432 (testimony of Prof. Andreas F. Lowenfeld).

243. *See id.* at 433, 443 (discussing the balance of foreign affairs power between the Executive and Legislative Branches).

244. *Id.* at 432 ("I am no longer as ready to assert as I once was [while serving the Executive Branch] that the magic words 'foreign affairs' or 'national security' mean a wider scope of delegation to the Executive Branch and a narrower duty to report to the Congress than is the case with respect to domestic affairs.").

245. *See, e.g., supra* Part IV.A.1 (discussing the innovative nature of the Presidential Memorandum and the legal hurdles it must surmount); Jess Bravin, *Pentagon Report Set Framework For Use of Torture: Security or Legal Factors Could Trump Restrictions*, *Memo to Rumsfeld Argued*, WALL ST. J., June 7, 2004 (discussing the "legal loopholes" the Executive Branch lawyers insist permit torture); Cole, *supra* note 236 (noting that President Bush's legal defense for unilateral NSA wiretapping "has taken overly aggressive [legal] positions that unnecessarily run roughshod over fundamental principles of the rule of law").

with few exceptions, to the political branches, creating the risk that judicial intervention will itself be a serious violation of separation of powers."²⁴⁶ Unlike domestic cases, where the Supreme Court relies heavily on its own constitutional interpretation, the Court routinely welcomes the constitutional interpretation of the political branches in foreign affairs cases.²⁴⁷ Searching for innovative legal arguments supporting unilateral executive action, "can do" lawyers miss the constitutional nuance that Professor Lowenfeld only grasped in retrospect.²⁴⁸ Executive lawyers should not jump to the conceptual question of whether the President possesses the legal authority to act unilaterally in foreign affairs.²⁴⁹ Instead, the initial inquiry should focus on the "normative" question of whether the President must exercise unilateral power without "meaningful" congressional participation.²⁵⁰ Whether the President can legally proceed in a unilateral fashion does not take into account the political circumstances surrounding the timing of such a decision.²⁵¹ In contrast, the latter inquiry necessitates consideration of the congressional posture, the demand for prompt action, the pursuit of a singular, cohesive foreign policy, and the upholding of the cooperative constitutional scheme.²⁵²

C. Abandoning the Constitutional Scheme

The Founding Fathers designed the presidency as a one-man office able to act on a moment's notice. In contrast, Congress must act as a collective, deliberative group of representatives focused on building consensus before implementing new laws and policies. This distinction highlights the critical

246. See Powell, *supra* note 90, at 537 (discussing the reluctance of the Supreme Court to interpret the Constitution in the area of foreign relations).

247. See *id.* (discussing the Supreme Court's policy of inviting the political branches to interpret the Constitution in the area of foreign relations).

248. See KRAFT, *supra* note 17, at 166 ("[T]he search for a legal resolution to these constitutional controversies has obscured the relevant focus of inquiry in cases of this nature.").

249. See *id.* (discussing the mistake of approaching unilateral presidential exercise of foreign policy making power as an "abstract legal question").

250. See *id.* (arguing that executive lawyers should examine whether the specific scenario necessitates presidential action without congressional involvement).

251. See *id.* (noting the drawbacks of "can do" legal analysis within the Executive Branch). To prevent unilateral executive action, political circumstances would have to reach a constitutional impasse. However, this situation has never arisen and hopefully never will.

252. See *id.* (discussing the advantages of resisting a strictly legalistic examination of the President's unilateral foreign affairs authority).

role the President must play during times of international crises.²⁵³ The preeminent role of the President in these dire international situations stems from the Founders' awareness that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man."²⁵⁴ Nevertheless, in situations where dramatic foreign policy decisions do not involve imminent danger or demand secrecy, congressional "[a]mbition should be made to counteract [executive] ambition."²⁵⁵ In the wake of the *Avena* decision the United States found itself in the latter situation. Mexico did not file suit in the ICJ because it sought to "work actively against our interests."²⁵⁶ Rather, Mexico simply wanted the United States to afford its citizens the VCCR rights Mexico affords Americans. Thus, the Bush administration should have utilized all three branches of government to address the problem of persistent state VCCR violations. Instead, the unilateral responses to *Avena* place executive ambition above the constitutional scheme of government. This subpart examines some of the negative consequences of employing unilateral executive action when the situation does not mandate such a response.

Medellin provided the Supreme Court with the opportunity to review the United States obligation to adhere with the final ICJ judgment in *Avena*.²⁵⁷ The

253. See Cheney, *supra* note 3, at 121 (discussing international situations that necessitate immediate executive action). Cheney argues:

Securing rights means, among other things, preserving the government's ability to respond internationally to countries that may want to harm us. In the face of danger, a tilt toward inaction . . . would help those foreign powers who want to endanger it. That is why the Constitution allowed a much greater scope for executive power in foreign than domestic policy.

Id.

254. See THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The Executive Department Further Considered").

255. See THE FEDERALIST NO. 51, at 318–20 (James Madison) (Clinton Rossiter ed., 2003) (discussing the structure of government and the preference for the proper checks and balances between different departments).

256. See Cheney, *supra* note 3, at 121 (discussing international situations where immediate executive actions become necessary). Disturbingly, in the recently released National Defense Strategy, the Bush administration seems to associate legal challenges to United States policies with terrorism. *National Defense Strategy of the United States of America*, DEP'T OF DEFENSE 5, available at http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm (last visited June 7, 2006) (arguing under the heading "Our Vulnerabilities" that "[o]ur strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism") (on file with the Washington and Lee Law Review).

257. The opportunity to review the final ICJ judgment in *Medellin* was novel because previous ICJ holdings concerning United States VCCR violations only carried the status of provisional orders requesting stays of execution. See *supra* Part. II.A (discussing *Avena*); Part II.D (discussing *Medellin*).

issues presented to the Court in *Medellin* did not include the legality and effect of the Presidential Memorandum.²⁵⁸ The Presidential Memorandum caught the Court off guard, producing a procedurally based dismissal because the issues for which it granted certiorari were no longer clearly defined.²⁵⁹ Although this outcome precluded the Court from finding that a final ICJ judgment bound domestic criminal courts,²⁶⁰ allowing the Court to rule on the original issues may have produced the most favorable result.²⁶¹ Ruling on just the narrow issues presented, the Court could have mandated compliance without expanding the holding beyond the *Avena* decision.²⁶² Further, if the Court based such a ruling on comity, the ICJ judgment would not bind domestic courts. A broader ruling would overturn *Breard* by determining that the procedural default doctrine does not apply in cases where VCCR violations occurred.²⁶³ In that scenario, the Administration would possess a much more plausible basis for withdrawal from the Optional Protocol. However, the fact remains that the Supreme Court did not rule on *Medellin*, and the substantial issues presented in that case remain undecided. By detrimentally influencing the judicial process, the Executive Branch eliminated a brief opportunity to clarify the VCCR violation issue, leaving state courts confused as to the proper method of adjudication.²⁶⁴

Apart from forming an incongruent foreign policy concerning VCCR rights, the Bush administration missed a unique opportunity to advocate congressional action.²⁶⁵ Such legislation could take various forms. Congress could amend the federal habeas corpus statute so that the procedural default doctrine would not apply to VCCR violations if the doctrine eliminated the

258. See John R. Crook, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: Supreme Court Dismisses Texas Death Penalty Case Considered by ICJ*, 99 AM. J. INT'L L. 889, 889 (2005) (noting the Supreme Court's unprepared stance concerning the legality of the Presidential Memorandum).

259. See *id.* (discussing the Court's dilemma because of the "unusual situation following President George W. Bush's" Memorandum).

260. It seems likely that the Bush administration wanted to avoid this outcome at all costs.

261. See Aeschleman, *supra* note 14, at 979 (discussing the potential Supreme Court ruling in *Medellin*).

262. See *id.* (noting the potential for a narrow holding affording compliance).

263. See *id.* (examining the potential for a broad ruling).

264. The differing results in the Oklahoma and Texas criminal courts illustrate the uneven administration of justice that will continue because of this missed opportunity. See *supra* notes 47-50 (discussing the reactions of Texas and Oklahoma).

265. See Aeschleman, *supra* note 14, at 978 (discussing the potential for legislation aimed at avoiding future ICJ inquires).

potential for "review and reconsideration" of VCCR claims.²⁶⁶ Altered *Miranda* warnings could include consular notification at the time of arrest. Although this approach would prove difficult because of the deliberate nature of Congress,²⁶⁷ it could negate future ICJ inquiry without precluding the United States from raising VCCR claims in the ICJ on behalf of American citizens detained abroad. Unfortunately, withdrawal from the Optional Protocol stripped the United States of the international judicial tool it created.

Finally, the expansion of executive foreign affairs power asserted in the Presidential Memorandum could prove devastating to the rights of states.²⁶⁸ Supreme Court precedent establishes that an existing executive agreement on foreign policy can preempt conflicting state law.²⁶⁹ In contrast, the Presidential Memorandum contends that by invoking foreign affairs, the President's exercise of power preempts state law despite the absence of a specific bilateral obligation.²⁷⁰ This assertion potentially overwhelms state sovereignty because "a wide variety of unilateral initiatives by the President could be linked to some putative source in treaties or customary international law."²⁷¹ One of the most internationally contentious rights held by states, the right to pursue the death penalty,²⁷² could face the danger of presidential preemption based on promoting foreign policy interests.²⁷³ While fruition of this ironic situation seems unlikely,²⁷⁴ expansion of presidential foreign affairs powers could result in

266. *See id.* (discussing potential habeas corpus reform).

267. *See id.* (commenting on the difficulty of pursuing congressional action). At a time when Republican leadership controls Congress, this option seems much more plausible.

268. *See* Brief for the States, *supra* note 16, at 21 ("The claimed power is subject to no limiting principle, and acknowledging it would give the President an essentially unlimited ability to preempt state law based on the assertion of foreign-affairs interest.").

269. *See* *Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 425 (2003) ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.").

270. *See* Brief for the States, *supra* note 16, at 22 ("Without a limitation to specific bilateral obligations, the President could preempt state law based on nothing more than a general statement to tie the preemption to some treaty.").

271. *Id.*

272. *See* Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1105 (2002) ("[T]he United States' adherence to the death penalty has become a growing irritant with other nations Increasingly, this issue has placed America and Europe on a collision course in almost every multilateral human rights forum Inevitably, these differences have begun to warp U.S. foreign policy.").

273. *See* Brief for the States, *supra* note 16, at 23 ("If the United States is right about the scope of presidential power in the present case, then there is no principled theory that would foreclose unilateral presidential abolition of state death penalty statutes based on his finding that abolition was in keeping with the United States' foreign policy interests.").

274. This situation would produce irony because the Bush Administration's pro-death

subsequent administrations negating the painstaking foreign relations work of previous administrations.²⁷⁵

VI. Conclusion

The Constitution contains sparse text concerning foreign policy-making power. Whether they intended it or not, the Framers created a governmental scheme where the two political branches struggle over the power to set foreign policy.²⁷⁶ In the wake of *Avena*, the Bush administration's dual unilateral actions intensified this struggle by claiming unprecedented control over foreign affairs. The President's unilateral actions encroached upon state sovereignty, trampled the Judicial Branch's authority to consider the issues implicated in *Medellin*, negated Congress's ability to enact effective legislation, and disregarded the advantages of congressional participation in foreign affairs.

This Note explains why the historic policy considerations offered in support of the Presidential Memorandum are incongruent with the consequences of withdrawal from the Optional Protocol.²⁷⁷ It comments on how incongruence results from executive ambitions favoring broader unilateral foreign affairs power, the lack of congressional response, and judicial reluctance in the area of foreign affairs.²⁷⁸ In addition, this Note argues that the President's unilateral actions may be legal, but are nonetheless, unconstitutional.²⁷⁹ Specifically, the courts may not rule on the legality of the executive actions; however, the President disregarded the constitutional preference for cooperative foreign policy-making.

In many regards the President's responses to *Avena* exhibit a political anomaly. Anti-death penalty advocates find themselves supporting the unprecedented authority of the Presidential Memorandum.²⁸⁰ Death penalty

penalty stance dates back to the President's administration of the death penalty during his service as the Governor of Texas.

275. This Note's discussion of the presidential authority to unilaterally withdraw from treaties provides a handy example of this phenomenon.

276. See HENKIN, *supra* note 2, at 84 ("In principle as in fact, recurrent competition for [foreign affairs] power has punctuated relations between President and Congress . . .").

277. See *supra* Part III (discussing the incongruence of the two unilateral executive actions).

278. See *supra* Part IV (commenting on factors contributing to incongruence).

279. See *supra* Part V (arguing that the president's actions may be legal, but nonetheless, ultimately unconstitutional).

280. See Liptak, *supra* note 47, at A14 (quoting Medellin's lawyer Sandra Babcock as stating: "The law is on our side . . . The President is on our side. I keep having to slap myself"). However, Babcock and other human rights activists decry withdrawal from the

states disagree with the President because future foreign policy objectives might support unilateral presidential abolition of state death penalty statutes.²⁸¹ The pending ruling of the Texas Court of Criminal Appeals and the inevitable application for writ of certiorari in the Supreme Court may clarify the legality of the Presidential Memorandum. However, withdrawal from the Optional Protocol eliminates ICJ review of future state VCCR violations. This Note supports a cooperative three branch approach to solving the problem of state VCCR violations. In accordance with *pacta sunt servanda*, "Americans ought never to demand privileges from foreign nations in order not to be obliged to accord them themselves."²⁸²

Optional Protocol as devastating to VCCR enforcement. *Id.*

281. See *supra* note 273 (noting arguments against the binding authority of the Presidential Memorandum). In contrast, withdrawal from the Optional Protocol will free the states from international review of domestic VCCR violations.

282. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 218 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (quoting Thomas Jefferson's statement that "Americans ought never to demand privileges from foreign nations in order not to be obliged to accord them themselves").

SYMPOSIUM
