Penn State International Law Review

Volume 28
Number 4 *Penn State International Law Review*

Article 3

5-1-2010

Medellin, the President's Foreign Affairs Power and Domestic Law

A. Mark Weisburd

Articles

Medellin, the President's Foreign Affairs Power and Domestic Law

A. Mark Weisburd*

Abstract

In this article, Professor Weisburd explores the implications of Medellín v. Texas *for the President's authority to affect domestic law through reliance on his authority to conduct the foreign affairs of the United States. He argues that the Court was correct to reject arguments that, on the facts of the case, the President could look to a delegation of authority from Congress or from the Senate as treaty-maker, or that President could treat the matter as resting on his power to settle claims against foreign governments, or that the President's obligation to "take care that the laws be faithfully executed" would provide the necessary grounding for his action. He also argues that there are reasons to support the Court's result stronger than those that appear in its opinions, and that critics' arguments are not very convincing. Finally, he suggests some implications of the result in* Medellín.

* Martha M. Brandis Professor of Law, School of Law, University of North Carolina at Chapel Hill. The author gratefully acknowledges the assistance of the Carolina Law Foundation in the preparation of this article.

Table of Contents

I. INTRODUCTION

It sometimes happens that important court decisions receive less attention than one might expect, especially if they are handed down more or less simultaneously with decisions in cases which, while no more important, have a higher profile. A case in point is *Medellín v. Texas*, decided by the Supreme Court on March 25, 2008.[1] Non-specialist observers see it as less significant than *Boumediene v. Bush*,[2] at least judging by comparing the number of references to each case in the *New York Times*[3] since their dates of decision. Of course, *Boumediene*'s importance cannot be gainsaid; its holding that prisoners at Guantanamo Bay had the right to seek relief through the writ of habeas corpus[4] is a significant statement regarding the limitations on the power of the United States government in wartime. But *Medellín* presented issues arguably even more fundamental; that case forced the court to address a claim of presidential power, not supported by any statute, that was breath-taking in scope.[5] The Court's rejection of that claim was phrased in terms that

1. *See* Medellin v. Texas, 552 U.S. 491 (2008).
2. Boumediene v. Bush, 128 S. Ct. 2229 (2008).
3. In a Lexis/Nexis search on June 15, 2009, seeking all references to the cases since their dates of decision, only seven references to Medellin were found (not counting letters to the editor), but there were twenty-seven references to Boumediene.
4. *See Boumediene*, 2229 S. Ct. at 2240.
5. *See generally Medellin*, 552 U.S. 491.

appear to limit strictly the President's authority in an area whose boundaries have been very murky indeed.

Medellín also presented important issues of treaty interpretation, and this article cannot avoid reference to those issues. Its focus, however, will be on the breadth of the claim of executive power raised in *Medellín*, that case's treatment of that claim, and the implications for the future of American foreign relations law presented by the Court's reasoning.

II. BACKGROUND

In 1994, José Ernesto Medellin, a Mexican national, was sentenced to death by a Texas court after his conviction for his role in the rapes and murders of two teenage girls.[6] Although Texas authorities were required by Article 36 of the Vienna Convention on Consular Relations[7] ("Consular Convention") to inform Medellín of his right to consult the Mexican consul, they failed to do so.[8] Mexican authorities did not learn of Medellín's situation until 1997, after he had exhausted his direct appeals. Medellín then sought a writ of habeas corpus from the Texas courts, based on Texas' failure to carry out its Article 36 obligations;[9] this relief was finally denied in October, 2001.[10]

In the meantime, in June, 2001, the International Court of Justice (ICJ) had decided the *LaGrand Case*, brought by Germany against the United States because of the violation by Arizona authorities of the Article 36 rights of two German nationals.[11] The ICJ held in *LaGrand* that, for individuals denied their Article 36 rights, the Consular Convention created a right to review and reconsideration of their sentences, notwithstanding otherwise applicable waiver rules.[12] Medellín thereupon sought habeas corpus relief from the federal courts,[13] arguing that American courts were bound by the ICJ's interpretation of the Consular Convention in *LaGrand*.[14] This argument failed at the

---

6. *See Medellin.* at 501-02.

7. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

8. *See Medellin*, 552 U.S. at 501.

9. *See id.*

10. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 662, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) (5th Cir. Feb. 28, 2005) [hereinafter Dretke Amicus Brief]; Reply Brief for Petitioner at 5-7, Medellin v. Dretke, 544 U.S. 660 (5th Cir. Feb. 28, 2005) (No. 04-5928) [hereinafter Dretke Petitioner's Brief].

11. *See* LaGrand (F.R.G. v. U.S), 2001 I.C.J. 466 (June 27), 40 I.L.M. 1068 (2001).

12. *See id.* at ¶¶ 75-77, 79-91.

13. *See Medellin,* 552 U.S. at 502.

14. *See* Dretke Petitioner's Brief, *supra* note 10, at 5.

district court level;[15] before the Court of Appeals heard Medellín's appeal from that determination, the ICJ decided the *Case Concerning Avena and Other Mexican Nationals*,[16] a claim by Mexico against the United States on behalf of fifty-two Mexican nationals, including Medellín, who had been sentenced to death in several American states but had not been timely informed of their Article 36 rights.[17] The ICJ in *Avena* held that fifty-one of these persons, including Medellín,[18] were entitled to a review and reconsideration of their sentences,[19] even though, under the procedural rules of the relevant American states, all of them had waived their rights to raise this issue through their failures to raise it at their trials.[20]

Back in the United States, the Court of Appeals hearing Medellín's appeal of the denial of his *habeas corpus* petition took note of *Avena,* but rejected Medellín's argument.[21] Medellín thereupon sought Supreme Court review, but before oral argument, the United States filed an amicus brief that—while it rejected Medellín's argument that *Avena* of its own force imposed an obligation on American courts to accord relief to him—argued that a memorandum from President Bush to Attorney General Gonzales addressing *Avena* was dispositive. That memorandum provided

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], 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.[22]

According to the United States, Texas was legally obliged to conform to the President's "determination," even if *Avena* otherwise would have no effect in American domestic law.[23] The Supreme Court dismissed Medellín's appeal to permit the Texas courts to consider the implications of the President's memorandum.[24] The Texas courts held that neither

15. *See Medellin*, 522 U.S. at 502.
16. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) [hereinafter Avena].
17. *See Medellin*, 522 U.S. at 540 (citing *Avena*, 2004 I.C.J. at 12, 39).
18. *See id.* at 502 (citing Avena at 53-55).
19. *See id.* at 502-03 (quoting *Avena*, 2004 I.C.J. at 72).
20. *See id.* at 503 (citing *Avena*, 2004 I.C.J. at 56-57).
21. *See id.* at 503.
22. *Medellín*, 552 U.S. at 503.
23. *See id.* at 504.
24. *See id.* at 503 (citing Medellin v. Dretke, 544 U.S. 660, 664 (2005)).

Avena nor the memorandum bound them, and denied Medellín any relief.[25] The Supreme Court granted certiorari.[26]

III. THE SUPREME COURT'S OPINION

The bulk of the Supreme Court's opinion dealt with Medellín's argument that obligations created by the Optional Protocol to the Consular Convention[27] ("Optional Protocol"), Article 94 of the U.N. Charter,[28] and/or the Statute of the ICJ,[29] taken together, bound American state and federal courts to comply with the *Avena* judgment.[30] The Court rejected this argument on the ground that none of these treaties were self-executing.[31]

More specifically, the Court held, first, that the Optional Protocol had no effect other than conferring on the ICJ jurisdiction to hear Mexico's claim, characterizing Article 94 of the Charter as the source of countries' obligations to comply with ICJ judgments.[32] It rejected the argument that Article 94 was a self-executing treaty provision, holding that it was non-self-executing.[33] The Court explained its understanding of the meaning of these terms as follows:

> The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.[34]

As for Medellín's argument relying on the ICJ Statute, the Court held that—so far from supporting his claim—the relevant articles of the Statute established that Medellín could not be considered a party to a case before the ICJ because, according to the Statute, only countries could be parties to contentious cases before that Court,[35] and its

---

25. *See id.* at 504.
26. *See id.* at 504 (citing Medellín v. Texas, 550 U.S. 917 (2007)).
27. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].
28. U.N. Charter art. 94 [hereinafter art. 94].
29. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 39 A.J.I.L. Supp. 215 (1945) [hereinafter ICJ Statute].
30. *See Medellin,* 552 U.S. at 506.
31. *See id.* at 505-06.
32. *See id.* at 507-08.
33. *See id.* at 508-11.
34. *Id.* at 505, n. 2.
35. *See Medellin,* 552 U.S. at 511 (citing ICJ Statute, *supra* note 31, at art. 34 (1)).

judgments were binding only as between the parties and with respect to the case in question.[36]

After disposing of Medellín's treaty-centered arguments, the Court turned to the arguments with which this paper is concerned—those to the effect that American courts were obliged to conform to the *Avena* judgment because of the President's memorandum.[37] The Court, while acknowledging the significant foreign affairs responsibilities of the President, held that the President's authority had to be grounded either in a statute or in the Constitution.[38] In this connection, the Court held that the proper standard for evaluating the President's power in this area was the familiar tripartite framework enunciated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer.*[39] It applied that framework to the first argument of the United States: that, because the Optional Protocol and Article 94 created an international legal obligation for the United States, they implicitly give the President authority to meet that obligation. The Court rejected this argument.[40] It noted that, while the President may resort to political or diplomatic means to carry out international obligations, "unilaterally converting a non-self-executing

36. *See id.* (citing ICJ Statute, *supra* note 31, at arts. 34(1), 59).

37. *See id.* at 523.

38. *See id.* at 524 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

39. *See id.* at 524 (quoting Youngstown, 343 U.S. at 635-638 (Jackson, J., concurring) ("1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in 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. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

40. *See Medellin*, 552 U.S. at 525.

treaty into a self-executing one is not among them."[41] Rather, the Court held, "the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress. . . ."[42] Indeed, the Court went on to hold that, because the Senate consents to the ratification of a non-self-executing treaty on the understanding that it has no domestic effect of its own force, Presidential enforcement of the treaty by creating domestic law is "in conflict with the implicit understanding of the ratifying (sic) Senate."[43] For that reason, the Court held, President Bush's action fell within the third of Justice Jackson's categories.[44] The United States attempted to fortify its position by pointing to what it called Congressional acquiescence in the President's exercise of the power to respond to ICJ judgments. The Court rejected that argument, pointing out that the instances on which the government relied did not "remotely involve[] transforming an international obligation into domestic law and thereby displacing state law."[45] The government also argued that the President's statutory obligation to represent the United States before U.N. organs, including the ICJ, supported its claim to Presidential authority, but the Court distinguished those responsibilities as involving the President's international role, not unilateral Presidential creation of domestic law.[46]

The Government's second argument was that President Bush's memorandum should be seen as an instance of the President's well-established authority to resolve claims disputes with foreign countries even absent Congressional action.[47] The Court distinguished the practice to which the United States referred as involving only "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals,"[48] and stressed that the Court's upholding of the President's authority in that area was based on an inference of Congressional consent, in light of the absence of Congressional objection to the practice, even though it was long-standing and known to Congress.[49] The Court distinguished the action the President sought to take in this case, however, as unprecedented, as the government admitted; since such an action had never been attempted before, the President's issuance of his memorandum could hardly be said

41. *Id.* at 525-26.
42. *Id.* at 526-27.
43. *Id.* at 527.
44. *See id.*
45. *Medellin*, 552 U.S. at 528.
46. *See id.* at 529-30.
47. *See id.* at 531.
48. *Id.*
49. *See id.*

to have taken place against a background of long-standing congressional acquiescence.[50] The Court stated

> Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws. . . . The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.[51]

In addition to the arguments made by the United States supporting the effectiveness of the President's memorandum, Medellín raised a different one: that the memorandum could be upheld as an exercise of the President's responsibility to "take Care that the Laws be faithfully executed."[52] The Court dismissed this argument, observing that "[t]his authority allows the President to execute the laws, not make them,"[53] and held that, since that the Court had concluded that the *Avena* judgment was not domestic law, the President could not rely on his take care powers.[54]

Justice Stevens concurred in the judgment in a very short opinion.[55] Most of it was devoted to an explanation of Stevens's reasons for agreeing with the Court's conclusions regarding the treaties on which Medellín relied and to exhorting Texas to comply with the United States's admitted international legal obligation respecting Medellín, despite the absence of any obligation in domestic law for Texas to do so.[56] With respect to the effect of the President's memorandum, he stated only, "I agree . . . that the President's memorandum is not binding law. Nonetheless, the fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment."[57]

Justice Breyer's lengthy dissent focused on his conclusion that the treaties Medellín cited required Texas to comply with the *Avena* judgment as a matter of domestic law.[58] He expressly refused to take a

---

50. *See Medellin*, 552 U.S. at 532.
51. *Id.*
52. U.S. CONST. art. II, § 3.
53. *Medellín*, 552 U.S. at 532.
54. *See id.*
55. *See id.* at 533-37 (Stevens, J. concurring).
56. *See id.*
57. *Id.* at 536.
58. *See* Medellín, 552 U.S. at 538-567 (Breyer, J. dissenting).

position regarding the legal effect of the President's memorandum, noting that "It is difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law,"[59] but adding "[o]n the other hand, the Constitution must impose significant restrictions upon the President's ability, by invoking Article II treaty-implementation authority, to circumvent ordinary legislative processes and to pre-empt state law as he does so."[60] In short, both of the separate opinions in *Medellín* agreed with the Court that there are limits to the President's authority to set aside state law, but neither is of much assistance in assessing the majority's opinion on this issue.

IV. ANALYSIS OF THE COURT'S OPINION AND OF THE ARGUMENTS OF CRITICS

A. The Scope of Authority the President Claimed

Consideration of *Medellín* and its implications requires an understanding of the breadth of the claim the President made regarding his memorandum. On the one hand, he asserted that American law imposed no obligation on the courts to comply with the *Avena* judgment. On the other, he claimed the authority to require such compliance nonetheless. Furthermore, in purporting to require such compliance, the President was, as the majority stated, "reach[ing] deep into the heart of the State's police powers and compel[ling] state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[61]

To express the foregoing in greater, and probably excessive, detail, the President purported to require the states to provide hearings to named criminal defendants despite the fact that the judgments had become final in their cases; he determined as well the subject matter of those hearings, that is, whether the defendants were in some way negatively affected by the denial of their rights under the Consular Convention. This action not only sought to affect the finality of the judgments but also was intended to set aside state procedural law regarding both the stage of proceedings at which defendants were obliged to raise defenses and the consequences of any failure to raise defenses at the point required. Furthermore, the President's memorandum took no account of the fact that, in Medellín's case at least, claims based on Article 36 of the Consular Convention had

59. *Id.* at 564.
60. *Id.* at 565.
61. *Medellin*, 552 U.S. at 532.

in fact already been considered on the merits by both state and federal courts considering habeas-corpus petitions.[62]

The Supreme Court characterized the memorandum as an exercise in law-making[63] and, given the attempted alteration of the state's rules of procedural default, that characterization is not unreasonable. It is worth noting, however, that the action could also plausibly be called an exercise of judicial authority. Just as a properly challenged judgment is not final as far as an appellate court is concerned, so the President acted as though the judgment in Medellín's case was not final as far as the federal executive was concerned. Just as an appellate court could require a trial court to reconsider a particular case in order to apply a rule of law different from that the trial court had thought to be correct, so the President treated the Texas courts as, in effect, having erred in their application of procedural default rules in this particular case. Further, the President took this position even as he simultaneously argued that, but for his issuance of his memorandum, Texas had no legal obligation to

62. One of the more puzzling aspects of this litigation is the relative lack of attention paid to the consideration already given to Medellín's Consular Convention claims in post-conviction proceedings in both state and federal court. In his initial application for a writ of habeas corpus from the Texas court, Medellín based his claim for relief for the Consular Convention violation on the argument that this violation should have led to the suppression of the confession he had made after receiving his *Miranda* warnings. Brief for Respondent at 3, n.3, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984) [hereinafter Respondent's Brief]. The Texas court denied relief and, as an alternative basis for its holding, relied on its conclusion that Medellín had failed to show that he had been harmed by the violation of his Consular Convention rights. *See* Ex Parte Medellín, Respondent's Proposed Findings of Fact, Conclusions of Law and Order, Conclusions of Law ¶ 16 (339th Dist. Ct., Harris Cty., Tex. 2001) (no. 675430-A) *found in* Respondent's Appendix 39, 61, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984) [hereinafter Respondent's Appendix]. The court hearing Medellín's petition for a federal writ of habeas corpus relied on a similar conclusion as an alternative basis for denying relief. *See* Medellín v. Cockrell, (S.D. Tex. 2003) (No. H-01-4078) *found in* Respondent's Appendix, *supra*, at 66. However, even though the United States brought to the attention of the ICJ the fact that Medellín's claims had been considered and rejected in post-conviction proceedings in its memorial in the *Avena* case, Counter-Memorial for the United States of America at 164, n. 360, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, and the ICJ's judgment acknowledges that some Consular Convention claims had been raised in American courts and dismissed on substantive grounds, *id.* at ¶ 20, the ICJ in awarding relief failed to distinguish between those cases and others in which the persons denied their Consular Convention rights had never been able to make an argument based on that denial. Nor does the President's memorandum distinguish between cases in which Consular Convention claims had received substantive consideration from a court and those in which no such consideration had been afforded. Texas raised this point in its brief to the Supreme Court but put little stress on it. *See* Respondent's Brief, *supra*, at 49-50.

63. *See Medellín*, 552 U.S. at 532.

provide any relief to Medellín, and that the decision whether to comply with the *Avena* judgment was a matter of his sole discretion.[64]

One more aspect of the President's Memorandum also requires discussion before we turn to the arguments addressed in *Medellín*. The Court there stated

> The President's Memorandum is . . . [an] "unprecedented action." . . . Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.[65]

But "reach[ing] deep into the heart of the State's police powers and compel[ling] state courts to reopen final criminal judgments and set aside neutrally applicable state laws"[66] was not only something no president has ever tried to do before this case, but something that had never been done by the judiciary in the course of enforcing a judgment from a foreign court or an international tribunal.[67] Of course, American courts frequently enforce awards of arbitral panels sitting overseas and judgments of foreign courts, but those cases do not involve either the panels or the foreign courts purporting to require an American court to reopen a matter which has been finally decided. Again, the "fair and equitable treatment" requirement of Article 1105 of the North American Free Trade Agreement (NAFTA)[68] has been interpreted as permitting arbitral panels established under Chapter 11 of NAFTA to assess the fairness of proceedings in American courts that have become final.[69] However, such panels have no authority to deprive a successful litigant of his victory; losing litigants make their claim against the countries whose justice systems have allegedly failed, NOT against the winning litigants.[70] Furthermore, such panels have no authority to make an award based solely on legal error; rather, an award based on the outcome of

64. *See* Amicus Brief of the United States at 27-28, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984) [hereinafter Amicus Brief].

65. *Medellín*, 552 U.S. at 532 (internal citations omitted).

66. *Id.*

67. *See id.*

68. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 17, 1992, 32 I.L.M. 289, 605, 639 [hereinafter NAFTA].

69. *See* Loewen Group, Inc. v. U.S., ICSID, Case No. ARB(AF)/98/3, ¶¶ 39-60, (Jan. 5, 2001) (decision on hearing of Respondent's objection to competence and jurisdiction).

70. *See* NAFTA, *supra* note 68, arts. 1115-16.

private litigation is justified only if the panel sees the proceeding as "clearly improper and discreditable."[71]

Another effort to find a precedent for the relief Medellín sought was his citation to the Court of two cases,—*Comegys v. Vasse*[72] and *La Abra Silver Mining Co. v. U.S.*,[73] as supporting "the proposition that the judgments of international tribunals are automatically binding on domestic courts."[74] The Court rejected the argument, characterizing both as stating only that a treaty's terms control the outcome of a case involving that treaty.[75] In fact, although neither actually supports that conclusion, they are both precedents that offer no support at all for any rule of automatic enforceability of the judgments of international tribunals.

Comegys arose because of certain proceedings before a tribunal established pursuant to an 1819 treaty between the United States and Spain which addressed, among other things, Americans' claims against Spain.[76] Under this treaty, the United States agreed to establish a tribunal, composed of Americans citizens appointed by the President by and with the consent of the Senate, to adjudge Americans' claims against Spain; such claims were voided by the treaty, except to the extent they were pursued before the tribunal. The United States further agreed to pay such claims as the tribunal found to be valid up to the amount of $ 5,000,000.00.[77] (Incidentally, one might question the characterization of this tribunal as "international" since, although its establishment was required by a treaty, its members were Americans appointed by the President, the claims it heard were made by Americans, and the awards it made were paid out of U.S. government funds.)

Vasse was a marine insurer who had written policies protecting American shippers against loss from, among other risks, the capture by Spain of the insureds' ships.[78] Some vessels covered by these policies had been captured by Spain, and Vasse had paid the resulting claims.[79] He went bankrupt in 1802.[80] His assignees in bankruptcy had brought a claim before the 1819 treaty tribunal regarding the sums Vasse had paid

71. *See* Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, ¶ 127, (Oct. 11, 2002).

72. Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828).

73. La Abra Silver Mining Co. v. U.S., 175 U.S. 423 (1899).

74. *Medellín*, 552 U.S. at 519.

75. *See id.*; Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 56-57 (Mar. 31).

76. *See* Treaty of Amity, Settlement and Limits, U.S.-Sp., Feb. 22, 1819, 8 Stat. 252.

77. *See id.* arts. 9, 11, 8 Stat. at 258-60.

78. *See Comegys*, 26 U.S. at 194.

79. *See id.*

80. *See id.*

on losses caused his insureds by Spain; they were successful and received an award.[81] Vasse then sued them for the award and won at trial.[82] The case was then taken to the Supreme Court.[83] The Court held that, while the courts were bound by the treaty tribunal's determination of the validity of any particular claim, that tribunal lacked the authority to determine the ownership of the claim.[84] Therefore, the fact that the tribunal had made its award to the trustees did not preclude Vasse's claim.[85] In other words, so far from deferring to the tribunal, the Court held that it was *not* bound by the fact that the tribunal had made its award to the trustees.[86] While the opinion included language characterizing as binding the tribunal's determinations regarding the validity of claims, that language was dictum, since there was no dispute as to that point. This case is thus inconsistent with any argument calling for absolute deference to an international tribunal.

La Abra likewise does not seem to cut against the Court's conclusion in *Medellín*. That case revolved around the award of a claims commission established by a treaty between the United States and Mexico to address the claims of the citizens of each country against the other.[87] Its determinations were to be final. Under the treaty, any monetary awards to claimants were to be paid by the government against whom the award was made to the other government, which would then distribute the payments to the claimants.[88] An American mining concern made a claim to the commission in 1870 and received an award in its favor in December, 1875.[89] After the United States had received a portion of the amount awarded to the company but before anything had been paid to it, Mexico presented to the United States previously unavailable evidence showing that the claim was fraudulent.[90] What followed was a drawn out drama of which the *La Abra* decision was the final act. First Congress, in 1878, authorized withholding of payment until the matter was investigated.[91] After an investigation, the Secretary of State concluded that there was good reason for suspicion, but doubted that the United States could continue to withhold payment without

81. *See id.* at 194-95.
82. *See id.* at 195.
83. *See Comegys*, 26 U.S. at 193.
84. *See id.* at 219-20.
85. *See id.* at 210-21. The Court ultimately held for the trustees, however, on the theory that the claims had in fact been part of the bankruptcy estate and thus had passed to the trustees upon Vasse's bankruptcy. *See id.*
86. *See id.* at 220.
87. *See La Abra*, 175 U.S. at 425.
88. *See id* at 429.
89. *See id.* at 427.
90. *See id.* at 425-26.
91. *See id.* at 439-41.

Congressional action.[92] Congress did not act, and the mining company was paid approximately $240,000; the United States remained in possession of a further $400,000 paid by Mexico in respect of this award.[93] A new presidential administration suspended payment pending negotiation between the United States and Mexico of a treaty permitting reexamination of the case.[94] The treaty was signed in 1882, but was eventually rejected by the Senate.[95] While the Senate was considering the treaty, the Supreme Court held in *Frelinghuysen v. Key*[96] that the President had the authority to withhold payment until the Senate acted.[97] Even after the treaty was rejected, presidents continued to withhold payment; the Supreme Court upheld the executive's discretion to take this action in *Boynton v. Blaine*,[98] apparently construing the 1878 legislation as according the President this degree of discretion.[99] Finally, in 1892, Congress enacted a statute permitting the United States to sue the mining company before the Court of Claims in order to address the claims of fraud.[100] The United States did so and the Court of Claims held that the company in fact had engaged in fraud.[101] *La Abra* was the appeal from the Court of Claims decision, which the Supreme Court affirmed.[102]

It is true that, in the course of its opinion, the Court stated, "We might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration."[103] However, its opinion then immediately went on to uphold the 1892 statute against an argument that it was somehow disrespectful of the tribunal. The Court described the obligation of the United States regarding the tribunal's award as one of execution in good faith, and characterizing the legislation as "an assurance in the most solemn and binding form" that the United States would force those of its citizens who make claims against other governments to act in good faith.[104]

---

92. *See La Abra*, 175 U.S. at 431-32.
93. *See id.* at 428.
94. *See id.* at 431.
95. *See id.* at 425-32.
96. Frelinghuysen v. Key, 110 U.S. 63 (1884).
97. *See id.* at 74-75.
98. Boynton v. Blaine, 139 U.S. 306 (1891).
99. *See id.* at 325-26.
100. *See La Abra*, 175 U.S. at 441.
101. *See id.* at 447.
102. *See id.* at 440-47, 499-500.
103. *Id.* at 463.
104. *See Id.*

Once again, the cited case turns out not be about the binding character of a tribunal's award, and is thus irrelevant to *Medellín*. If anything, this series of cases of which *La Abra* is the last seems to recognize considerable discretion in the executive regarding such awards, *Frelinghuysen* in particular stressing the President's discretion to withhold payment of awards made by the tribunal while a treaty relevant to the award in question is pending.[105]

Professor Monaghan has argued that the arbitration held under the auspices of the Treaty of Washington[106] after the Civil War amounted to international review of a Supreme Court decision, and thus is relevant to a consideration of the Constitutionality of the review of federal courts by supranational courts.[107] That assertion, however, mischaracterizes the actual character of these arbitrations. To be sure, the proceedings involved claims by British nationals against the United States for, among other things, condemnations of ships and cargoes by American prize courts—including the Supreme Court - which allegedly applied incorrect legal standards.[108] However, the arbitration proceedings were "reviews" in a sense quite different from the review by a superior court of the actions of an inferior tribunal. The arbitration awards were made exclusively against the United States, which obviously had consented to participate in the process. The U.S. naval personnel who had captured the vessels in question were not participants, however, even though they would have received at least 50% of the value of the condemned property as prize money by virtue of the prize courts' allegedly illegal judgments,[109] and were also subject to damage claims if they had acted unlawfully in capturing a particular vessel.[110] That is, while one of the successful parties before the prize courts—the United States—could have seen the elimination of any benefit it had realized by the condemnation, that party had consented to subject itself to this risk. However, the arbitration did not change results of the prize court proceedings as they affected the captors of the vessels, who manifested no such consent.

105. *See Frelinghuysen*, 110 U.S. at 72-75.

106. Treaty Concerning Claims, Fisheries, Navigation of the St. Lawrence, etc.; American Lumber on the St. John; Boundary, U.S.-U.K., May 8, 1871, 17 Stat. 863 (Treaty of Washington) (the panels were established by articles XII-XVII).

107. *See* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 860-62.

108. *See* JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3902-57 (Washington: Government Printing Office 1898).

109. *See* An Act for the Better Government of the Navy of the United States, §§ 5-6, 2 Stat. 49, 52-53 (1800).

110. *See* SIR THOMAS ERSKINE HOLLAND, A MANUAL OF NAVAL PRIZE LAW: FOUNDED UPON THE MANUAL PREPARED IN 1866 BY GODFREY LUSHINGTON 68 (Darling & Son 1888).

Thus, not only did the arbitration not require American courts to revisit cases that had been finally decided; it likewise had no effect against successful participants in such cases who had not consented to the tribunal's authority.

With this background, it is easier to consider the arguments the Supreme Court rejected in *Medellín*. Leaving aside those related to treaty interpretation, there are three: 1) that Article II's requirement that the president "take care that the laws be faithfully executed" empowers him to take steps necessary to implement the United States's obligation, pursuant to Article 94 of the U.N. Charter, to comply with ICJ judgments; 2) that, whatever the case with other treaties, those involved in *Medellín*, when read with the United Nations Participation Act,[111] amounted to a delegation to the President of the authority to take steps necessary to comply with the *Avena* judgment; and 3) that the President possesses inherent authority to resolve international disputes to which the United States is a party, and therefore has the authority to enforce an ICJ judgment dealing with one such dispute.

B. The "Take Care" Clause Argument

The Supreme Court gave the "take care" argument fairly short shrift,[112] and it seems difficult to maintain. In the first place, the Amicus Brief of the United States (Amicus Brief) asserts that the President has the authority to decide whether or not to comply with an ICJ decision.[113] This claim of discretionary authority, however, is difficult to reconcile with the "take care" clause if that language imposes on the President the *duty* to enforce the laws, as numerous authorities argue.[114] Further, it is important to recall that the President, in his memorandum directing action by the state courts, although claiming to act pursuant to authority accorded him "by the Constitution and laws," characterized his action as discharging "the international obligations" of the United States.[115] The international obligations of the United States are not limited to those created by treaty; they include obligations created by customary international law. If the "Take Care" clause creates in the President the authority to carry out an international obligation not binding as a matter of domestic law, it is hard to see why that authority would not extend to customary law obligations as well as to treaty obligations (even if, as

111. *See* 22 U.S.C.A. §§ 287-287*l* (2004).
112. *See Medellín*, 552 U.S. at 532.
113. *See* Amicus Brief, *supra* note 64, at 11.
114. *See* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 359-60 (2008).
115. *See* Medellin v. Texas, 552 U.S. 491, 503 (2008)

Professor Swaine has argued,[116] it is possible to imagine a class of treaties neither susceptible of judicial enforcement nor the subject of implementing legislation but which could nonetheless provide authority for execution by the President[117]). Yet it seems clear that the courts do not agree that the President is obliged to see that customary international law is obeyed. For example, the Supreme Court has held that the courts are bound by the President's determination that certain territory is subject to the sovereignty of the United States, notwithstanding the existence of a competing claim from another country and the Court's awareness of the existence of rules of customary international law aimed at resolving competing national claims to sovereignty.[118] Similarly, the Court has held itself bound by executive determinations regarding competing claims to sovereignty over particular territory by foreign countries, notwithstanding its ability to decide such cases according to international law absent such an executive determination.[119] Even the Restatement of Foreign Relations Law acknowledges that there is support for the proposition that the President is not compelled by the Constitution to adhere to customary international law.[120]

If the courts will not question presidential determinations on certain legal questions, despite the existence of rules of customary law against which the president's conclusion could be tested, it must follow that the "take care" clause does not apply to rules of customary international law. And IF a particular treaty is understood to impose on the United States *only* obligations at the international level, then it is difficult to see why that class of international obligations should be any more subject to the "take care" clause than obligations created by customary law.

---

116. *See* Swaine, *supra* note 114 at 355-56.

117. Perhaps surprisingly, it appears that only one case has purported to find a treaty that has not been legislatively implemented as providing authority for Presidential action. The court in Ex Parte Toscano, 208 F. 938 (S.D.Cal. 1913), held that the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18 1907, 36 Stat. 2310, authorized the President to intern troops of one of the groups fighting in a Mexican civil war. *See Toscano*, 208 F. at 942-43. This result was questioned in United States ex rel. Martinez-Angosto v. Mason, 344 F.2d 673, 681-86 (2d Cir. N.Y. 1965). Reaching a result similar to that in *Mason*, the court in Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 22 F.Supp. 2d 521 (E.D. Va. 1998), refused to allow the United States to intervene in a case in which private salvors sought salvage rights in the wrecks of certain Spanish government sailing vessels, despite the claim by the United States that it was simply carrying out its responsibilities under a friendship treaty with Spain, *id.* at 522-26; in that case, however, the Court held that the treaty did not require the United States to take such action. *See id.* at 526.

118. *See* Jones v. U.S., 137 U.S. 202, 215, 221 (1890).

119. *See* Williams v. Suffolk Ins. Co., 38 U.S. 415, 418, 420 (1839).

120. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., § 115, rep. note. 3 (1987).

In this connection, it is important to stress that the conclusion that the President was obliged to "take care" that customary international law was obeyed would have sweeping consequences, simultaneously raising the possibility of a vast expansion of Presidential authority domestically and of a severe diminution of the ability of the United States to play a part in the creation of customary international law.

The content of customary international law is much disputed; indeed, authorities on the subject do not even agree as to the sources to be consulted in order to determine that content.[121] This degree of uncertainty means that there is at least some support for the existence of rules of international law covering a very broad range of activities. And that fact in turn means that there would be many, many cases in which a President could assert, with some support, that particular actions by some governmental unit in the United States had violated international law, triggering his authority to require that governmental unit to correct the violation. Moreover, if the Supreme Court were to couple an acceptance of claims of the scope of Presidential power asserted by the Amicus Brief with a decision to accord executive branch interpretations of customary international law the same deference it gives to executive treaty interpretations,[122] the inevitable effect would be a vast expansion of presidential power.

Paradoxically, applying a mandatory "take care" obligation to rules of international law could also limit the President's discretion to an undesirable extent. This result follows from a feature of customary international law which will seem peculiar to persons familiar only with the American domestic legal system, that is, that one of the ways in which the content of customary international law is altered over time is through its violation.[123] As Professor Charney argued many years ago,

> In the international system, the United States must have the power to engage in the lawmaking process. This participation may involve actions that put the United States in violation of existing customary international law. If the executive branch is restrained by the rule that customary international law is domestic law of the United States

121. For accounts of the controversies regarding the content and manner of creation of non-treaty international law, *see* J. Patrick Kelly, *Naturalism in International Adjudication*, 18 DUKE J. COMP. & INT'L L. 395, 398-407 (2008); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

122. *See* Medellín, 552 U.S. at 513.

123. *See* Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 914-17 (2006).

> and that it may not be violated, U.S. participation in the international system will be handicapped.[124]

Obviously, any reading of the "take care" clause that applied it to purely international obligations would have just this effect.

Medellin's brief sought to frame an argument supporting the President's actions based on the "take care clause," but failed to address the implications of recognizing a "take care" obligation in circumstances such as these.[125] It also attempted to portray the President's memorandum as "showing proper respect for state functions" and as not making law, thus failing to confront the full sweep of the President's action, discussed above.[126] Similarly, Professor Swaine in a provocative article asserts that "if Article 94 . . . impose[s] an international legal obligation, it would ordinarily comprise a 'law' that the President must execute under the Take Care Clause,"[127] not addressing the authority inconsistent with the argument that the President's discretion is controlled by international law. And, while he acknowledges the importance of observing Constitutional restrictions on presidential authority,[128] he does not address the federalism and separation of powers issues presented by a Presidential determination that a state court must alter its procedural law and re-open a particular final judgment.

C. The Delegation Argument

As noted above, the Court rejected the government's delegation argument because the non-self-executing character of the treaties in which the government purported to find delegations of authority was seen as evincing an intent that those treaties have no domestic law effect, and thus as inconsistent with any intent in the treaty-makers to delegate to the President the power to decide to create domestic law effects because of the international obligations those treaties created. The Court rejected a companion argument based on Congressional acquiescence in Presidential reactions to previous ICJ rulings on the grounds that the President's actions in those earlier cases were utterly different from those involved in *Medellín*.[129] It likewise rejected an argument grounded on the authority given to the President by the U.N. Participation Act to represent the United States before U.N. organs because that Act could

---

124. *Id.* at 917
125. *See Medellin*, 552 U.S. at 532.
126. *See id.*
127. Swaine, *supra* note 114, at 379.
128. *Id.* at 357-58.
129. *See Medellin*, 552 U.S. at 519.

not be read as creating unilateral Presidential authority to make domestic law.[130]

This analysis is unsatisfactory. As Professor Wuerth has noted,[131] to label a treaty as non-self-executing, while it necessarily implies that the Senate would have assumed that the treaty could not be applied by the Courts without further legislation, does not necessarily indicate that the Senate had any particular attitude toward Presidential implementation of the treaty.[132] The Court itself defined "a non-self-executing treaty" as one that "does not by itself give rise to domestically enforceable federal law,"[133] a definition that seems hard to square with the inference the Court draws from the treaties' non-self-executing character. That inference would seem to require that a Senatorial understanding that a treaty was non-self-executing be equated with an active Senatorial intent that the treaty not be domestically enforceable absent further Congressional action. It is certainly possible that the Senate had no intent regarding this matter one way or the other.

To say that the Court's discussion on the delegation point was weak does not, however, necessarily mean that its conclusion on that point was wrong. In fact, there are at least two arguments against seeing the delegation for which the Government contended.

First, and most obviously, neither the treaties at issue nor the U.N. Participation Act say anything at all about delegation. While the status of the non-delegation doctrine in Constitutional law is, at best, uncertain, the Supreme Court has at least insisted on an express statutory grant of authority to the Executive to regulate *something* as a prerequisite for seeing the Executive as having been delegated law-making authority.[134] Second, as discussed in detail below, there is a strong argument that the power the President purported to exercise through the issuance of his memorandum could be classed as judicial. To the extent that this

130. *See id.* at 525-26.

131. Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1 (2009).

132. *See id.* at 6-7.

133. *Medellín*, 552 U.S. at 519, n. 3.

134. *See* U.S. v. Mead, 533 U.S. 218, 229-30 (2001) (observing that the Court has most often held administrative actions to be valid delegations of legislative authority when the actions have been taken pursuant to a Congressional authorization for the agency in question to engage in notice and comment rule-making). The Court acknowledges that it has not always required authorization to engage in such rule-making as a prerequisite for finding a delegation of legislative authority; however, it illustrates this point by citing to a case in which the administrator was expressly authorized to regulate the area as to which the issue had arisen. *See id.* at 230-31(citing Nationsbank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995)). That is, the Court did *not* rely for this point on a case dealing with a statute which provided the relevant executive agency without express authority to take some sort of action.

characterization is correct, the question arises, from what source would the treaty-makers derive the authority to delegate *judicial* power? Delegation, after all, refers to authorizing someone else to do something one is oneself entitled to do—but the treaty-makers are not authorized to exercise judicial power. A third problem with delegation in this context is that the delegation in question is to the President, while it is the President who makes the treaties at issue. That is, recognizing such a power thus permits the President to, in effect, confer upon himself the power of Congress, if executing a treaty is equated to legislation, or, perhaps, the power of the judiciary. Of course, it might be argued that, since the President is forbidden to ratify a treaty without Senate consent, one-third plus one of the members of the Senate could prevent a questionable delegation by treaty. Nonetheless, one might wonder about finding a delegation to the President through a process in which the President plays the primary role.

Responses to these arguments against delegation seem to be difficult to frame. They are not to be found in the Amicus Brief which simply asserts that the President has the authority he claimed, without really defending the proposition.[135] However, Professor Stephan has also addressed the delegation argument, and put more effort into defending it than did the government. He first points to the President's authority to bring and defend claims before the ICJ, and asserts that, "Inferring the existence of a capacity to settle a dispute with which an international tribunal is seized from an express authority to bring and defend claims in that tribunal does not seem all that great a stretch."[136] He goes on to argue that the established authority of the President to settle certain international claims should be seen as "illuminat[ing] the background understanding" of the Senate when it consented to ratification of the treaties at issue in *Medellín*, thereby supporting the inference that those treaties delegated to the President the discretionary authority to decide whether and how to comply with ICJ judgments.[137] He sees such a delegation as entailing "fairly clear standards, subject to

135. Regarding the treaties at issue, the Amicus Brief merely states that "The Optional Protocol and the U.N. Charter create an obligation to comply with *Avena*, and those treaties implicitly give the President authority on behalf of the Nation," Amicus Brief, *supra* note 64, at 11. That brief goes on to assert that, since "Congress has expressly authorized the President to direct all functions connected with the United States' (sic) participation in the United Nations." *Id.* at 16 (citing 22 U.S.C.A. §§ 287, 287a (2004)). Since the President would have the responsibility of seeing to the enforcement of an ICJ judgment in a case where the United States won, logically, he should have authority to enforce an ICJ judgment in a case the United States loses. *See id.* at 17.

136. Paul B. Stephan, *Symposium: Treaties and Domestic Law After Medellín v. Texas: Open Doors*, 13 LEWIS & CLARK L. REV. 11, 26-27 (2009).

137. *See id.* at 27.

judicial review, setting limits to this authority. The President could not, for example, use the ICJ order requiring further review of tainted convictions as a pretext for commuting a death sentence."[138] He argues that such a reading does not require seeing the President as entitled to make law on any subject covered by a treaty, since the authority could be limited to treaties containing express agreements to binding dispute resolution.[139] He argues, further, that arguments based on the breadth and unprecedented character of applying such executive authority to state criminal proceedings overlook the President's well-established authority "to intervene in state criminal proceedings" by extraditing a person pursuant to an extradition treaty even if that person is a defendant in an ongoing criminal trial.[140]

Professor Stephan acknowledges that Congress's delegation of authority to the President in perhaps the best known case addressing delegations in the realm of international affairs, *United States v. Curtiss-Wright Export Corp.*,[141] was express, but argues against imposing such a requirement on treaties committing the United States to resolving disputes through binding third-party settlements.[142] In support of that argument, he cites *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[143] as standing for the proposition that Congressional allocations of responsibilities to Executive agencies implicitly authorize those agencies to promulgate binding interpretations of the allocating statute, and characterizes the Optional Protocol, the U.N. Charter, and the U.N. Participation Act as allocating such administrative authority to interpret the treaties, including the authority to read the treaties as implicitly delegating to the President discretion to enforce ICJ judgments.[144] He also notes that it is unreasonable to look for explicit delegations in treaties since, as international instruments, treaties are very unlikely to address the modes of domestic enforcement of each of the treaty parties.[145]

These arguments do not work. To say that the capacity to settle may be inferred from authority to bring and defend claims cannot be correct, since there are some types of settlement to which the President clearly could not obligate the country on his own authority, for example, a settlement requiring the payment of money. Of course, Professor

138. *Id.* at 27-28.
139. *See id.* at 28-29.
140. *See id.* at 29.
141. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).
142. *See* Stephan, *supra* note 136, at 24.
143. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
144. *See* Stephan, *supra* note 136, at 30-31.
145. *See id.* at 31.

Stephan acknowledges that some limits on such authority must exist, but he explains neither the source of nor the nature of such limits; without some articulable limiting principle, it is hard to see what standard would exist for the judicial review he posits. To be sure, he provides an example of an action which he believes would go beyond the authority delegated in the context of *Medellín*, that is, that the President could not use the *Avena* judgment as a "pretext" for commuting a death sentence. But suppose a particular defendant could point to the disappearance, since his trial, of evidence which might have been seen by a sentencing jury as establishing the presence of a mitigating factor but which could have been available only through the assistance of his government—why would the President's authority to implement *Avena* not permit commutation in such circumstances?

The argument based on the Senate's "background understanding" cannot be reconciled with the actual legislative history of the treaties here at issue. Not only is there no mention of such an understanding in these materials, but, as the Court notes in *Medellín*, Executive Branch testimony at the hearings on the U.N. Charter and the consent to the compulsory jurisdiction of the ICJ addressing the question of enforcement of ICJ judgments refer only to enforcement by the Security Council.[146] The Senate's debate on acceptance of the ICJ's compulsory jurisdiction also indicates that the Senate also understood that ICJ judgments could only be enforced by the Security Council.[147] Nor does Senate consideration of the Optional Protocol support Professor Stephan's argument, since the Committee report recommending that the Senate consent to ratification of that treaty states only that the Consular Convention "does not change or affect present U.S. laws or practice."[148] An affirmative understanding that ICJ judgments can be enforced only through the Security Council and that adherence to the Optional Protocol did not change U.S. law is hard to square with an implicit delegation to the President of the authority to change U.S. law, at his discretion, if necessary to enforce ICJ judgments.

The analogy to extradition is also problematic. If the United States extradites someone in the middle of a criminal trial in which he is the defendant, it is not taking part in that trial. In this case, however, the President did not remove Medellín from the Texas judicial system, but purported to insert himself into that system and, in essence, take it over.

Finally, and most fundamentally, and as Professor Stephan states, any delegation of the authority in question would have to be implicit,

146. *See* Medellín v. Texas, 552 U.S. 491, 506-07 (2008).
147. *See* 92 CONG. REC. 10694-95 (1946).
148. S. REP. NO. 91-9, at 2 (1969).

since no statute or treaty contains an express delegation and, we might add, there is a similar silence on this point in the legislative histories of all of the relevant treaties.[149] However, as noted above, the Supreme Court has demanded some explicit grant of regulatory authority before finding a delegation. Professor Stephan's discussion of *Chevron* does not really deal with this point. The question in that case was not whether the agency had been delegated authority to issue regulations, which was not disputed; rather, the Court had to determine the weight it should place on those regulations in interpreting the underlying statute.[150] *Chevron* is therefore hardly authority for the proposition that a legislative action that explicitly delegates nothing should be read as delegating lawmaking authority. Further, while it may be unreasonable to look in treaty language for delegations of authority to the President, it is surely not unreasonable to look for discussion of the issue in Senate hearings and debate on a treaty, and on Senate committee reports concerning a treaty—and in this case, all of those sources cut against delegation arguments.

D. Inherent Presidential Authority

The last argument the government raised to defend the President's Memorandum was to assert that it fell within the President's authorities to resolve disputes over international claims.[151] In rejecting that argument, the Court first observed that the cases on which the government relied all involved claims by American citizens against foreign governments.[152] It stressed, further, that the practice was not only long-standing, but reflected an equally lengthy period of Congressional acquiescence in such executive actions.[153] The sort of action the President sought to take in this case, however, was, as the government conceded, unprecedented, and thus could not be characterized as behavior in which Congress had acquiesced for a long time.[154]

Certainly, these distinctions are accurate, but the Court never explained why the situation in *Medellín* was so different from those presented by the cases cited by the government as to require a different result. There are, however, arguments that were available to the Court to fortify its conclusion.

149. *See* Stephan, *supra* note 136, at 30-31.
150. *See Chevron*, 467 U.S. at 842-47.
151. *See Medellín*, 552 U.S. at 529.
152. *See id.* at 530-32.
153. *See id.*
154. *See id.* at 532.

In the first place, the Court speaks too conservatively when it characterizes the Congressional reaction to these Presidential claim settlement arrangements as "acquiescence." A more accurate term would be facilitation. Thus, in the case of the Litvinov Assignment, addressed in *U.S. v. Pink*,[155] Congress by joint resolution provided for the appointment of a commissioner "to determine the validity and amounts of claims by American nationals against the Government of the Union of Soviet Socialist Republics. . . ."[156] The Court in *Dames & Moore v. Regan*[157] details the long history of both Presidential settlements of American citizens' claims against foreign governments and the Congressional enactments that recognized the President's authority in this regard and provided the machinery for implementing the settlements the President had obtained.[158]

More fundamentally, it is crucial to focus on the background against which such settlements have taken place throughout most of the history of the United States. Until 1952,[159] the United States accorded foreign countries absolute immunity against suit in both state and federal courts. Americans with a claim against a foreign government, therefore, could not pursue them in American courts. Unless claimants were willing to take their chances in the foreign country's judicial system, their only hope of realizing on their claims was for the United States government to take the claims up with the foreign country concerned. The only impact in the United States of such government efforts was that Americans who would otherwise have little chance of seeing their claims vindicated could hope that they might end up with something. The President's resolving of such claims, in other words, involved no interference with anything happening in any judicial system in the United States; it was instead a mode of relief for persons for whom the judicial system could provide no aid. Even under current law permitting claims against foreign governments in a number of circumstances, persons with claims against foreign governments not listed as state sponsors of terrorism based on alleged torts within the foreign government's territory; persons with commercial claims against foreign governments, which claims have no relationship to the United States other than the residence of the claimant; and persons with claims based on expropriations when the expropriated

155. U.S. v. Pink, 315 U.S. 203, 227-28 (1942).

156. Joint Resolution to Provide for the Adjudication by a Commissioner of Claims of American Nationals Against the Government of the Union of Soviet Socialist Republics, S.J. Res 53, 75th Cong. (1939).

157. Dames & Moore v. Regan, 453 U.S. 654 (1981).

158. *Id.* at 680-82.

159. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. State Dept., to Acting Atty Gen'l Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEPT. OF STATE BULL. 984, 984-85 (1952).

property (or property exchanged for it) is not within the United States, will find that the foreign countries against which they wish to bring claims are immune from suit.[160] In such cases, action by the President is the only way such claims may be vindicated.

In contrast, the situation in *Medellín* was not one where the President was acting because of the impossibility of judicial proceedings in the United States. To the contrary, he was seeking to reopen proceedings already complete and compel the courts involved to reexamine judgments all ready rendered. Simply to state the distinction makes clear that the latter type of action raises questions regarding the domestic effect of executive actions which the former will rarely present.[161]

A final problem with the inherent power argument is that claims of discretionary executive authority to ignore the concept of *res judiciata*, to require state courts to alter their procedures, and to direct those courts as to how to proceed in individual cases raise fundamental problems of federalism and of separation of powers. To the extent the Memorandum is seen as an attempt at presidential law-making, it presents the problems such attempts always present, that is, those of identifying the source and scope of the asserted legislative authority. However, the Memorandum could also be seen as amounting to a claim to the exercise of judicial authority, as noted above. Attempts by the executive to claim judicial authority, however, are less familiar than attempts to exercise legislative authority, and the complications they present therefore require more discussion.

---

160. *See* 28 U.S.C. §§ 1602-1611 (2009).

161. It might be argued that the very fact that the Supreme Court has decided cases in this area demonstrates that the argument in the text must be incorrect. If there can be no American litigation in such cases, how could matters come before the Supreme Court in the first place? The response is that the Supreme Court cases in question each dealt with unusual circumstances. The line of cases culminating in *U.S. v. Pink* is not to the contrary. *See generally Pink*, U.S.315 203. Those cases involved litigation by the United States to obtain possession of property intended to be used to pay claims against the Soviet Union. The persons opposing the United States were making no claims against the Soviet Union; rather, their claims were against the entities whose assets the United States sought to take. Similarly, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), involved claims against foreign private entities subject to personal jurisdiction in this country; claims against them became the subject of negotiations with a foreign government only because of the close interaction between the predecessors of the defendants and the foreign government at the time the alleged wrong was done. *See id.* at 405-12, 415-16. Only *Dames & Moore v. Regan*, 453 U.S. 654 (1981), involved a suit by an American concern against a foreign government, and even there, the President transferred out of the United States all the property against which plaintiffs might have executed a judgment - an action taken as part of a plan for resolving all American claims against Iran, which the Court held to be clearly within the President's authority. *See id.* 669-75. This meant that the plaintiffs could obtain relief only through the process the President had negotiated. *See id.* at 662-67, 686-87.

A reasonable place to start is with the Supreme Court's holding in *Plaut v. Spendthrift Farm, Inc,*[162] which held unconstitutional a federal statute purporting to re-open certain private civil suits brought under the federal securities laws and dismissed by the federal courts as time barred.[163] In particular, the Court stated:

> Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."[164]

The opinion goes on:

> Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes.[165]

The vice of the statute at issue in *Plaut*, then, was that it amounted to an assumption by Congress of the authority to nullify what the Court considered a core power of the judiciary; the difficulty was not that there would be some sort of effect on an otherwise final judgment, but that the department purporting to cause that effect was the Legislature, not the Judiciary.[166]

Of course, *Plaut* involved an attempt to reopen final federal judgments by Congress, rather than an effort by the President to re-open final state judgments, but that distinction makes no difference in these circumstances. It has been clear at least since *Martin v. Hunter's Lessee*[167] that the judicial power of the United States includes the

162. Plaut v. Spendthrift Farms, 514 U.S. 211 (1995).
163. *See id.* at 213-15, 217-19.
164. *Id.* at 218-219 (emphasis in the original).
165. *Id.* at 227 (emphasis in the original).
166. *See id.* at 227, 233-34.
167. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

authority of the Supreme Court to exercise appellate jurisdiction over state court decisions falling within the class of cases included with the judicial power by clause 2 of Article III of the Constitution[168]—a group that, of course, includes cases arising under treaties.[169] Similarly, *Marbury v. Madison*[170] explains that "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."[171] By asserting the authority to "revise and correct" the judgment of the Texas courts in a case involving a treaty, that is, a case falling within the federal judicial power, the President was effectively attempting to exercise the federal judicial power. To be sure, the President purported only to direct the Texas courts to provide "review and reconsideration" in Medellín's case, but, according to *Plaut*, one of the reasons for the Constitution's stress on the separation of powers was a habit of state legislatures in the pre-Constitutional period of requiring the reopening of particular cases.[172] If such actions by a legislature violate the concept of the separation of powers, then it is difficult to see how an identical action by the President does not.

There is a second, related aspect of the President's action that also requires attention. If a fundamental characteristic of a judicial system is that it possesses the authority to *finally* resolve matters before it, the President's memorandum—operating as it did to deprive the state judgments in question of finality—amounted to a claim of executive authority to strip state judiciaries of their judicial character. In this connection, it is crucial to repeat that the President *denied* that American law required the states to afford Medellín any relief absent Presidential action. Rather, he claimed that state judges, so far from being independent, were subject to his control, and further that this subjection derived from his own individual authority, without action even by Congress. And in claiming the authority to terminate the independence of state judges, the President was effectively claiming the authority to rearrange the most fundamental aspects of the states' governmental structures.

There is at least some reason to doubt whether the Constitution would permit the federal government to so gravely alter the character of state judiciaries even by treaty.[173] State courts' judgments can be

168. *See id.* at 337-42.
169. *See* U.S. CONST. art. III, § 2.
170. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
171. *Id.* at 175.
172. *See Plaut*, 514 U.S. at 219-25.
173. For a discussion of this point, see A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L. L. 877, 891-924 (2000); *see also* Michael D.

reviewed by the Supreme Court, after all, only because Article III of the Constitution requires the creation of the Court, defines the judicial power of the United States as extending to *all* cases arising under the Constitution and under the laws or treaties of the United States, and permits Congress to vest in the Supreme Court appellate jurisdiction in *all* cases falling within the judicial power.[174] Nothing in the Constitution purports to confer even on Congress general authority to control the jurisdiction and procedure of state courts. And, as I have argued elsewhere, while I do not agree that the treaty power is subject to the same limitations as is Congress under Article I, it seems to me that federalism limitations on the treaty makers are looser than those imposed on Congress only in that the treaty makers may address a broader range of questions of substantive law than can Congress, and thus can supersede state rules of law to a greater extent than Congress can; there are respectable arguments that the treaty power is not a warrant for imposing on the states fundamental changes in the structures of their governments.[175] If there is reason to doubt that the federal government could enact a statute or conclude a treaty requiring states to re-open closed cases because of an international tribunal's determination, it is difficult to see how the President has the authority to achieve an identical result in a case where he admits that no statute or treaty obliges the state to act as he directs.

If these were the only issues presented by this case, it would be significant enough. However, it is important to remember that the relevant international legal instruments make no distinctions between international claims deriving from federal cases and those deriving from state cases. If circumstances can arise in which the ICJ concludes that an American state court must provide "review and reconsideration" in a particular case, it would seem that such a result could also happen when the relevant court was federal. Further, it would seem that the executive power arguments raised by the United States to defend the President's memorandum in *Medellín* do not in themselves depend on any principle that would require a different result if the President had issued his directive to federal courts rather than to state courts.[176] Indeed, if the President's claim settlement authority were seen to apply in this case, it is worth remembering that the Supreme Court has held that Presidential

---

Ramsey, *Missouri v. Holland and Historical Textualism Symposium: Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 969, 980 (2008).

174. *See* U.S. CONST. art. III, §§ 1, 2, cls. 1, 2.

175. *See* Weisburd, *supra* note 173, at 912-13, 916-24.

176. Of course, federal statutory limitations on the federal courts' operation may provide such a principle.

authority in this area can provide rules of decision in federal cases.[177] In short, a modest extension of the authority the President claimed in *Medellín* could squarely present a conflict between the executive and the judicial branches of the federal government over fundamental questions of authority.

V. IMPLICATIONS

The foregoing discussion critiques the Court's opinion in *Medellín* and describes possible consequences if the Court had upheld the authority the President claimed when he issued his memorandum. But the question of what this decision portends for the future is rather more important than that of what might have happened had the Court reached the opposite result. This section addresses that question.

Preliminarily, it is appropriate to note that *Medellín* appears to have no effect on the ability of the President to participate, on behalf of the United States, in the process by which customary international law is made. The Court's stress on the lack of Presidential authority to make law[178] is clearly addressed to law-making in the domestic context.[179] The Court is equally clear in emphasizing the scope of Presidential authority regarding international affairs outside the domestic law-making context.[180]

Turning, then, to subjects where *Medellín* should have some impact, we begin by restating the holdings of the case. They were: 1) a non-self-executing treaty may not be construed as delegating to the President the authority to create law binding on American courts; 2) a statute empowering the President to represent the United States at an international organization does not, of itself, confer on him the authority to make legal rules deemed necessary to comply with an international legal obligation created by a judgment of a court which is an organ of the international organization; and 3) because the cases holding that executive orders issued by the President solely on his own authority pre-empt inconsistent state law involved a practice in which Congress has acquiesced for a very long time, they are not authority for the proposition that any action by the President taken with a view to addressing an international law obligation of the United States has the domestic effect of displacing state law.[181] The Court also seemed to put weight on the fact that the Memorandum "reaches deep into the heart of the State's

177. *See* Dames & Moore v. Regan, 453 U.S. 654, 689-90 (1981).
178. *See* Medellín v. Texas, 552 U.S. 491, 527-28 (2008).
179. *See, e.g., id.* at 529-30.
180. *See id.* at 523-24, 529-30.
181. *See supra* Part IV.

police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[182]

A. Limiting Garamendi

One fairly clear consequence of *Medellín* is that the very broad language used in *American Ins. Ass'n v. Garamendi*[183] no longer carries weight. *Garamendi* arose out of efforts to resolve claims of Holocaust victims against, among others, certain German insurance companies. The federal government negotiated a sole executive agreement (that is, an international agreement concluded by the President solely on his own authority without participation either of Congress or of two-thirds of the Senate[184]) with Germany and with the insurance companies to address the matter. More or less simultaneously, California enacted statutes permitting suits to recover on Holocaust-related insurance claims and requiring insurance companies then doing business in California to file massive disclosures regarding insurance policies issued either by the companies or by their current affiliated companies from 1920 through 1945.[185] The penalties for failure to make the required disclosures were draconian. The affected insurance companies sought an injunction against the application of the state statutes from a federal court, and the matter eventually made its way to the Supreme Court.[186]

In holding the California statutes unconstitutional, the Court stated that "the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of state law."[187] The Court took this position, moreover, even though the relevant executive agreement, though providing clear evidence of the policy of the Federal government, did not purport to establish a legal rule inconsistent with the State's law.[188] To complicate matters, *Garamendi* does not really make clear how much its result depended on the unusual nature of the relevant state statute. To be sure, it stresses that "quite unlike a generally applicable 'blue sky' law, [the California statute] singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago."[189] This language follows, however, the

182. *Id.* at 532.
183. American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)
184. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporter's note 4.
185. *See Garamendi*, 539 U.S. at 401.
186. *See id. at* 412-13.
187. *Id.* at 420.
188. *See id.* at 416-17.
189. *Id.* at 425-26.

statement that "the express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield."[190] The opinion cites "the weakness of the state's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies . . ."[191] only to resolve any doubts about the clarity of the state-federal conflict.[192]

Taken literally, the reach of this decision is extremely broad. Since *Garamendi* speaks only in terms of federal foreign policy, and does not require express preemption, the only way to determine whether any particular state statute would be preempted under this standard would be for a court to attempt to determine the contours of federal policy. Presumably, the fact that the policy was unclear, or had been stated only at the most abstract level, would not excuse state legislators and federal judges from figuring out what the federal policy was and what counted as a conflict. Furthermore, literal application of the "state legislation . . . produc[ing] something more than incidental effect in conflict with express foreign policy of the National Government" language would mean that any aspect of state law could be seen as giving rise to a conflict, including neutral statutes directed at regulating a broad range of activity that, by happenstance, included activities covered by the federal policy.[193] Of course, the statute in question in *Garamendi* was not such a statute, but the Court seems to say that, while the character of the statute at issue in *Garamendi* helped to make the conflict clear, a conflict raised by *any* state statute would require preemption. Obviously, such a standard is at once too vague and too sweeping to be applied without tremendous difficulty.

Medellín clearly presented a case where the Texas statutes precluding Medellín from obtaining the hearing required by *Avena* were "in conflict with the express foreign policy of the National Government."[194] Indeed, the conflict was clearer than that in *Garamendi*, since the President, in the interest of foreign policy, purported to expressly supersede the Texas statute. Instead of applying the *Garamendi* language, however, the Court held the President's action unconstitutional. Furthermore, *Medellín* characterizes *Garamendi* simply as a case involving Presidential settlement of Americans' claims against foreign governments or foreign citizens,[195] and makes no reference to *Garamendi*'s broad language. Under these circumstances, it

190. *Garamendi*, 539 U.S. at 425.
191. *Id.*
192. *See id.*
193. *Id.* at 420.
194. *Id.*
195. *See* Medellin v. Texas, 552 U.S. 492, 530 (2008).

seems impossible to see the broad standard enunciated in *Garamendi* as surviving *Medellín*, a development welcomed even by commentators otherwise unenthusiastic about the *Medellin* result.[196]

B. Domestic Law Status of Sole Executive Agreements

There has been a degree of uncertainty about the place in American law for sole executive agreements. The circumstances in which such an agreement could displace state law, and even whether the agreements could have some impact on pre-existing federal law, have not been entirely clear. *Medellín* seems to clarify the status of such agreements. The Court distinguishes the cases holding that sole executive agreements preempt state law as all involving situations in which the agreement was intended to resolve the claims of American citizens against the country and, perhaps, certain of its nationals, with which the agreement was concluded.[197] The Court, further, stressed that a crucial factor supporting the effect of such agreements was the fact of Congressional acceptance of the President's authority to make them over a very long period of time.[198] While *Dames & Moore* took note of the long-standing character of the practice,[199] *Medellín* was the first case to hold expressly that the absence of a comparable history of Congressional comfort was inconsistent with the existence of the authority the President claimed.[200] This holding therefore makes clear the circumstances in which the President, acting unilaterally, may displace state law. Furthermore, since there is apparently no history of Congressional acquiescence in Presidential preemption of state law in any field other than that of settlement of American citizens' claims against foreign governments, there seems to be no other subject on which the President has equivalent authority.

C. "Re-interpretation" of Treaties

In the mid-1980's, a dispute arose between the United States and the Soviet Union and, more to the point of this paper, within the United States, over the proper interpretation of the AntiBallistic Missile Treaty.[201] The Reagan Administration, which had the previous year announced its intention of developing a defense against ballistic missile

196. *See* Stephan, *supra* note 136, at 28, n. 57; Wuerth, *supra* note 131, at 5-6.
197. *See Medellin*, 552 U.S. at 531.
198. *See id.*
199. *See* Dames & Moore, 453 U.S. at 680-82.
200. *See Medellín*, 552 U.S. at 532.
201. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R. May 26, 1972, 23 U.S.T. 3435.

attacks, took the position that the reading of the Treaty to which the United States had publicly adhered since the Treaty was concluded was, upon examination, incorrect; according to the Administration, the Treaty did not, in fact, restrict activities regarding missile defense to the extent that the United States had previously consistently asserted.[202] Although most of the discussion revolved around the correctness of the new interpretation and its implications for arms control, questions were also raised about the permissibility of the Executive Branch asserting, after the conclusion of a treaty, that the proper reading of the treaty was quite different from that explained to the Senate by Executive Branch witnesses during the process of consenting to ratification and upon which the Senate relied in deciding to consent.[203]

Arguably, the court's analysis in *Medellín* is relevant to this question, should it ever arise again. First, digressing from the focus of this article, aspects of the Court's treatment of the question whether Article 94 is self-executing are relevant to this matter. In that connection, although the Court, in its analysis of the argument that Article 94 was self-executing, stated that "the United States' [sic] interpretation of a treaty 'is entitled to great weight,'"[204] it stressed that the Executive had "unfailingly" adhered to the interpretation of the relevant treaties which it urged in the case and which the Court ultimately accepted.[205] One may infer that a later Executive interpretation which differed fundamentally from earlier Executive interpretations would raise questions not at issue in *Medellín*.

More to the point of this article, the *Medellín* Court's discussion of the Government's delegation argument seems inconsistent with any authority in the Executive to alter its understanding of a treaty after ratification. The Court stressed that, because the Senate consented to ratification of the relevant treaties on the understanding that they were non-self-executing, the President lacked the authority to execute them unilaterally.[206] However, if the Senate's understanding of a treaty at the time of Senatorial consent to ratification determines whether the treaty is self-executing, it would seem that the Senate's understanding would likewise control the American understanding of the substance of the treaty. It is difficult to see a difference between the President's claiming the authority to execute a treaty the Senate understood to be non-self-

202. For discussion of these events, see Michael R. Gordon, *A Tug of War Erupts on Missile Treaty Data*, N.Y. TIMES, Jul. 15, 1986, at A20; Anthony Lewis, *Abroad at Home: Arms Control Tricks*, N.Y. TIMES, Aug. 4, 1986, at A17.

203. Gordon, *supra* note 202.

204. *Medellín*, 552 U.S. at 513.

205. *See id.*

206. *See id.* at 526-27.

executing, and the President's claiming the authority to assert that a treaty means "X" when the Senate understood the treaty to mean "Y." Of course, this conclusion says nothing about how one would go about determining what the Senate's understanding was; it asserts only that the President lacks the authority to attribute to a treaty a meaning different from the Senate's understanding, however that understanding was determined.

D. Scope of the President's War Power

In recent years, the Court has handed down several decisions rejecting President Bush's claims of extensive authority to, in effect, make law as an aspect of his authority as Commander-in-Chief. Thus, *Hamdi v. Rumsfeld*[207] held that an American citizen alleged to be an "enemy combatant" captured on the battlefield and detained by Presidential order was protected by the Due Process Clause of the Fifth Amendment[208] and entitled to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker,"[209] even though the Court saw the detention as authorized by Congress.[210] *Boumediene v. Bush* further held that aliens alleged to be enemy combatants and detained at Guantanamo Bay were entitled to have access to a proceeding in which they could "challenge the President's legal authority to detain them, contest the [decision-maker's] findings of fact, supplement the record on review with exculpatory evidence, and request an order of release . . . " even if a statute purported to limit them to a proceeding in which those rights were denied.[211]

The holding in *Medellín* appears to reinforce the teaching of these cases. These cases necessarily must be understood as holding that the President's commander-in-chief powers, even if reinforced by statute, do not permit him to disregard the structure of the Constitution by attempted circumvention of the clause limiting the authority of Congress to suspend the writ of *habeas corpus*.[212] Similarly, *Medellín* holds that the President's foreign affairs power does not permit him to require state judiciaries to alter their procedures in particular cases absent, at least, some action by Congress.[213] Indeed, the Court turned to the quotation in

207. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
208. *See id.* 528-29.
209. *Id.* at 533.
210. *See id.* at 516-17.
211. Boumediene v. Bush, 128 S. Ct. 2229, 2292 (2008).
212. U.S. CONST. art. I, § 9, cl. 2.
213. *See Medellin*, 552 U.S. at 524.

Hamdan v. Rumsfeld[214] (another of the war power cases)[215] from *Ex parte Milligan*[216] in holding that the decision whether to execute a non-self-executing treaty was "governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'"[217] As important as it is, therefore, *Medellín* cannot be seen in isolation. Rather, it reflects the Court's concern throughout the mid-2000's with underlining the principle that the powers of the President are not all-encompassing; the war powers cases apply that rule to Presidential claims based on those powers, while *Medellín* applies it to claims based on the President's foreign policy authority.[218]

VI. CONCLUSION

Medellín held that President Bush lacked the authority to take an action none of his predecessors had ever attempted to take. One might think that the determination that presidents lack a power which they have done without for over two hundred years is unlikely to have much impact on the future of the Republic. This conclusion, however, understates the stakes in *Medellín.*

As discussed at length in this paper, the power the President sought to exercise had characteristics of both legislative and judicial power. He sought this power, moreover, in order to carry out an obligation which he characterized as not binding in domestic law, but effective exclusively as the international level. For the Court to have recognized such a power would have raised serious questions about the possibility of imposing any limits on executive actions alleged to have been taken in order to comply with international legal obligations.

Less apparent on the surface of the case, however, but equally as important, is a different issue: what is the formal role international institutions play in American political life? Had the Court held that the President could implement an ICJ judgment that was not binding in

214. Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006).

215. *Hamdan* held that military commissions the President proposed to establish to try alleged alien enemy combatants violated the then-governing statute, *id.* at 590-95, 617-35.

216. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

217. *Medellín*, 552 U.S. at 526 (quoting Hamdan 548 U.S. at 591).

218. Professor Cerone has suggested that *Medellín* might reflect an invocation of "international law to expand [presidential] authority, both externally and internally, while rejecting the limitations imposed by international law." John Cerone, *Making Sense of the U.S. President's Intervention in Medellín*, 31 SUFFOLK TRANSNAT'L L. REV. 279, 280 (2008). To the extent that he sees the President's memorandum in *Medellín* as being of a piece with the Bush administration's broad claims of executive power to deal with terrorism, I agree.

domestic law and the implementation of which had not been authorized by Congress, it would essentially have treated the ICJ as the equivalent of a domestic court. Both state and federal executive authorities routinely execute judgments of their respective courts; had execution of the ICJ's judgment been treated as equally routine, it would have been hard to see the practical difference between the effects of an ICJ judgment and the effects of a decision by a federal court.

In rejecting the President's claim, then, the Supreme Court was not simply denying the President a power that had never been thought necessary. It was also holding that, in the current state of American law, Americans are not obliged to alter their domestic legal system in deference to an international tribunal unless Congress chooses to create such an obligation.