

***Gutierrez v. Nevada:***  
**International Law Gets Its Day in [State] Court**

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### **I. Introduction**

Carlos Gutierrez (Gutierrez) spent a year abusing Mailin Stafford (Mailin), his three-year-old stepdaughter, for sucking on her thumbs.<sup>1</sup> He subjected her to frequent beatings and spankings, forced her to eat chili peppers and Tabasco sauce and threw her into freezing cold showers until she began to drown or turn blue.<sup>2</sup> On June 15, 2004, Gutierrez punched her in the stomach one last

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† B.A., New York University, 2010; J.D. Candidate, University of North Carolina School of Law, 2014. I would like to thank my family and friends for their love and support, both my grandfathers for their inspiration in my writing and legal career, and Logan and Matt for listening to me talk about the details of this case for far too many months.

<sup>1</sup> See *Gutierrez v. State*, 112 Nev. 788, 790, 920 P.2d 987, 988 (1996).

<sup>2</sup> *Id.*

time before she crawled onto his lap and died.<sup>3</sup> A three-judge panel sentenced Gutierrez to death.<sup>4</sup> On his first appeal, Gutierrez's death sentence was affirmed.<sup>5</sup> He then filed a second appeal, seeking a post-conviction petition for a writ of habeas corpus, which the Second Judicial District Court of Nevada dismissed on procedural grounds.<sup>6</sup> On appeal, Gutierrez argued that he suffered actual prejudice because the United States failed to inform him of his right to consular assistance, which was in violation of Article 36(1)(b) of the Vienna Convention on Consular Relations (Vienna Convention).<sup>7</sup> Mexico had previously filed suit against the United States in the International Court of Justice (ICJ) for denying Carlos Avena Guillen and numerous other Mexican nationals their right to consular access under the Vienna Convention.<sup>8</sup> In *Case Concerning Avena and Other Mexican Nationals (Avena)*, the ICJ found the United States had violated its international legal obligations under the Vienna Convention by failing to notify the Mexican nationals of their consular rights.<sup>9</sup> The ICJ directed the United States to reassess the convictions of Avena and the other Mexican nationals.<sup>10</sup>

After *Avena*, the United States Supreme Court in *Medellín v. Texas*<sup>11</sup> held state courts were not required to enforce the ICJ decision<sup>12</sup> and that *Avena* did not preempt state procedural rules that barred prisoners from raising Vienna Convention claims in

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<sup>3</sup> *Id.* at 791, 920 P.2d at 989.

<sup>4</sup> *Id.* at 789, 920 P.2d at 988.

<sup>5</sup> *Id.*

<sup>6</sup> Gutierrez v. State, No. 53506, 2012 WL 4355518 (Nev. Sept. 19, 2012).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

<sup>9</sup> *Id.* at 71.

<sup>10</sup> Emily Culp, *A Father Waits: Medellín v. Texas and the Application of World Court Decisions on U.S. Domestic Law*, 35 N.C. J. INT'L L. & COM. REG. 233, 240 (2009).

<sup>11</sup> *Medellín v. Texas*, 552 U.S. 491 (2008).

<sup>12</sup> See Culp, *supra* note 10, at 243 (citing *Medellín*, 552 U.S. 491) ("Having found that the Vienna Convention on Consular Rights was a non-self-executing treaty and that Congress had yet to advance any specific legislation implementing its provisions, the Supreme Court found that the *Avena* decision was not automatically binding domestic law.").

successive habeas corpus petitions.<sup>13</sup> However, in his concurrence, Justice Stevens noted the Court's decision did not prohibit states from voluntarily choosing to comply with the foreign court's decision.<sup>14</sup>

On September 19, 2012, the Supreme Court of Nevada became only the second court in the United States to reconsider a conviction based on the ICJ's decision in *Avena*.<sup>15</sup> Nevada's decision to uphold the ICJ's mandate in its courts provides important protection for foreign nationals seeking review of their convictions based on Vienna Convention violations. The decision shows a much-needed trend towards greater international cooperation by the United States.<sup>16</sup> Part II of this Note will explore the facts and holding of the Nevada Supreme Court in *Gutierrez v. Nevada*. Part III will examine the Vienna Convention, the *Avena* decision, and previous decisions in applying the procedural rights of the Vienna Convention to state courts. Part IV will analyze the implications of *Gutierrez* on the future of international legal rights in the state court system. Part V will conclude by urging attorneys to continue pursuing Vienna Convention obligations as a procedural right to which defendants are entitled.

## II. Statement of the Case

### A. Facts

Mailin, born January 29, 1991, was the three-year-old daughter of Tara Gutierrez (Tara).<sup>17</sup> On December 4, 1992, Tara married

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<sup>13</sup> Sandra Babcock, *Nevada's Supreme Court Upholds ICJ Ruling on Consular Rights of Mexicans*, DEATH PENALTY WORLDWIDE (Sept. 25, 2012, 5:04 AM), <http://blog.law.northwestern.edu/cihr/2012/09/nevadas-supreme-court-upholds-icj-ruling-on-consular-rights-of-mexicans.html>.

<sup>14</sup> *Id.* In furtherance of the United States' disregard for the *Avena* decision, Texas executed Umberto Leal Garcia in 2011, in violation of the ICJ mandate. *Id.*

<sup>15</sup> *Id.* Oklahoma was the first state to uphold the decision in *Torres v. State of Oklahoma*. See *infra* III.C.2.

<sup>16</sup> See generally *Gutierrez v. State*, No. 53506, 2012 WL 4355518 (Nev. Sept. 19, 2012) (holding that the defendant suffered actual prejudice due to the lack of consular assistance resulting from alleged lack of proper notice to consular officials).

<sup>17</sup> *Gutierrez v. State*, 112 Nev. 788, 789, 920 P.2d 987, 988 (1996).

Gutierrez, and in May 1993, the three of them moved in with Gutierrez's brother for a month.<sup>18</sup> Gutierrez punished Mailin every time he caught her sucking on her thumb.<sup>19</sup> He would "spank her with a sandal" on her hands, behind, and upper legs.<sup>20</sup> He spanked her with such force that it would knock Mailin back and bruise her.<sup>21</sup> In the summer of 1993, Gutierrez moved the family in with their friends for a week, during which he punished the two-year-old Mailin each day for her thumb-sucking habit.<sup>22</sup> In addition to the spankings, he "fed her hot chilies . . . in an attempt to get her to stop sucking her thumb."<sup>23</sup> Mailin received more spankings for wetting her bed, which resulted in bruises on her behind and hands.<sup>24</sup> The family then moved to an apartment in July or August of 1993.<sup>25</sup> Mailin's grandparents reported her injuries ("bruises on her face, back, lower [behind], arms, and hands") to the police.<sup>26</sup> She was sent to foster care on August 19, 1993, but returned to her parents within two months on October 13, 1993.<sup>27</sup>

Mailin sucked her thumb until January or February of 1994 and, even after she stopped, Gutierrez continued to beat her approximately four times a week.<sup>28</sup> In addition to the chili pepper punishment, she was also forced to drink Tabasco sauce, which made her vomit.<sup>29</sup> Gutierrez began to punish Mailin for her vomiting through a shower treatment, subjecting her to a cold shower until she began to drown and turn blue.<sup>30</sup> She was also forced to "eat her own vomit and feces."<sup>31</sup> After the first shower

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Gutierrez*, 112 Nev. at 790, 920 P.2d at 988.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Gutierrez*, 112 Nev. at 790, 920 P.2d at 988.

<sup>30</sup> *Id.*

<sup>31</sup> *Justice Says Torture of Child Calls for Death*, LAS VEGAS SUN, Apr. 10, 2006, <http://www.lasvegassun.com/news/1996/apr/10/justice-says-torture-of->

treatment, Tara found Gutierrez with blood on his hands and Mailin with blood in her mouth.<sup>32</sup> This shower treatment continued weekly.<sup>33</sup> When Mailin became unable to withstand the cold showers, Gutierrez subjected her to hot showers.<sup>34</sup> He also began to punch and kick the three-year-old in the stomach.<sup>35</sup> On June 15, 1994, Gutierrez responded to Mailin's call for her mother from the bathroom.<sup>36</sup> Mailin was ordered to take off her clothes.<sup>37</sup> "Tara heard water running, then heard a loud bang."<sup>38</sup> When Mailin walked out of the bathroom, she was crying, awkward, and dizzy, with a new bruise on her stomach.<sup>39</sup> Mailin cringed in pain as Gutierrez pushed in at the bruise on her stomach.<sup>40</sup> Mailin quietly played with her sister, Tatiana,<sup>41</sup> for a half hour, "then crawled onto Gutierrez's lap and died."<sup>42</sup> Gutierrez and Tara wrapped the three-and-a-half-year-old child's body in a blanket and threw her into a ravine near Fillmore, California.<sup>43</sup> They returned to Reno and reported that Mailin had been kidnapped.<sup>44</sup> Two days later, Gutierrez and Tara "led authorities to the ravine where her bruised and battered body was found."<sup>45</sup>

Mailin's mother was charged with felony child neglect, and Gutierrez pled guilty to first-degree murder.<sup>46</sup> "Following a sentencing hearing, the three-judge panel found one aggravator

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child-calls-for-death/.

<sup>32</sup> *Gutierrez*, 112 Nev. at 790, 920 P.2d at 988.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 791, 920 P.2d at 989.

<sup>37</sup> *Id.*

<sup>38</sup> *Gutierrez*, 112 Nev. at 791, 920 P.2d at 989.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Tatiana Gutierrez was born to Gutierrez and Tara on September 23, 1993. *Id.* at 790, 920 P.2d 988.

<sup>42</sup> *Gutierrez*, 112 Nev. at 791, 920 P.2d at 989.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Brendan Riley, *Death Sentences Upheld in Two Northern Nevada Cases*, LAS VEGAS SUN, (June 10, 2000), <http://www.lasvegassun.com/news/2000/jun/10/death-sentences-upheld-in-two-northern-nevada-case/>.

<sup>46</sup> *Id.*

(torture and depravity of mind) and one mitigator (no prior criminal history). The panel determined that the mitigator did not outweigh the aggravator and sentenced Gutierrez to death.<sup>47</sup> Gutierrez appealed the sentence to the Supreme Court of Nevada, claiming his death sentence was excessive and imposed “under the influence of passion or prejudice.”<sup>48</sup> The Supreme Court of Nevada affirmed his death sentence because “[t]he incidents leading to Mailin’s death present a parade of horrors, which were neither isolated nor the product of a sudden act of rage.”<sup>49</sup>

Following the Nevada Supreme Court’s initial decision, Gutierrez filed a second postconviction petition for a writ of habeas corpus.<sup>50</sup> The Second Judicial District Court in Washoe County, Nevada dismissed the petition on procedural grounds.<sup>51</sup> Gutierrez, then appealed this decision to the Supreme Court of Nevada.<sup>52</sup> The Nevada Supreme Court reversed the lower court’s dismissal, remanding the issue for an evidentiary hearing regarding Gutierrez’s “ability to overcome the procedural bars to further consideration of his death sentence.”<sup>53</sup>

#### *B. Nevada’s Incorporation of Avena*

In its initial decision, the Supreme Court of Nevada contended that, absent a mandate from Congress, Nevada courts could choose to subordinate their own procedural rules in favor of those allowing consular access, thereby following in *Avena*’s footsteps.<sup>54</sup> It also ruled Nevada’s state courts may choose to uphold *Avena* when those arrested show a lack of access to their consulate actually prejudiced their case.<sup>55</sup> Here, the Nevada Supreme Court found Gutierrez had been prejudiced by his lack of consular

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<sup>47</sup> *Gutierrez*, 112 Nev. at 789, 920 P.2d at 988.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 792, 920 P.2d at 989.

<sup>50</sup> *Gutierrez v. State*, No. 53506, 2012 WL 4355518, at \*1 (Nev. Sept. 19, 2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

access.<sup>56</sup> In support of this finding, the Mexican consulate closest to Reno submitted an affidavit that it would have provided assistance to Gutierrez had they received timely notification.<sup>57</sup> The court weighed this affidavit with Gutierrez's background, which included minimal education and limited knowledge of English.<sup>58</sup>

In its ruling, the court was particularly concerned about the fact that the interpreter, who served Gutierrez during his initial sentencing, was convicted of perjury one year after Gutierrez received his death sentence.<sup>59</sup> While the interpreter swore under oath that he was a certified interpreter, he was not.<sup>60</sup> In Nevada, criminal defendants with limited English capabilities have a due process right to an interpreter.<sup>61</sup> The interpreter's perjury violated Gutierrez's due process right.<sup>62</sup> In turn, Gutierrez argued with consular access, the officials would have "(1) ensured that he understood the United States legal system and the proceedings against him; (2) attended the proceedings, assisted trial counsel, and endeavored to ensure a fair trial; (3) informed him and counsel of Gutierrez's treaty rights; and (4) monitored counsel's representation and language interpretation."<sup>63</sup> While the United States Constitution does not require interpreters to be certified, it does require the State and the defense to mount reliable evidence.<sup>64</sup> "Errors that fundamentally alter the defendant's statements or the context of his statements may render the interpretation constitutionally inadequate [under this requirement of reliability]."<sup>65</sup> Accordingly, the Supreme Court of

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<sup>56</sup> Gutierrez v. State, No. 53506, 2012 WL 4355518, at \*2 (Nev. Sept. 19, 2012).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Ouanbengboune v. State, 125 Nev. 763, 768, 220 P.3d 1122, 1126 (2009) (quoting Ton v. State, 110 Nev. 970, 971, 878 P.2d 986, 987 (1994)).

<sup>62</sup> See Gutierrez, No. 53506, 2012 WL 4355518, at \*3.

<sup>63</sup> *Id.* at \*4 (Parraguirre, J., dissenting).

<sup>64</sup> *Id.* at \*2 (majority opinion) (citing United States v. Si, 333 F.3d 1041, 1043 n.3 (9th Cir. 2003)).

<sup>65</sup> *Id.* at \*2 n.5 (citing Baltazar-Monterrosa v. State, 122 Nev. 606, 614-17, 137 P.3d 1137, 1142-44 (Nev. 2006)).

Nevada upheld the *Avena* decision's applicability in state court and reversed and remanded Gutierrez's case for an evidentiary hearing.<sup>66</sup>

### III. Background Law

#### A. Article 36 of the Vienna Convention on Consular Relations

Imagine yourself arrested in a foreign nation. You do not understand the language. You do not understand the legal system. You may not even know why you were arrested. To remedy situations like this, signatories to the Vienna Convention established the right to obtain consular access as a fundamental form of protection for nationals in international law.<sup>67</sup> This idea was codified in the Vienna Convention, signed on April 24, 1963, and entered into force on March 19, 1967.<sup>68</sup> The agreement sets forth guidelines to promote friendly relations among the forty-nine signatory nations and "ensure[s] the efficient performance of functions by consular posts on behalf of their respective States."<sup>69</sup> While individuals are afforded few protections from the laws of the nations they visit, individuals in foreign lands enjoy protections based on customary principles of international law.<sup>70</sup> One such principle is embedded in Article 36 of the Vienna Convention, which provides "a foreign national [the right] to contact his consulate upon detention or arrest in a foreign land."<sup>71</sup> Article 36 reads:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
  - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to

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<sup>66</sup> *Id.* at \*2.

<sup>67</sup> Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 *CARDOZO J. INT'L & COMP. L.* 27, 32 (2000) (footnote omitted).

<sup>68</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

<sup>69</sup> *Id.* at Preamble.

<sup>70</sup> Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 *TRANSNAT'L LAW* 227, 229 (2000).

<sup>71</sup> *Id.*

communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.<sup>72</sup>

The statute was a source of high debate at the Vienna Convention and was left out of the initial draft.<sup>73</sup> However, the purpose of the statute was to provide assistance to foreigners who may be detained without any understanding of the host country's language, their legal rights in the host country, or perhaps even the cause of their arrest.<sup>74</sup> The statute provides consular access to help understand the legal system of the arresting nation, provides a support system in a stressful situation, secures bilingual legal representation, and provides an overall stronger legal defense.<sup>75</sup>

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<sup>72</sup> Vienna Convention, *supra* note 68, art. 36.

<sup>73</sup> United Nations Conference on Consular Relations: Official Records, Mar. 4-Apr. 22, 1963, at 3, U.N. Doc. A/Conf.25/6 (1963); *see also* LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 107 (1966) ("Of all the provisions in the Vienna Convention, the one with by far the most tortuous and checkered background is indubitably Article 36 concerning consular communication and contact with the nationals of the sending state.").

<sup>74</sup> *See* Trainer, *supra* note 70, at 234.

<sup>75</sup> *See* Adrienne M. Tranel, *The Ruling of the International Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403, 411-12 (2005)

The United States ratified the Vienna Convention in 1969 and agreed to ICJ jurisdiction over any disputes between nations.<sup>76</sup> “However, in March 2005, President Bush withdrew the United States from the Optional Protocol that gives the ICJ jurisdiction to hear disputes arising under the Vienna Convention.”<sup>77</sup> The United States steadfastly advocates that foreign nations enforce Vienna Convention consular rights when detaining American citizens within their borders; however, the United States does not exercise the same consideration and respect for foreign nationals detained here.<sup>78</sup> The ICJ has found the United States in breach of their Vienna Convention obligations three times.<sup>79</sup> The United States’ consistent disregard of its own violations has fostered bitterness in the international community.<sup>80</sup> The United States’ focus on international cooperation has been questioned.<sup>81</sup> Experts maintain that “compliance serves to protect the interests of the United States abroad, promotes the effective conduct of foreign relations, and underscores the United States’ commitment in the international community to the rule of law.”<sup>82</sup> Indeed, threats to the United

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(highlighting a myriad of reasons that make consular access an important right for foreign nationals).

<sup>76</sup> Sandra J. Weiland, *The Vienna Convention on Consular Relations: Persuasive Force or Binding Law?*, 33 DENV. J. INT’L L. & POL’Y 675, 678 (2005).

<sup>77</sup> *Id.*

<sup>78</sup> *See id.* at 675; *see also* Trainer, *supra* note 70, at 230 (“However, the United States has a less than perfect record when it comes to affording these rights to foreign nationals detained in America.”); *see also* Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 180-81 (2002) (“[S]everal foreign governments reportedly raised ‘strong protests’ about the failure of the State Department to notify them promptly about the apprehension of their citizens.”).

<sup>79</sup> The ICJ has also heard the *Breard* case brought by Paraguay (Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measure, 1998 I.C.J. 248 (Apr. 9)) and the *LaGrand* case brought by Germany (LaGrand (Ger. v. U.S.), 2001 I.C.J. 466 (June 27)). *See* Weiland, *supra* note 76, at 676; *see* discussion *infra* Part III.B (discussing the most recent violation found in the *Avena* decision).

<sup>80</sup> *See* Weiland, *supra* note 76, at 676.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (quoting Amnesty International, *USA: Another “Double Standard” on Consular Rights*, (Mar. 10, 2005), <http://amnesty.org/en/library/info/>

States and its citizens abroad have increased dramatically in the past decade.<sup>83</sup> A consistent policy of upholding the Vienna Convention in state and federal courts would ensure a relationship of continued reciprocity to protect the rights of American citizens abroad.<sup>84</sup>

The Vienna Convention treaty was ratified by the United States Senate and approved by the President, making the Convention the “supreme Law of the Land.”<sup>85</sup> It would seem that state courts are bound to uphold the Vienna Convention in their own proceedings under the Supremacy Clause, as the “supreme Law of the Land” would trump state law.<sup>86</sup> The Supremacy Clause states, in pertinent part, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>87</sup> As Justice Stevens noted in *Torres v. Mullin*, “[t]he Court is . . . unfaithful to . . . [the] command [of the Supremacy Clause of the United States Constitution] when it permits state courts to disregard the Nation’s treaty obligations.”<sup>88</sup> Furthermore, the Vienna Convention falls under the fundamental international law principle of *pacta sunt servanda*, requiring parties to a treaty to perform treaty obligations in good faith.<sup>89</sup>

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AMR51/050/2005/en).

<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Breard v. Greene*, 523 U.S. 371, 376 (1998); U.S. CONST. art. VI, cl. 2.

<sup>86</sup> *See United States v. Pink*, 315 U.S. 203, 230-31 (1942) (finding that treaties will govern in the presence of inconsistent state law); *see also* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT’L L. 147, 154 (1999) (“[T]reaty-based rights are superior to State laws or policies and even trump earlier inconsistent federal legislation.”).

<sup>87</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

<sup>88</sup> *Torres v. Mullin*, 540 U.S. 1035, 1037 (2003) (Stevens, J., *op. respecting denial of pet. for writ of cert.*)).

<sup>89</sup> Cara S. O’Driscoll, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 328 (2000) (quoting the Vienna Convention on the Law of Treaties art. 26, May 23, 1969, S. TREATY DOC. NO. 92-1, 1155 U.N.T.S. 331) (“This rule is embodied in Article 26 of the Treaty Convention, which states that ‘Every treaty in force is binding upon the parties to it and must be performed by them

However, despite this seemingly clear constitutional language, there has been much debate over the binding nature of international treaties on state judicial proceedings.<sup>90</sup> This debate has focused two theories regarding the relationship between international and domestic law: monism and dualism.<sup>91</sup> The monist view has been framed as a system where international and domestic laws are connected as one legal order, and international law is automatically incorporated into domestic law.<sup>92</sup> In this view, international law is supreme.<sup>93</sup> Alternatively, dualism is a system where international and domestic laws are distinct entities, and international law is incorporated on a case-by-case basis.<sup>94</sup> “The dualist theory . . . is a constitutional axiom in contemporary United States jurisprudence.”<sup>95</sup>

Courts have been largely deferential to the United States Department of State’s interpretation of international treaties.<sup>96</sup> The

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in good faith.”).

<sup>90</sup> See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 553 (1999). See generally Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT’L L. 675 (1998) (discussing Virginia’s and the federal government’s treatment of the ICJ order in the *Breard* case).

<sup>91</sup> Bradley, *supra* note 90, at 530; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-35 (4th ed. 1990); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64-67 (1995); 1 OPPENHEIM’S INTERNATIONAL LAW 53-56 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>92</sup> See Bradley, *supra* note 90, at 530.

<sup>93</sup> *Id.* Although this view requires giving up a certain level of sovereignty of a nation in complying with the international norms, it also encourages a greater level of international cooperation.

<sup>94</sup> *Id.*

<sup>95</sup> James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. Supp. 421, 422-23 (1998). For further discussion on the incorporation of international law domestically, see Bradley, *supra* note 90.

<sup>96</sup> *Iraola, supra* note 78, at 185 n.30 and accompanying text (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (“Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”)); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); *Kolovrat v. Oregon*, 366 U.S.

Vienna Convention requires a detained foreign national to receive notification of his or her Vienna Convention rights “without delay.”<sup>97</sup> This timing has been interpreted as requiring authorities to inform the national of his or her rights “as soon as reasonably possible under the circumstances.”<sup>98</sup> The State Department has made clear that this requires notifying a foreign national of his right to contact his consulate before he is booked for detention.<sup>99</sup> The Department has further clarified that notification should be given “within 24 to 72 hours of the arrest or detention.”<sup>100</sup>

*B. Case Concerning Avena and Other Mexican Nationals  
(Mexico v. United States of America)*

On January 9, 2003, Mexico brought suit against the United States to the ICJ for violations of the Vienna Convention in *Avena*.<sup>101</sup> This became the third case brought to the ICJ against the United States for violating the Vienna Convention.<sup>102</sup> Mexico alleged the United States had violated Article 36 Vienna Convention rights of fifty-two Mexican nationals by failing to inform them of their right to consular access.<sup>103</sup> Specifically, Mexico alleged the United States failed to provide the Mexican

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187, 194 (1961) (“[T]he meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight.”).

<sup>97</sup> See Vienna Convention, *supra* note 68, art. 36.

<sup>98</sup> *Iraola*, *supra* note 78, at 185 (quoting *United States v. Miranda*, 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999) (finding the defendant’s rights had been violated under the Convention where he was not notified of his right to consular access until two days after being arrested, though he had been notified of his Miranda rights immediately following his arrest, and holding that he could have been told of his consular rights much earlier under the circumstances)); see U.S. Dep’t of State, *Consular Notification and Access* 21 (2010), available at [http://travel.state.gov/pdf/cna/CNA\\_Manual\\_3d\\_Edition.pdf](http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf).

<sup>99</sup> See U.S. Dep’t of State, *supra* note 98, at 21; see also *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 991 (S.D. Cal. 1999), *aff’d*, 230 F.3d 1368 (9th Cir. 2000).

<sup>100</sup> U.S. Dep’t of State, *supra* note 98, at 25.

<sup>101</sup> *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128, at 12 (Mar. 31).

<sup>102</sup> See *supra* note 79 and accompanying text.

<sup>103</sup> See *Avena*, 2004 I.C.J. at 24 (explaining that Mexico amended its original claim of the United States violating the rights of fifty-four Mexican nationals to fifty-two).

nationals with information about their consular rights “without delay” after having enough knowledge to ascertain the nationality of these individuals.<sup>104</sup> The Mexican consulate became aware of twenty-nine of the fifty-two cases only after the death penalty had already been imposed<sup>105</sup> and in three, learned of the violation only after “no judicial remedies remain[ed].”<sup>106</sup> The ICJ held the United States had once again breached its Vienna Convention obligations:

(1) By failing to inform the Mexican nationals of their rights under Articles 36, paragraph 1(b) “without delay upon their detention.”<sup>107</sup>

(2) “[B]y not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106(2)” and thus depriving Mexico of the ability to render assistance to the individuals in a timely fashion;<sup>108</sup>

(3) By depriving Mexico of the ability to “communicate with and have access to those nationals and to visit them in detention” in a timely fashion;<sup>109</sup> and

(4) By depriving Mexico of its ability to arrange legal representation for the nationals in a timely fashion.<sup>110</sup>

The ICJ interpreted the “without delay” language of Article 36(1)(b) to mean “a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”<sup>111</sup> The Court further provided for an appropriate remedy to affected nationals when the United States breaches its international obligations under the Vienna Convention.<sup>112</sup> The ICJ found the appropriate remedy for

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<sup>104</sup> *Id.* at 23.

<sup>105</sup> *Id.* at 26.

<sup>106</sup> *Id.* at 26-27.

<sup>107</sup> *Id.* at 71.

<sup>108</sup> *Id.*

<sup>109</sup> *Avena*, 2004 I.C.J. at 71.

<sup>110</sup> *Id.* at 72.

<sup>111</sup> *Id.* at 49 (distinguishing that there is not a duty to inform the detainee of his consular right “immediately upon arrest”).

<sup>112</sup> *Id.* at 72.

these breaches to be the “review and reconsideration of the convictions and sentences of the Mexican nationals” by the United States.<sup>113</sup> The standard specified by the ICJ for review is that the United States courts must ascertain whether the violation caused *actual prejudice* to the defendant in the administration of criminal justice.<sup>114</sup> It further provided that the effective means of review and reconsideration should include a full examination of the violation and possible prejudice.<sup>115</sup> “Lastly, review and reconsideration should be both of the sentence and of the conviction.”<sup>116</sup> It leaves some discretion to the United States in its review by allowing the review to be “by means of its own choosing[.]”<sup>117</sup> The ICJ recognized some of the defendants in *Avena* had not exhausted their judicial remedies, and thus the United States could still review and reconsider their cases easily and fulfill its obligations under Article 36.<sup>118</sup> However, a procedural bar could be a potential problem.<sup>119</sup> Vienna Convention violation claims are procedurally barred on appeal if they were not raised at the trial court level;<sup>120</sup> thus, a “catch-22”<sup>121</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 60.

<sup>115</sup> *Avena*, 2004 I.C.J. at 65 (referencing the Court’s prescription in *LaGrand*).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 72.

<sup>118</sup> *Id.* at 27 (noting that judicial remedies were exhausted in three cases, that there was still an opportunity for direct appeal in twenty-four cases, and that habeas corpus relief was available in the remaining twenty-five cases).

<sup>119</sup> Heather L. Finstuen, *From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 OKLA. L. REV. 255, 256 (2005).

<sup>120</sup> *Id.* This has become known as the procedural default rule. See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT’L L. 434, 444-46 (2004); see also Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CALIF. L. REV. 1729, 1753 (2003).

<sup>121</sup> See generally JOSEPH HELLER, *CATCH-22* (Simon & Schuster, 1961) (providing that “catch-22” is a term derived from the novel of the same name by Joseph Heller, referring to a situation where a problem cannot be solved because the only solution is not possible due to a circumstance inherent in the problem or by a rule).

arises in requiring defendants to raise a claim of the violation based on a right of which they are unaware. The continued failure of United States officials to provide notice of Vienna Convention rights to foreign nationals coupled with the procedural bar “has led to a ‘systematic failure’ of the United States to comply with Vienna Convention obligations.”<sup>122</sup>

While the United States has been strict in requiring other nations to adhere to the Vienna Convention when arresting or detaining American citizens, American courts rarely implement the requests of ICJ decisions and continue to disregard their international legal obligations.<sup>123</sup> However, there is little that may be done to ensure the United States complies with these decisions since the only mechanism under the United Nations Charter for requiring a nation to enforce ICJ decisions is to seek enforcement through the United Nations Security Council.<sup>124</sup> The Charter does not explicitly require ICJ decisions to have direct domestic legal effect, and doing so would raise several constitutional issues.<sup>125</sup> It may be beneficial for the United States to give deference to the interpretation of treaties by the international body because it is “desirable to have a common understanding of the meaning of a treaty.”<sup>126</sup> When the United States has consented to an adjudicative proceeding by the ICJ, it would seem to follow that they have “delegated some interpretative authority to the tribunal”<sup>127</sup> and should then give “respectful consideration to the

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<sup>122</sup> Finstuen, *supra* note 119, at 257 (citing Note, *Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2654 (2003)).

<sup>123</sup> See *infra* Part III.C.

<sup>124</sup> U.N. Charter art. 94, para. 2. However, it is important to note that the United States is a permanent member of the Security Council, *id.* art. 23, para. 1, and can veto any decisions of the Security Council. See *id.* art. 27, para. 2-3 (requiring the concurring vote every permanent member of the Security Council for all non-procedural matters).

<sup>125</sup> See Curtis A. Bradley, *Enforcing the Avena Decision in U.S. Courts*, 30 HARV. J. L. & PUB. POL'Y 119, 121 (2006) (“ICJ judges are not subject to the appointment and life tenure provisions . . . , making it problematic to vest ICJ judges with the authority to displace United States laws and decisions directly. . . . [Second] the *Avena* decision would override state criminal laws and procedures . . . such direct effectuation would raise federalism concerns.”).

<sup>126</sup> *Id.* at 123.

<sup>127</sup> *Id.*

interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”<sup>128</sup> State courts have split on whether or not to adhere to the ICJ interpretation, and the United States Supreme Court has suggested states may voluntarily comply with the Vienna Convention requirements, if they so choose.<sup>129</sup>

C. *The State Split in Addressing Avena in State Court Proceedings*

1. *Torres v. State of Oklahoma*

In May 2004, Oklahoma issued an unprecedented ruling incorporating international law into Oklahoma state law.<sup>130</sup> Here, the Oklahoma Court of Criminal Appeals remanded a case for an evidentiary hearing due to a violation of the defendant’s Vienna Convention right to consular access under Article 36.<sup>131</sup> Accordingly, Torres, the defendant, became the first inmate on death row to have his execution stayed on the basis of an ICJ decision.<sup>132</sup> This case presented an issue of first impression; it was the first instance in which a United States court was required to decide whether or not to uphold the *Avena* decision in its proceedings.<sup>133</sup>

Osbaldo Torres, a Mexican national, received death penalty sentences when he was convicted for two counts of first-degree

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<sup>128</sup> *Id.* (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

<sup>129</sup> See *Medellín* case discussion, *infra* Part III.C.

<sup>130</sup> *Torres v. State*, 120 P.3d 1184 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing). However, this year, Oklahoma was confronted with another Article 36 Violation of the Vienna Convention and did not use *Torres v. State* as controlling law in declining to affirm a trial court’s decision to suppress testimony made by defendants to the police without consular advice. *State v. Ramos*, 97 P.3d 1251 (Okla. Crim. App. Mar. 13, 2013). This case did not involve an *Avena* defendant and is distinguishable from *Torres*; however it does demonstrate a continued reluctance to provide adequate remedies to defendants for violations of international law. *Id.*

<sup>131</sup> *Id.* at 1185.

<sup>132</sup> *Finstuen*, *supra* note 119, at 255.

<sup>133</sup> *Torres*, 120 P.3d at 1187 (order granting stay of execution and remanding case for evidentiary hearing).

murder.<sup>134</sup> In a 1999 federal habeas review, Torres appealed, asserting a breach of his Vienna Convention rights.<sup>135</sup> The Tenth Circuit Court of Appeals affirmed the district court's rejection of the claim based on the procedural default rule articulated in *Breard*<sup>136</sup> because Torres had not asserted this claim in the earlier state proceedings.<sup>137</sup> On November 17, 2003, the United States Supreme Court denied Torres' petition for a writ of certiorari.<sup>138</sup> In its decision, Justice Stevens opined "[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair."<sup>139</sup> In light of the *Avena* decision requiring judicial review and reconsideration of the violation of the Vienna Convention rights, Torres filed a subsequent application for post-conviction relief with the Oklahoma Court of Criminal Appeals,<sup>140</sup> to which the court responded just five days prior to Torres' scheduled execution.<sup>141</sup> The Oklahoma court's response ordered a stay of execution and remanded Torres's case for an evidentiary hearing to determine whether Torres had been prejudiced by Oklahoma's violation of his Vienna Convention rights.<sup>142</sup> "The [court's] order coincided with the Oklahoma Pardon and Parole Board's

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<sup>134</sup> *Id.* at 1184.

<sup>135</sup> *Id.* at 1184-85.

<sup>136</sup> See *Torres v. Mullin*, 317 F.3d 1145, 1159 (10th Cir. 2003); see also *Breard v. Greene*, 523 U.S. 371, 375-77 (1998).

<sup>137</sup> See *Torres*, 317 F.3d at 1145 (10th Cir. 2003) (upholding Torres's conviction because: "(1) the prosecution's evidence was ruled sufficient to establish that [the] petitioner intended the death of victims [which] was not an unreasonable application of established law;" (2) the "jury was instructed adequately on the intent required for malice murder" and these instructions were not "contrary to, nor an unreasonable application of federal law;" (3) the "prosecutor's comments did not deny [the] right to [a] presumption of innocence or privilege against self-incrimination;" (4) the "destruction of smeared, latent fingerprints did not violate due process;" and (5) "the appellate court's conclusion that [Torres's] death sentence did not violate the Eighth Amendment was not an unreasonable application of federal law").

<sup>138</sup> *Torres v. Mullin*, 540 U.S. 1035, 1035 (2003). For a more detailed discussion of the procedural history, see *Finstuen*, *supra* note 119, at 269-71.

<sup>139</sup> *Torres*, 540 U.S. at 1036 (Stevens, J., op. respecting denial of pet. for writ of cert.).

<sup>140</sup> *Torres*, 120 P.3d at 1184.

<sup>141</sup> *Finstuen*, *supra* note 119, at 258.

<sup>142</sup> *Id.*

recommendation to stay Torres's execution and Oklahoma Governor Brad Henry's grant of clemency, signaling a united approach from governmental officials and the state judiciary to a Vienna Convention claim."<sup>143</sup>

In its decision to remand the case, the Oklahoma Court of Criminal Appeals adopted a three-prong test which assessed: "(1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant."<sup>144</sup>

When detailing how to assess the third prong, the court held that "the defendant must present evidence showing what efforts his consulate would have made to assist in his criminal case."<sup>145</sup> It further stated prejudice is assumed if the presence of all three factors is established.<sup>146</sup> The court also emphasized the third prong does not require the defendant to show the outcome of the case would have been different had the consulate been able to assist the defendant in his case.<sup>147</sup> In the past, the United States had allowed states to decide whether to follow the ICJ's rulings.<sup>148</sup> The *Torres* decision suggests that Oklahoma resolved three issues regarding its own state proceedings. Specifically, it found:

- (1) the ICJ's ruling in *Avena* to be authoritative upon its own judicial process;
- (2) the Vienna Convention to be self-executing and affirmed a private right of action for violations of the Convention;<sup>149</sup> and
- (3) the appropriate remedy for such a violation by remanding the case for further evidentiary hearing.<sup>150</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *Torres*, 120 P.3d at 1186.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1187.

<sup>148</sup> See Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L., 683, 683 (1998) (noting the United States left the decision to follow the ICJ's order up to the governor of Virginia who declined to follow).

<sup>149</sup> See Finstuen, *supra* note 119, at 275-76.

<sup>150</sup> For an in depth discussion of these three resolutions, see Finstuen, *supra* note 119, at 275-76.

For eight years, Oklahoma remained the only state to resolve these issues in favor of the aggrieved defendant.<sup>151</sup>

## 2. Medellín v. State of Texas

Jose Ernesto Medellín was sentenced to death for capital murder in September 1993.<sup>152</sup> After numerous failed petitions, Medellín's case finally reached the United States Supreme Court in May 2005.<sup>153</sup> His lawyers hoped the then-recent *Avena* judgment would provide Medellín with a result different from his past appeals.<sup>154</sup> However, the United States Supreme Court dismissed the case, finding Medellín's subsequent state habeas motion could provide the review and reconsideration required by *Avena*.<sup>155</sup> The Texas Court of Criminal Appeals dismissed Medellín's application for a habeas review.<sup>156</sup> Quoting the Supreme Court in *Sanchez-Llamas v. Oregon*,<sup>157</sup> the Texas court found "ICJ decisions are not binding on United States courts."<sup>158</sup> The court also addressed President Bush's memo,<sup>159</sup> which urged states to comply with the *Avena* requirements; in so doing, the Texas court asserted the President had exceeded his authority and could not "dictate to the judiciary what law to apply or how to interpret the applicable law" because this is a power reserved to the judicial branch.<sup>160</sup> In response, the United States Supreme Court granted certiorari to hear the case and held *Avena* did not

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<sup>151</sup> *Torres v. State*, when decided by the Oklahoma Court of Criminal Appeals, was decided in 2004, and Medellín's case, resolved by the United States Supreme Court, was decided in 2005. *Torres v. State*, 120 P.3d 1184 (Okla. Crim. App. May 13, 2004); *Medellín v. Dretke*, 544 U.S. 660 (2005).

<sup>152</sup> *Medellín v. Cockrell*, No. CIV.A H-01-4078, 2003 WL 25321243, at \*1 (S.D. Tex. June 25, 2003).

<sup>153</sup> *Medellín*, 544 U.S. 660.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 666-67.

<sup>156</sup> *Ex Parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

<sup>157</sup> 548 U.S. 331 (2006).

<sup>158</sup> *Ex Parte Medellín*, 223 S.W.3d at 332.

<sup>159</sup> President George W. Bush's Memorandum for the Attorney General (Feb. 28, 2005), available at [georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html](http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html).

<sup>160</sup> *Ex Parte Medellín*, 223 S.W.3d at 335 (quoting *Sanchez-Llamas*, 548 U.S. at 354 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

have a direct effect on state law and that President Bush's memo did not require states to comply with the ICJ's decision to review and reconsider Medellín's case nor the cases of other affected Mexican nationals.<sup>161</sup> Ultimately, Medellín sought a stay of execution from the United States Supreme Court, which was denied; hours later, he was executed.<sup>162</sup>

The first issue the United States Supreme Court confronted in *Medellín* was to determine whether or not the Vienna Convention treaty was self-executing.<sup>163</sup> While the Court acknowledged the Convention was an international legal obligation for the United States, it also cautioned that "not all international law obligations automatically constitute binding federal law enforceable in United States courts."<sup>164</sup> "While treaties 'may comprise international commitments . . . [,] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'"<sup>165</sup> In short, the United States Supreme Court found the Vienna Convention was not a self-executing treaty based on its language and Congress had not enacted any legislation implementing its provisions. Thus, *Avena* was not automatically binding domestic law.<sup>166</sup>

The second issue the Court confronted was the binding nature of President Bush's memorandum, a document that supported *Avena* operating as binding domestic law in the United States.<sup>167</sup> Its decision was simple: the power to transform an international obligation into domestic law is vested solely in the legislative branch.<sup>168</sup> Thus, while the President could represent the United States in front of the international bodies and tribunals such as the

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<sup>161</sup> *Medellín v. Texas*, 552 U.S. 491, 523-32 (2008).

<sup>162</sup> James C. McKinley, Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, at A10.

<sup>163</sup> *Medellín*, 552 U.S. at 504-23.

<sup>164</sup> *Id.* at 504.

<sup>165</sup> *Id.* at 505 (citing *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C.J.)).

<sup>166</sup> *Id.* at 506.

<sup>167</sup> *Id.* at 523-32.

<sup>168</sup> *See id.* at 526 (citing *Foster v. Neilson*, 27 U.S. 253, 315, 2 Pet. 253, 315 (1829); *Whitney v. Roberston*, 124 U.S. 190, 194 (1888); *Igartúa-De La Rosa*, 417 F.3d at 150).

United Nations and the ICJ, this role on the international stage did not extend into a unilateral presidential authority to create domestic law.<sup>169</sup>

In *Medellín*, Justice Stevens provided an important concurrence. “The entire Court and the President agree that breach will jeopardize the United States’ ‘plainly compelling’ interests in ‘ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.’”<sup>170</sup> His concurrence further noted the United States’ obligation to comply with the ICJ’s ruling falls to each of the states, and that since Texas’ failure to provide notification of the consular right “ensnared the United States in the current controversy” of breaching the Vienna Convention, Texas should implement measures to ensure it does not breach the ICJ’s *Avena* ruling as well.<sup>171</sup> Ultimately, Stevens reserved discretion to the states to “shoulder the primary responsibility for protecting the honor and integrity of the Nation.”<sup>172</sup> The *Medellín* decision, according to Stevens, does not foreclose states from taking further appropriate action.<sup>173</sup> According to his rationale, it is each State’s failure to provide adequate notice that causes the breach in the treaty.<sup>174</sup> Thus, the noncompliant State must take extra responsibility in remedying the situation.<sup>175</sup> The strongest distinction between

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<sup>169</sup> *Medellín v. Texas*, 552 U.S. 491, 529 (2008).

<sup>170</sup> *Id.* at 537 (Stevens, J., concurring) (internal citation omitted).

<sup>171</sup> *Id.* at 536.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 537.

<sup>174</sup> *Id.* at 536. Justice Stevens stated:

Under the express terms of the Supremacy Clause, the United States’ obligation to ‘undertak[e] to comply’ with the ICJ’s decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas’ duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having put the nation in breach of one treaty, it is now up to Texas to prevent the breach of another. *Id.*

<sup>175</sup> *Id.*

Medellín's case and Torres' case described above is that neither Texas nor the United States Supreme Court found Medellín had been actually prejudiced by his lack of consular access, where the Oklahoma court saw the possibility of prejudice in Torres's case.<sup>176</sup>

### 3. Leal Garcia v. State of Texas

Humberto Leal Garcia (Leal) was convicted of murder and sentenced to death in 1995 for the murder of a sixteen-year-old girl during an aggravated sexual assault.<sup>177</sup> After the *Avena* decision,<sup>178</sup> Leal petitioned the Texas Court of Criminal Appeals after the *Avena* decision, which denied the appeal.<sup>179</sup> Leal finally filed a writ of certiorari and stay of execution to the United States Supreme Court so that Congress could consider whether to enact legislation incorporating the *Avena* decision into domestic law.<sup>180</sup> Both were denied.<sup>181</sup> In *Leal Garcia v. State of Texas (Leal)*, the Court held it had never stayed an execution due to the prospect of future applicable legislation:

It has now been seven years since the ICJ ruling and three years

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<sup>176</sup> *Medellín v. Texas*, 552 U.S. 491, 501-02 (2008) (stating that “[t]he trial court also rejected the Vienna Convention claim on its merits, finding that Medellín had ‘fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment’”); *id.* at 501 n.1 (stating that the Supreme Court’s “disposition of this case . . . need not consider whether Medellín was prejudiced in any way by the violation of his Vienna Convention rights”); *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2004) (“Torres clearly showed that the Mexican government would have expended considerable resources on the capital phase of his case. If Torres were still under a capital sentence, this would indeed amount to a showing of prejudice.”).

<sup>177</sup> *Leal Garcia v. Quarterman*, 573 F.3d 214, 216 (5th Cir. 2009).

<sup>178</sup> See *id.* at 217 for a full timeline of Leal’s procedural history.

<sup>179</sup> *Ex parte Cardenas*, No. WR-41743-02, 2007 WL 678628, at \*1 (Tex. Crim. App. Mar. 7, 2007) (citing *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. Nov. 15, 2006)).

<sup>180</sup> See *Leal Garcia v. Texas*, 131 S. Ct. 2866, 2867, 180 L. Ed. 2d 872 (2011) (explaining that in June 2011, Senator Patrick Leahy introduced legislation to the Senate with the support of the Executive Branch implementing the *Avena* decision while the House of Representatives has not).

<sup>181</sup> *Id.* at 2867 (“Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.”).

since our decision in *Medellín I*, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.<sup>182</sup>

The Court further noted that even based on a Vienna Convention claim, the lower courts had found Leal had not been prejudiced by his lack of consular access.<sup>183</sup>

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, addressing the policy ramifications of such decisions to ignore instructions from the ICJ.<sup>184</sup> The dissenters pointed out that the decision in *Medellín* relied in significant part on a determination the “President . . . ha[d] [not] represented to [the Court] that there is any likelihood of congressional . . . action.”<sup>185</sup> This was remedied in *Leal* by showing “Senator Patrick Leahy, the chairman of the Senate Committee on the Judiciary, has introduced (and expressed an intention to hold speedy hearings on) a bill that would permit Leal and other similarly situated individuals to obtain the hearing that international law requires.”<sup>186</sup>

There are also strong foreign-policy interests affected by a decision to violate international legal obligations.<sup>187</sup> First, the decision would cause harm the United States’ relationship with Mexico as the violations of its foreign nationals’ rights continue to accrue.<sup>188</sup> In its brief, the Government of Mexico made clear that declining to stay Leal’s execution “would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and efforts to strengthen our common border.”<sup>189</sup> Second,

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<sup>182</sup> *Id.* at 2868.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 2869-70 (Breyer, J., dissenting).

<sup>185</sup> *Id.* (citing *Medellín v. Texas*, 554 U.S. 759, 759-60 (2008) (per curiam)).

<sup>186</sup> *Leal Garcia*, 131 S. Ct. at 2869.

<sup>187</sup> *Id.* at 2870.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2870.

noncompliance could pose serious harm to the rights of American citizens detained abroad by failing to extend to them the benefits of consular assistance that the Vienna Convention provides.<sup>190</sup> The dissent seems to suggest the majority opinion has violated the separation of powers doctrine by making decisions related to powers that are constitutionally delegated to other branches.<sup>191</sup>

#### IV. Analysis and Impact of *Gutierrez*

Following these Texas executions, an *Avena* defendant finally received reprieve in the Supreme Court of Nevada where the court held that Gutierrez had been actually prejudiced by the State's violation of his Vienna Convention rights.<sup>192</sup> Nevada became the second state to be swayed by Justice Stevens' plea to voluntarily undertake to comply with the *Avena* ruling and took on the "greater level of duty" to mollify the consequences of their breach.<sup>193</sup> *Avena* requires the United States to review and reconsider the sentences of the affected Mexican nationals "by means of its own choosing."<sup>194</sup> The standard by which to review and reconsider must be made by determining "whether the failure to provide proper notice to consular officials caused actual prejudice to the defendant in the process of administration of criminal justice."<sup>195</sup>

The Nevada court acknowledged *Avena* does not require the ICJ's postconviction review procedures to preempt the state specific postconviction procedure.<sup>196</sup> Accordingly, the United States Supreme Court rejected the postconviction claims of Leal and Medellín.<sup>197</sup> However, in both cases, the Supreme Court

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2871 ("[T]he Court ignores the appeal of the President in a matter related to foreign affairs, it substitutes its own views about the likelihood of congressional action[.]").

<sup>192</sup> *Gutierrez v. State*, No. 53506, 2012 WL 4355518, at \*2 (Nev. Sept. 19, 2012).

<sup>193</sup> *Id.*

<sup>194</sup> *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), at 64.

<sup>195</sup> *Gutierrez*, 2012 WL 4355518, at \*1 (quoting *Avena*, 2004 I.C.J. at 60) (internal citations omitted).

<sup>196</sup> *Id.*

<sup>197</sup> *See supra* Part III.C.2-3.

emphasized that neither defendant had been actually prejudiced by his lack of timely consular access.<sup>198</sup> Though *Avena* does not subordinate state procedural rules automatically, absent any Congressional legislation, the Court pointed out that states *may choose* to substitute the *Avena* rules for their own, if actual prejudice can be demonstrated by the Vienna Convention violation.<sup>199</sup> Nevada further emphasized “Justice Stevens rightly described [the burden of complying with *Avena*] as ‘minimal’ when balanced against the United States’ ‘plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.’”<sup>200</sup>

The court distinguished the United States Supreme Court cases of *Medellín* and *Leal*, while balancing similarities against the *Torres* case, because Gutierrez “arguably suffered actual prejudice due to the lack of consular assistance.”<sup>201</sup> At twenty-six-years-old, with very little English speaking capacity, Gutierrez had the Mexican equivalent of a sixth-grade education; he clearly needed assistance in navigating the American legal system.<sup>202</sup> The closest Mexican consulate swore in an affidavit that it would have assisted Gutierrez through his judicial process had the consulate been timely notified.<sup>203</sup> Gutierrez suffered further prejudice in the course of his case by the court interpreter, Gonzalez, who falsified his credentials as an interpreter and was later convicted of perjury.<sup>204</sup> Even the State’s interpreter expressed concern regarding Gonzalez’s accuracy during the hearing.<sup>205</sup> The State

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<sup>198</sup> *Id.*

<sup>199</sup> See *Gutierrez*, 2012 WL 4355518, at \*1 (citing *Medellín v. Texas*, 552 U.S. 491, 533, 536-37 & n.4 (2008) (Stevens, J., concurring) (discussing *Torres v. State*, 120 P.3d 1184 (Okla. Crim. App. May 13, 2004), where Oklahoma “unhesitatingly assumed” the burden of complying with *Avena* by ordering “an evidentiary hearing on whether Torres has been prejudiced by the lack of consular notification”).

<sup>200</sup> *Medellín*, 552 U.S. at 537 (Stevens, J., concurring) (internal citations omitted).

<sup>201</sup> *Gutierrez*, 2012 WL 4355518, at \*2.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See *id.* (“[T]he State described interpreter Gonzalez as ‘a sociopath’ who, while ‘articulate, well groomed, [and] well mannered . . . does not know

acknowledged Gonzalez's role as integral to Gutierrez's sentencing hearing.<sup>206</sup> It must be resolved in an evidentiary hearing whether the errors Gonzalez had made while translating were prejudicial and fundamentally erroneous enough to render the interpretation constitutionally inadequate.<sup>207</sup> Accordingly, the Nevada Supreme Court remanded the case for further evidentiary hearing: "Perhaps timely consular notice would not have changed anything for Gutierrez; perhaps the interpreter's skills, despite his perjury, were sound. These are issues on which an evidentiary hearing needs to be held."<sup>208</sup> The Nevada Supreme Court's decision marks an important step in shifting the trend towards states applying international law procedures within their judicial proceedings.<sup>209</sup> While previously there had been a balance of one state on each side (Oklahoma chose to uphold the *Avena* decision; while Texas did not), the scale has tipped towards greater international cooperation.<sup>210</sup> This provides two decisions to future states confronted with these issues on which to rely in choosing to uphold international law obligations in their courts.<sup>211</sup>

The Nevada court was particularly troubled by the falsified credentials of the interpreter and emphasized the hypocritical nature of the United States' treatment of the Vienna Convention rights:

What is clear, though, is if a non-Spanish speaking U.S. citizen were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have

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how to recognize or offer truthful assertions.'").

<sup>206</sup> *Id.*

<sup>207</sup> *Gutierrez*, 2012 WL 4355518, at \*2. *See generally* Baltazar-Monterrosa v. State, 122 Nev. 606, 613-17, 137 P.3d 1137, 1142-44 (2006) (discussing that the right to a fair trial may be impaired if the interpretations change the fundamental nature of the testimony).

<sup>208</sup> *Gutierrez*, 2012 WL 4355518, at \*3.

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

regularized them.<sup>212</sup>

This raises an important concern for the United States, which has vehemently required foreign nations to accord American citizens with the same Vienna Convention rights it has denied to so many foreign nationals.<sup>213</sup> If the United States continues choosing to ignore its international legal obligations and alienates nations by depriving their citizens of their international legal rights, American citizens might find themselves in foreign jails without consular access in the same way.<sup>214</sup> Mexico has already expressed animosity in its *Leal* amicus brief that these continued executions and breaches of Vienna Convention obligations “would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States.”<sup>215</sup>

More than 2,500 Americans are arrested abroad each year.<sup>216</sup> In a system that relies so heavily on reciprocity to govern much of international law,<sup>217</sup> failing to abide by the Vienna Convention

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<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See Gutierrez*, 2012 WL 4355518, at \*3.

<sup>215</sup> Brief for Government of Mexico as Amici Curiae Supporting Petitioner at 23, *Leal Garcia v. Texas*, 131 S. Ct. 2866, 180 L. Ed. 2d 872 (2011) (No. 11-5001).

<sup>216</sup> Heather M. Heath, *Non-Compliance with the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. INT'L L. REV. 1, 9 (2004); *see also* Mari Shinkai, *Travel Abroad Requires Knowledge of Destination*, U. WIRE, Mar. 3, 2003 (stating that more than 2,500 American citizens are arrested outside of the United States each year); U.S. Dep't of State, OFFICE OF OVERSEAS CITIZENS SERVICES, BUREAU OF CONSULAR AFFIARS, PUBL'N NO. 10252 (2002), *available at* [http://permanent.access.gpo.gov/lps49674/travel.state.gov/travel/overseas\\_citizens.html](http://permanent.access.gpo.gov/lps49674/travel.state.gov/travel/overseas_citizens.html).

<sup>217</sup> Heath, *supra* note 216, at 10 (citing *Hilton v. Guyot*, 159 U.S. 113, 228 (1895)) (asserting the tenet that international law is based upon reciprocity and mutuality); *see also* *Boos v. Barry*, 485 U.S. 312, 323 (1988) (recognizing the crucial cornerstone of reciprocity in international law); *United States v. Superville*, 40 F. Supp. 2d 672, 676 (N.D. Ill. 1999) (explaining the importance of reciprocal respect under the obligations of the Vienna Convention). *See generally* Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 93 (2003) (reviewing the importance of reciprocity to enforce international law); C.M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AM. J. INT'L L. 495, 501 (1986) (stating that reciprocity is a cornerstone of international law); Harold G. Maier, *A Hague Conference Judgments Convention and United*

could jeopardize the influence of these agreements entirely.<sup>218</sup> Senator Leahy addressed the continued reciprocity required to keep the Vienna Convention effective when he introduced legislation in the Senate to bring the United States into compliance with the treaty through the Consular Notification Compliance Act: “[a]ccess is protected by the consular notification provisions of the [Vienna Convention], but it only functions effectively if every country meets its obligations under the treaty—including the United States.”<sup>219</sup> As an influential nation within the global setting, the United States should continuously strive to uphold its international legal obligations; noncompliance jeopardizes the United States’ credibility and questions the nation’s “commitment to international treaties.”<sup>220</sup> The Obama Administration endorsed the bill with letters of support from the Attorney General, Eric Holder, and Secretary of State, Hillary Rodham Clinton. Secretary Clinton further sent letters to the members of the Senate Judiciary Committee urging speedy action on the bill: “Swift enactment of this bill would serve our critical interests—also recognized by the prior Administration—in protecting American citizens, preserving our foreign policy relations, and abiding by vital treaties to which

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*States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1223-25 (1998) (asserting that reciprocity is the foundation of international law).

<sup>218</sup> Heath, *supra* note 216, at 10 (citing *United States v. Superville*, 40 F. Supp. 2d at 676) (explaining that the Secretary of State has expressed concern that “[t]he execution . . . could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention”); see also Ronald L. Hanna, Comment, *Consular Access to Detained Foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice*, 25 S. ILL. U. L.J. 163, 177 (2000) (stressing the importance of honoring the rights of foreign nationals arrested in the United States if such rights are to be recognized for United States citizens arrested abroad); Molara Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 335 (1999) (recognizing the danger U.S. citizens arrested abroad may face if the consular rights under the Vienna Convention are not extended to foreign nationals arrested within the United States).

<sup>219</sup> Press Release, Senator Patrick Leahy, Leahy Renews Effort to Bring U.S. Into Compliance With International Consular Notification Treaty (June 4, 2011), available at <http://www.leahy.senate.gov/press/leahy-renews-effort-to-bring-us-into-compliance-with-international-consular-notification-treaty>.

<sup>220</sup> Heath, *supra* note 216, at 10.

the Senate has advised and consented[.]”<sup>221</sup> Though the Senate legislation did not survive the committee process, perhaps this recent decision by Nevada will reignite a fire in Congress towards passing similar legislation in the future. Although the United States Supreme Court may have chosen to ignore the nation’s interest in complying with international legal obligations, it is optimistic that some states have chosen to acknowledge such an important impact and will hopefully continue to do so in the future. If the United States fails at this critical juncture to uphold the international rule of law, other nations will likely follow suit.

## V. Conclusion

Nevada’s decision “provides important ammunition to foreign nationals seeking review of their Vienna Convention claims in states other than Texas.”<sup>222</sup> Texas remains the only state to reject the notion of reconsidering convictions of defendants who failed to receive a Vienna Convention right and chose not to uphold the ICJ ruling in *Avena*. Lawyers should fervently continue to litigate Vienna Convention violations, especially on defendants subject to the *Avena* decision. Nevada and Oklahoma have now provided other jurisdictions with two decisions upon which to rely, if they choose to uphold the *Avena* decision and Vienna Convention rights within their states. Furthermore, the decision’s call to consider the repercussions of this decision for American citizens abroad can bring to the forefront the importance of the United States adhering to its international legal obligations. Perhaps this will spark congressional action in passing legislation similar to the Consular Notification Compliance Act. This legislation would bring with it an important message to the international community, a demonstration of the United States’ commitment and dedication to its international treaty obligations. Regardless of whether this sparks discussion of national legislation, if states continue to follow in Nevada’s footsteps, nations like Mexico will feel more supported by the United States. This could go a long way in mending the broken international relationships of America.

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<sup>221</sup> Letter from Hilary Rodham Clinton, U.S. Sec’y of State, to Sen. Patrick Leahy, Chair of the S. Judiciary Comm. (July 7, 2011), *available at* <http://www.leahy.senate.gov/imo/media/doc/072711ClintonToLeahy.pdf>.

<sup>222</sup> Babcock, *supra* note 13, ¶ 6.

Nevada's decision may change the course of action for more states litigating the Vienna Convention rights of foreign nationals in their jurisdictions. For Gutierrez, while he gave no consideration to the life of his three-year-old stepdaughter, the Nevada decision gives him a small glimmer of hope towards saving his own life.