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# Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations

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# LESSONS FROM AVENA: THE INADEQUACY OF CLEMENCY AND JUDICIAL PROCEEDINGS FOR VIOLATIONS OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

LINDA E. CARTER\*

*The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.*<sup>1</sup>

*Applying 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>2</sup>

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1. *Herrera v. Collins*, 506 U.S. 390, 440 (1993) (Blackmun, J., dissenting).

2. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting the denial of certiorari).

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## I. INTRODUCTION

There are presently 118 death row inmates in the United States who are citizens of other countries.<sup>3</sup> They represent 31 different nationalities and are incarcerated in 16 states and a federal penitentiary.<sup>4</sup> It is likely that most of the 118 death row inmates had a right to be told that they could contact the consulate of their home country pursuant to a multilateral treaty, the Vienna Convention on Consular Relations (VCCR).<sup>5</sup> It is also likely that their consular notification rights were violated and that the consulates were unaware that one of their citizens was charged with a serious offense.<sup>6</sup> Many of these individuals have argued in court and in clemency that the violation of their consular notification right under the VCCR adversely affected the fairness of the criminal proceedings.<sup>7</sup>

The capital cases involving foreign nationals and the consular notification treaty bring into focus the troubling confluence of the illusory nature of clemency and the limitations of federal habeas corpus. The inadequacy of post-conviction proceedings in the United States became acutely apparent when the violations of the VCCR were litigated in the International Court of Justice (ICJ) in two recent cases. This essay explores why both clemency and the legal process fail to satisfy the treaty's requirements for the consular notification right. Clemency understandably fails to provide the protection needed, should not be relied upon for any guaranteed right, and should not be

3. *Foreign Nationals and the Death Penalty in the United States*, Death Penalty Information Center, Nov. 28, 2004 [hereinafter DPIC], at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited May 28, 2005).

4. *Id.*

5. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Over 160 countries are signatories to the VCCR. *See id.*

6. DPIC, *supra* note 3, *Reported Foreign Nationals Under Sentence of Death in the U.S.* (indicating that only three of the foreign nationals on death row were timely notified of the right to contact their consul).

7. *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001) (summarizing the response of courts to the VCCR, which has typically involved avoiding the issue whether the treaty conveys individual rights and rejecting remedies of suppression or dismissal). *See also* Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1 (2002) (discussing the response of courts to VCCR claims after *LaGrand*).

significantly revised in an effort to improve compliance with the VCCR. The legal process, however, inexcusably fails to provide adequate protection for the right, should be relied upon to provide a forum to prevent a miscarriage of justice, and should be reformed to meet this need. Legal reforms are most likely to occur either through judicial decisions or through legislative action, although executive action is also an avenue. The possibility of the United States Supreme Court resolving the compliance issue in a case in which it has recently granted certiorari is discussed. In addition, a recent Presidential memorandum that has surfaced in the case before the Supreme Court and that directs compliance with the *Avena* decision is described. Both judicial and executive means of compliance with the treaty obligation are desirable and complementary to each other and to legislative reform. This article suggests that, in addition to any judicial or executive measures, legislative action is also needed. Congress should take the initiative to pass an amendment to the federal habeas corpus statute that would permit a hearing when required by a treaty or other law even when the issue would otherwise be barred under habeas rules. As presently conducted, there is too great a likelihood that a VCCR claim will not be heard in a U.S. court, in violation of the treaty. There is an urgent need for legal reform, and legislative reform can provide the most comprehensive approach.

## II. THE VIENNA CONVENTION ON CONSULAR RELATIONS AND CAPITAL CASES

The Vienna Convention on Consular Relations (VCCR) is not a recent treaty. It opened for signatures in 1963 and was entered into force for the United States in 1969.<sup>8</sup> Currently, over 160 countries are parties to the treaty. The right to consular information and notification was not litigated in criminal cases in U.S. courts, however, until the mid-1990s. The treaty provides in pertinent part:

With a view to facilitating the exercise of consular functions relating to nations of the sending state . . . 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

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8. Vienna Convention on Consular Relations, *supra* note 5, at 21 U.S.T. at 77.

authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*<sup>9</sup>

The treaty's notification requirement means that any foreign national in the United States who is detained, and whose country is a party to this treaty, has a right to be told in a timely manner that he or she can contact the consulate of his or her home country. Routinely violated in the United States, the consular notification right came to the fore in capital cases beginning with a Canadian national who was convicted and sentenced in Texas.<sup>10</sup>

The VCCR is an important treaty for foreign nationals accused of capital or noncapital crimes in the United States. Consular assistance may include humanitarian efforts, such as notifying family members of the defendant's location.<sup>11</sup> The assistance may also include legal efforts, such as obtaining counsel to represent the defendant, assisting counsel with locating witnesses and documents in the home country, filing amicus briefs, negotiating with the prosecutor, and perhaps, most importantly, explaining the differences and consequences of actions in the two legal systems.<sup>12</sup>

### III. INTERPRETATION OF THE CONVENTION: THE INTERNATIONAL COURT OF JUSTICE

Paraguay, Germany, and Mexico have all pursued violations of the VCCR in U.S. courts and by taking a case to the ICJ. In the

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9. *Id.* at 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-93 (emphasis added).

10. *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996). When the Canadian authorities became aware of Faulder's case, extensive efforts were made on both diplomatic and legal levels to spare his life. Texas, however, proceeded with the execution in 1999. See Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1114-15 (2002).

11. See, e.g., Mark Warren, *Consular Notification and Assistance: A Guide for Defense Attorneys*, Sept. 2004, HUMAN RIGHTS RESEARCH (providing a summary of possible assistance, humanitarian, protective, and legal), at <http://www3.sympatico.ca/aiwarren/attorneys.htm> (last visited Feb. 19, 2005). See also Michael Fleishman, Note, "Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases", 20 ARIZ. J. INT'L & COMP. L. 359 (2003) (discussing various cases of Mexicans and interaction with their consular officers).

12. This flaw proved fatal for Angel Breard, who did not appear to understand the significance of a plea offer and the consequences of going to trial. He rejected a plea offer to life imprisonment, went to trial and confessed on the stand, and was sentenced to death. See discussion of consular assistance and Breard's case in John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, Sept.-Oct. 1998, at 28. See also Bishop, *supra* note 7, at 16-27 (outlining the Breard case).

*Breard*<sup>13</sup> (Paraguay) and *LaGrand*<sup>14</sup> (Germany) cases, the defendants were tried, convicted of murder, and sentenced to death without the required consular notification. All avenues of review in U.S. courts, including federal habeas, civil lawsuits against the state involved, and the seeking of original jurisdiction in the U.S. Supreme Court were exhausted, without achieving any consideration of the VCCR violation on the merits. Clemency was also exhausted. Ultimately, both Paraguay and Germany obtained provisional measures from the ICJ, indicating that the United States should take all measures at its disposal to prevent the executions until the ICJ could hear the cases on the merits.<sup>15</sup> In each case, the defendants were executed prior to any further ICJ proceedings.<sup>16</sup> Although Paraguay did not pursue its claim in the ICJ, Germany continued and obtained a decision in its favor on the merits.<sup>17</sup> In the third case, *Avena*, Mexico sought relief in the ICJ on behalf of all 52 Mexican nationals on death row in nine different states.<sup>18</sup> Because the individual defendants were at different stages of post-conviction proceedings, some were closer to having execution dates than others. Once again, the ICJ issued provisional measures, indicating that the United States must take all measures at its disposal to prevent the execution of three of the Mexican nationals who were the closest to having executions pending. None were executed prior to the recent decision on the merits in favor of Mexico.<sup>19</sup>

In the two cases in which the ICJ reached a decision on the merits, the Court interpreted the VCCR to require a meaningful recogni-

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13. *Breard v. Greene*, 523 U.S. 371 (1998).

14. *F.R.G. v. United States*, 526 U.S. 111 (1999).

15. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9) (order of provisional measures); *LaGrand (F.R.G. v. U.S.)*, 1999 I.C.J. 9 (Mar. 3) (order of provisional measures).

16. Angel Breard, the Paraguayan citizen, was executed a few days after the ICJ order of provisional measures of Apr. 9, 1998. Germany's case was on behalf of two brothers, Walter and Karl LaGrand. One of the LaGrand brothers was executed before and the other after the ICJ order of provisional measures of Mar. 3, 1999. See *Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed> (last visited Feb. 19, 2005).

17. *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 514 (June 27).

18. Application Instituting Proceedings (*Mex. v. U.S.*), 2003 I.C.J. (*Avena*) No 128, at 18 (Jan. 9), available at [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iapplication\\_20030109.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF). The suit started for 54 Mexicans in 10 states but was reduced to 52 Mexican nationals in 9 states. *Id.*

19. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No 128 (Mar. 31), available at [http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus\\_imusjudgment\\_20040331.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf) (last visited Feb. 19, 2005).

tion of the rights under the treaty.<sup>20</sup> In the first case, *LaGrand*, the ICJ found that the treaty requires that the United States "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in [the VCCR]."<sup>21</sup> The ICJ further found that the United States could comply with the review and reconsideration "by means of its own choosing."<sup>22</sup>

The United States chose to rely on clemency and the usual judicial processes that could result in a refusal to consider the issue.<sup>23</sup> In the second case, *Avena*, Mexico challenged these choices, arguing that the treaty required judicial consideration of the violation.<sup>24</sup> The ICJ agreed with Mexico in the *Avena* case. The Court emphasized that a review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process."<sup>25</sup> The ICJ stated that the "legal consequences of this breach have to be examined and taken into account" and that "[t]he Court considers that it is the judicial process that is suited to this task."<sup>26</sup> The ICJ also reaffirmed its prior finding in *LaGrand* that a judicial process that precluded the consideration of the VCCR issue is inadequate. The United States is not giving full effect to the rights under the treaty if a procedural device, such as procedural default in habeas corpus, precludes the consideration of the VCCR violation.<sup>27</sup>

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20. By signing an Optional Protocol, the United States had agreed to the jurisdiction of the ICJ for matters concerning the interpretation or application of the VCCR. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487. In a surprising development, the United States withdrew from the Optional Protocol on March 7, 2005. *Announcement: All Consular Notification Requirement Remain in Effect*, U.S. DEPT. OF STATE, available at [http://travel.state.gov/news/news\\_2155.html#](http://travel.state.gov/news/news_2155.html#) (last visited Apr. 16, 2005). See report of the withdrawal in *U.S. Quits Pact Used in Capital Cases*, WASHINGTON POST, Mar. 10, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html?>

21. *LaGrand*, 2001 I.C.J. at 514. For an excellent discussion of the significance of the review and reconsideration finding, see Christian J. Tams, *Consular Assistance and Rights and Remedies: Comments on the ICJ's Judgment in the LaGrand Case*, 13 EUR. J. INT'L L. 1257 (2002).

22. *LaGrand*, 2001 I.C.J. at 514.

23. *Avena*, Counter-Memorial of the United States (Mex. v. U.S.), paras. 6.63–6.78 (Nov. 3, 2003), available at [http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus\\_ipleadings\\_20031103\\_c-mem\\_06.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20031103_c-mem_06.pdf) (last visited Feb. 19 2005).

24. *Avena*, Memorial of Mexico (Mex. U.S.), paras. 280–282 (June 20, 2003), available at [http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus\\_ipleadings\\_20030620\\_memorial\\_04.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20030620_memorial_04.pdf) (last visited Feb. 19 2005).

25. *Avena*, 2004 I.C.J. No 128, at para. 138.

26. *Id.* at para. 140.

27. *Id.* at para. 113.

The ICJ's concerns with the adequacy of clemency and the preclusionary effect of procedural default within the framework of the VCCR violations are indicative of a problem in post-conviction proceedings in the American criminal justice system. The nature of clemency is important to an understanding of why clemency cannot be a vehicle for a review and reconsideration. Moreover, the limited use, and inconsistent use, of clemency in practice confirms the inability of clemency to serve as an effective means to consider the effect of a VCCR violation on the criminal proceedings. Federal habeas corpus proceedings, as presently constituted, also cannot adequately serve the function of a review and reconsideration. Procedural default and other aspects of federal habeas corpus that preclude consideration of the VCCR issue bar effective review. It is, thus, important to consider both clemency and habeas before turning to possible legal reforms.

#### IV. WHY IS CLEMENCY INADEQUATE TO CONSIDER THE EFFECT OF VCCR VIOLATIONS?

In the 1992 case of *Herrera v. Collins*,<sup>28</sup> Justice Rehnquist wrote: "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."<sup>29</sup> In *Avena*, the United States used this theory to argue that clemency procedures satisfied the requirement under the VCCR for a "review and reconsideration" of the conviction and sentence when there was a violation of the consular notification right.<sup>30</sup> The United States contended that clemency is "part of the overall scheme for ensuring justice and fairness in the legal process"<sup>31</sup> The ICJ, however, rejected clemency as an adequate review and reconsideration. The ICJ stated that its interpretation of the VCCR in *LaGrand*, requiring a review and reconsideration, was premised on the idea "that the process of review and reconsideration should occur within the overall *judicial* proceedings. . ."<sup>32</sup> The heart of the requirement was an *effective* means to review and reconsider the conviction and sentence.<sup>33</sup> The ICJ is certainly correct in its as-

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28. 506 U.S. 390 (1993).

29. *Id.* at 411-12.

30. *Avena*, U.S. Memorial, *supra* note 23, at 6.67-6.68.

31. *Avena*, 2004 I.C.J. No 128, at para. 136.

32. *Id.* at para. 141 (emphasis added).

33. *Id.* at para. 142. The Court stated:

assessment of clemency in the United States. The position of the United States reflects a misunderstanding or misuse of clemency. Why is it, though, that the historic remedy for preventing miscarriages of justice fails to provide an effective review and reconsideration of the consular notification issue? The answer to this question lies in the nature of clemency and its application.

Clemency historically,<sup>34</sup> and to this day in the United States, is vested in the executive. For federal prosecutions, the clemency power is vested in the President.<sup>35</sup> For state prosecutions, the precise mechanism varies, but the authority rests with the executive branch of the state. In many states in the United States, the governor has the authority to grant clemency, which includes a pardon, a commutation of a sentence, and a reprieve. In some states, the power to grant clemency is vested in an appointed board. In other states, the clemency power is dependent on a combined judgment of executive decision-makers, such as where the governor grants or denies clemency, but may only grant it upon the recommendation of a majority of a board of pardons and paroles.<sup>36</sup>

The judiciary in the United States has taken a "hands-off" approach to clemency. There is virtually no judicial oversight of the executive's grant or denial of clemency. In a 1998 opinion, a splintered majority of the United States Supreme Court found that there were "some *minimal* procedural safeguards" of due process in a clemency

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The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practiced within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment. *Id.*

34. See discussion of the history of clemency in Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); James R. Acker & Charles S. Lanier, *May God—Or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM L. BULL. 200 (2000).

35. U.S. CONST. art. I, § 2, cl. 1.

36. See *Clemency Process by State*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#process> (last visited Feb. 19, 2005) for up-to-date information on the process used in individual states. For those states with a combination of a board recommendation and action by the governor, there are different models. *Id.* In nine states, the governor must have the recommendation of a board to grant clemency; in nine other states, there is a nonbinding recommendation from a board; and in three states, the governor sits as a member of a board that decides clemency issues. *Id.*

proceeding in a capital case.<sup>37</sup> The examples given indicate that this minimal level is indeed low. Writing a concurrence, which was joined by three other justices, Justice O'Connor gave examples of flipping a coin or arbitrarily denying access to a clemency proceeding as a denial of due process.<sup>38</sup> She concurred in the case before the Court, which found that Ohio had provided sufficient due process.<sup>39</sup> In subsequent cases, lower courts in the United States have repeatedly found no due process violation in clemency procedures.<sup>40</sup>

With the only oversight of clemency resting with voters who elect the governors,<sup>41</sup> it is not surprising that there is neither consistency nor standardized reasons for granting or denying clemency. The VCCR cases exemplify the unpredictability and unreliability of clemency. Osvaldo Torres was recently granted a commutation by the governor of Oklahoma, in part on the basis of the VCCR violation in his case.<sup>42</sup> Earlier in 2004, however, Hung Thanh Le was denied clemency in the same state despite raising a VCCR claim.<sup>43</sup> Similarly, Javier Suarez Medina was executed in Texas in 2002 despite the protest of Mexican President Vicente Fox over a VCCR violation.<sup>44</sup>

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37. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment).

38. *Id.* The fifth vote for a due process right was provided by Justice Stevens, who wrote separately.

39. Ohio's process involved a hearing by a parole board that recommended a result to the governor, who then decided whether or not to grant clemency. *Id.* at 276. The defendant was told on three-days notice that he could have a prehearing interview. *Id.* at 289. The defendant's attorney could not be present at the interview; nor could the defendant submit evidence to the board. *Id.* at 289. This procedure satisfied the minimal due process standards. *Id.* at 290.

40. See cases collected in LINDA E. CARTER & ELLEN KREITZBERG, *UNDERSTANDING CAPITAL PUNISHMENT LAW* 260-62 (Lexis 2004). The *Faulder* case, involving a VCCR violation in a capital case of a Canadian national, is an example of how minimal the due process needs to be. In *Faulder's* case, the Board failed to hold hearings, provided no reasons, and kept no records. The Fifth Circuit Court of Appeals found no due process violation. *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999).

41. For further discussion of the effect of politics inhibiting the grant of clemency, see Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. F. ON C.L. & C.R. 191 (2003). See also Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004) (exploring the unusual nature of clemency and its uneasy relationship with judicial processes).

42. *Clemency*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Feb. 19, 2005).

43. Despite a recommendation of clemency by the Oklahoma Pardon and Parole Board, and a 30-day stay by the governor, clemency was denied and Le was executed in March 2004. *Foreign Nationals Executed Since 1976*, *supra* note 16.

44. *Current Issues and News about Foreign Nationals*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579> (last visited Feb. 19, 2005).

Since 1976, 21 foreign nationals have been executed in the United States, six granted commuted sentences, and three released on the basis of innocence.<sup>45</sup> It is probable that in none of the cases involving foreign nationals, whether executed, commuted, or released, was the VCCR observed in a timely manner.

On a more general level, cases involving juveniles and inmates with mental retardation further illustrate how inconsistently clemency is granted. For example, in 2003, an inmate who was a juvenile at the time of the crime was executed in Oklahoma whereas an inmate in Kentucky was granted clemency because he was a juvenile at the time of the crime.<sup>46</sup> In a recent article, Professor Rapaport documents clemency grants to nine death row inmates because they were juveniles, mentally retarded, or mentally ill during the period from 1977 to 2002.<sup>47</sup> During the same period of time, it is estimated that twenty-one juveniles and thirty-four mentally retarded death row inmates were executed.<sup>48</sup>

Perhaps the greatest discrepancy in the exercise of discretion is the contrast between Illinois and California. In 2003, Governor Ryan of Illinois commuted the sentences of all 167 inmates on death row in that state.<sup>49</sup> In California, with over 600 death row inmates and the largest death row in the United States, no death sentence has been commuted since the reinstatement of constitutional capital punishment statutes in 1976.<sup>50</sup>

Moreover, the rarity of clemency in and of itself negates any reliance on it. Since the reinstatement of capital punishment in the United States in 1976, clemency has been granted in 228 cases, 167 of

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45. *Foreign Nationals, Part III*, DEATH PENALTY INFO. CENTER, at <http://deathpenaltyinfo.org/article.php?scid=31&did=583#innocence> (last visited Apr. 18, 2005).

46. *Execution of Juveniles in the U.S.*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#execsus>; *Clemency*, *supra* note 42. The execution of defendants who were juveniles at the time of their crimes was recently held unconstitutional in *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

47. Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 354 (2003).

48. *Id.* Professor Rapaport points out that it is difficult to know the number of mentally ill inmates who have been executed, but the number may well be higher than for those inmates with mental retardation. *Id.*

49. See articles cited in Carter & Kreitzberg, *supra* note 40, at 253. Of those 167, 164 sentences were commuted to life imprisonment and 3 were commuted to 40 years. *Id.* at 253 n.1.

50. Neal Walker, *Executive Clemency and the Death Penalty*, 22 AM. J. CRIM. L. 266, 267-68 (1994) (indicating no commutations in California in last 20 years); *State by State Information*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/state/> (last visited Apr. 15, 2005) (indicating 0 commutations in California since 1976).

which were the blanket grant in Illinois.<sup>51</sup> During the same period of time, 960 executions have taken place,<sup>52</sup> and there are presently over 3,400 persons on death row in the United States.<sup>53</sup> Clemency is routinely denied in most states in capital cases.

Despite the inconsistency and unreliability of clemency as a mechanism to correct miscarriages of justice, clemency serves important purposes in the criminal justice system and should not be changed. Clemency is an "act of mercy"<sup>54</sup> and, as such, is a final safeguard if exercised. Clemency may also serve to correct an unjust result in legal proceedings. Professor Rapaport has pointed out that clemency additionally serves an important function as an "incubator and laboratory for defenses and mitigation" that are not yet recognized in legal doctrines.<sup>55</sup> As an unregulated, unreviewable process, clemency may, in fact, at times correct an injustice in the system, either on the basis of innocence, procedural unfairness, or an unjust result. An unfettered power to grant clemency, despite its irregularity, is a tool in preventing miscarriages of justice.

The proper roles of clemency, however, must be kept in perspective, and clemency must not be the primary vehicle for post-conviction review. Although there are a number of thoughtful proposals for greater regulation of clemency with standards and judicial oversight,<sup>56</sup> it is unlikely that this will occur in the near future on a nationwide basis. Clemency should not be relied upon, as the United States did in *Avena*, as an effective means of guaranteeing a hearing on a legal right. In contrast to the unregulated clemency process, we

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51. *Clemency*, *supra* note 42.

52. *Executions by Year*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last updated Apr. 21, 2005).

53. *Death Row Inmates by States*, DEATH PENALTY INFO. CENTER, at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (last visited Apr. 15, 2005).

54. The meaning of "mercy" itself is complex. For a discussion of many facets of what is meant by mercy and its implications in the recent symposium in the *North Carolina Law Review* see, *inter alia*, Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C.L. REV. 1319 (2004); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C.L. REV. 1345, 1348 (2004); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C.L. REV. 1415 (2004).

55. Rapaport, *supra* note 47, at 372.

56. See, e.g., Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996); Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825 (2002); Stephen Saltzburg, *Justice Kennedy Commission Report, Adopted by the House of Delegates*, AMERICAN BAR ASSOCIATION, AUGUST 9-10, 2004, (recommending that states establish standards and procedures for executive clemency), available at <http://www.abanet.org/leadership/2004/annual/dailyjournal/121C.doc>.

expect standards, procedures, and review in the judicial system. Consequently, a post-conviction process falls within the purview of the judicial and legislative branches.

### V. WHY IS THE CURRENT JUDICIAL PROCESS INADEQUATE TO CONSIDER THE EFFECT OF VCCR VIOLATIONS?

An accused person in the United States has a right to a trial and a direct appeal of any conviction, whether prosecuted in federal or state court. Although the federal government prosecutes some crimes, the vast majority of criminal trials occur in state courts. Consequently, much of the litigation raising VCCR violations is occurring as the result of state criminal prosecutions, and this section will focus on the procedures that pertain to a state prosecution. In any state, an accused person will have a trial and a subsequent appeal to a state appellate court. States also provide for state collateral review—usually called state habeas corpus. In addition, any person convicted in state court may seek collateral review by filing a petition for habeas corpus in federal court. Federal habeas corpus is governed by a statute that was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>57</sup> With layers of review in both state and federal courts, why are the judicial procedures inadequate to guard against a miscarriage of justice with a VCCR violation?

In many cases, the judicial procedures may be adequate if reviewed in a pretrial motion or on direct appeal. The problem arises if the judicial procedure is one of federal habeas corpus. The nature of collateral review through habeas corpus is limited in scope, access, and relief. While federal habeas corpus is the last avenue of judicial proceedings for defendants, the likelihood of a court granting a writ is remote. Why is that so? The reasons are rooted in concerns for finality and federalism. There is a desire to have criminal proceedings end without continual legal challenges. There is also a desire that federal courts not interfere with and, in fact, defer to the judgments of state courts even on issues of federal constitutional law.<sup>58</sup> The result is that several restrictions on hearing federal habeas claims may result in an inability for the defendant to have his claim considered. The primary

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57. 28 U.S.C. § 2241 (2000).

58. See, e.g., Peter Hack, *The Roads Less Traveled: Post-Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 176 (2003) (finality and federalism); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002).

restriction, though, that affects access to a hearing on the VCCR right is the procedural default doctrine.<sup>59</sup>

How does the procedural default doctrine preclude a hearing on a claim? In general, access to the federal courts through habeas corpus is limited to those claims that were raised in state court so that state courts had a chance to rule on them. If there is an adequate state procedural rule not to allow the defendant to raise a new claim, the defendant will usually be *procedurally defaulted* and barred from bringing it in federal court.<sup>60</sup> There are two ways around procedural default from the case law: 1) cause and prejudice or 2) a fundamental miscarriage of justice that translates into innocence of the crime or ineligibility for the death penalty.<sup>61</sup> These exceptions to procedural default are invoked sparingly.

What has happened with the VCCR violations in the face of the procedural default doctrine? Both the case of Angel Breard and the cases of the LaGrand brothers are good examples. In neither situation was the VCCR claim raised until federal habeas corpus. At that point, the federal courts found that the defendants were procedurally defaulted from raising the treaty claim in the habeas case.<sup>62</sup> Moreover, the federal courts in Breard's case explicitly found that he had failed to establish cause and prejudice as an exception to procedural default. The complete ignorance of his attorneys of the VCCR was inadequate "cause" because, according to the court, the treaty was in existence and accessible to the attorneys through legal research.<sup>63</sup> As a result, the federal courts refused to consider the VCCR claim. That meant that no court in the United States, state or federal, considered the effect of a violation of an international treaty on Breard's or the LaGrands' cases.

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59. Other restrictions include the limitations on successive petitions, 28 U.S.C. § 2244(b)(2) (2000); the standard for relief when a state court has ruled on the merits, 28 U.S.C. § 2254(d)(1); and the requirements for a certificate of appealability to a federal circuit court, 28 U.S.C. § 2253(c)(2). Two other hurdles that do not completely deny access, but significantly impact relief in habeas proceedings are (1) the preclusion of an evidentiary hearing unless certain requirements are met under 28 U.S.C. § 2254 (e)(2), and (2) the harmless error doctrine. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (whether the error "had substantial and injurious effect or influence in determining the jury's verdict").

60. There is no specific rule in the habeas statute on procedural default. As a result, its parameters are governed by case law. See RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 26.1 (4th ed. 2001).

61. *Id.*

62. *LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

63. *Pruett*, 134 F.3d at 619-20.

A recent Fifth Circuit Court of Appeals decision demonstrates the judicial confusion about the effect of an ICJ decision and the doctrine of procedural default. Despite the decisions in *LaGrand* and *Avena*, holding that the treaty is violated if a doctrine such as procedural default precludes hearing the claim, the Fifth Circuit found that the petitioner's case was procedurally defaulted because the VCCR claim was not raised in state court. Although recognizing that the ICJ's judgments were to the contrary, the Fifth Circuit considered the United States Supreme Court's *Breard* decision to be controlling.<sup>64</sup> In *Breard*, without the benefit of the ICJ's interpretation of the treaty, the Supreme Court had viewed procedural default as an appropriate procedure.<sup>65</sup> The Fifth Circuit's decision could be distinguished as a failure by the court to appreciate the change in the law since *LaGrand*. However, the court's reticence to abide by the ICJ's decision is not unique. Courts are typically not familiar with decisions from international tribunals, and there is debate over the significance of the decisions.<sup>66</sup>

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64. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004), cert. granted, 125 S.Ct. 686 (Dec. 10, 2004); cert. dismissed as improvidently granted, 125 S.Ct. 2088 (May 23, 2005). See also *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002) (finding foreign national petitioner procedurally defaulted on VCCR issue under state post-conviction rules based on reliance on *Breard* despite newer decision in *LaGrand*, although granting the petition on other grounds).

65. *Breard*, 523 U.S. at 375-77. In the course of denying *Breard*'s petition for certiorari, the Supreme Court commented in a per curiam opinion that *Breard* had procedurally defaulted his VCCR claim by not raising it in state court; that the VCCR provided for the rules of the receiving State to apply, which the Court thought included procedural default; that the 1996 amendments to the habeas statute, which preclude an evidentiary hearing unless the claim is raised in state court, were later in time than the VCCR and thus, controlling; and that it was unlikely that *Breard* could have shown prejudice from the VCCR violation. *Id.* at 375-76. However, because *Breard* preceded the ICJ's judgment in *LaGrand*, the *Breard* decision does not decide the issue of the effect of *LaGrand* or *Avena* on the application of the procedural default rule. The Supreme Court assumed that, even with procedural default, the United States was giving "full effect" to the rights under the VCCR as required by the terms of the treaty. See *id.* at 377 (asserting that *Breard* was better advised by his US attorney on his rights in the US than by the Paraguayan Consulate, and that it would be speculative to say that had his VCCR rights been respected, he would have pleaded guilty). *LaGrand* rejected that assumption and found the opposite to be the case.

66. *Compare, e.g., United States ex rel. Madej v. Schomig*, No. 98-C1866, 2002 U.S. Dist. LEXIS 20170 (N.D. Ill. Oct. 22, 2002) (finding that *LaGrand* was binding on the court, although deciding the case on other grounds) and *Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing; hearing ordered to consider effect of VCCR violation and ineffective assistance of counsel) and *J. Chapel, specially concurring* (expressly stating that VCCR and decision of ICJ are binding on the court) with *Commonwealth v. Diemer*, 785 N.E.2d 1237 (Mass. App. Ct. 2003), cert. denied *sub nom* *Diemer v. Massachusetts*, 124 S. Ct. 1144 (2004) (noting that the effect of *LaGrand* was "unclear").

## VI. HOW TO BRING THE UNITED STATES INTO COMPLIANCE WITH THE TREATY: JUDICIAL, EXECUTIVE, AND LEGISLATIVE SOLUTIONS

Commentators have proposed various solutions to the failure to provide a review and reconsideration of a sentence and conviction when there is a VCCR violation. The proposals include executive orders, state legislation, congressional legislation creating a cause of action, and federal lawsuits to force state compliance.<sup>67</sup> These proposals deserve serious consideration and implementation in addition to any judicial decisions or revisions of the habeas corpus statute. Recent developments include both a possible judicial solution and a novel executive directive. The judicial response might come from the United States Supreme Court, which accepted *certiorari* in December, 2004, in a case raising the issue of compliance with the ICJ decisions in the courts.<sup>68</sup> An executive attempt to resolve the compliance issue was revealed in the course of the litigation before the Supreme Court. In their amicus brief, the Justice Department cited a memorandum from the President to the Justice Department that states an executive determination to comply with the *Avena* decision.<sup>69</sup> The Presidential memorandum is a determination "that the United States will discharge its international obligations under the decisions 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."<sup>70</sup> Amending the habeas statute, however, is also a logical solution re-

67. See, e.g., Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 IND. INT'L & COMP. L. REV. 1, 4-7 (1999) (positing both congressional legislation and executive action that would provide avenues to require states to comply with a treaty even if it affects a state criminal proceeding); John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 WILLAMETTE J. INT'L L. & DIS. RESOL. 39, 51 (2004) (referring to the possibility of executive action or enforcement through a lawsuit brought by the Justice Department to compel a state to comply with the treaty in a criminal case); Joshua A. Brook, Note, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J. L. REF. 573 (2004) (suggesting judicial, executive, and legislative remedies).

68. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S.Ct. 686 (Dec. 10, 2004); *cert. dismissed as improvidently granted*, 125 S.Ct. 2088 (May 23, 2005). See Postscript, *infra* at notes 93-98 and accompanying text, for a brief summary of the Court's reasons for dismissing *certiorari* and the dissenting views.

69. Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellin v. Dretke*, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-5928).

70. *Id.*

ardless of the outcome of the case before the Supreme Court or the effect of the President's memorandum. The judicial and executive approaches currently underway may prove to be only partial solutions or may leave open legal questions that could be answered more completely with legislative action. As the primary vehicle for post-conviction relief, the habeas statute should be amended to resolve the controversy and to make it clear that federal courts must review a VCCR violation even in a situation where the claim would ordinarily be procedurally defaulted.

A judicial resolution of compliance with the VCCR is uncertain. Although the Supreme Court granted certiorari in the case of *Medellin v. Dretke*, the case from the Fifth Circuit Court of Appeals discussed earlier, in which the Fifth Circuit found that Medellin's VCCR claim was procedurally defaulted, the substantive and procedural issues in the case are complicated. As a result, it is difficult to know if the Court will resolve all of the aspects of compliance with the treaty. The heart of the substantive dispute is whether the interpretation of the treaty by the ICJ is the operable law in U.S. courts. If it is, then there must be a review and reconsideration of the VCCR claims regardless of the procedural default doctrine. The Court accepted certiorari on two questions, both of which raise substantive legal theories for applying the *Avena* decision in U.S. courts. The first question is based on a direct application of the *Avena* decision.<sup>71</sup> The second question is based on giving effect to the decision as a matter of comity and uniform treaty interpretation.<sup>72</sup> Both theories are contested by Texas. The labyrinth of disputed procedural issues in *Medellin* includes the standards under the habeas statute for granting a certificate of appealability (COA) and whether the Court should stay or dismiss the case in light of the President's memorandum.

The substantive dispute between Medellin and Texas is particularly complex because it involves both a treaty and a decision from an international tribunal interpreting the treaty. Medellin argues that the VCCR, as a self-executing treaty, is binding on the United States, including the state and federal courts, under the Supremacy Clause of the U.S. Constitution.<sup>73</sup> They further assert that because the United States has agreed to the jurisdiction of the ICJ and to the binding nature of the ICJ decisions, the ICJ decision applies in U.S. courts in the

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71. Reply Brief for Petitioner at i, *Medellin* (No. 04-5928).

72. *Id.*

73. *Id.* at 4-6.

same manner as would the treaty itself.<sup>74</sup> Medellín further claims that there is an individual right under the treaty that can be raised in federal habeas corpus as the federal statute refers to rights under a treaty, as well as under the Constitution or federal laws.<sup>75</sup> Texas and the United States, as an *amicus curiae*, counter that the obligation to comply with decisions of the ICJ is only enforceable through the Security Council of the United Nations.<sup>76</sup> They take the position that the *Avena* decision does not impose a judicially enforceable right under U.S. law.<sup>77</sup>

In addition to the contested substantive issues, *Medellin* has become a procedural quagmire. In their brief, Texas raised the issue of the standards for granting a COA, a necessary prerequisite to an appeal from a denial of habeas corpus. Texas claims that the Fifth Circuit appropriately declined to issue the certificate.<sup>78</sup> Although the questions on which certiorari was accepted are not couched in terms of the COA, the underlying procedural posture is a denial of the COA. The COA issue, however, is inextricably intertwined with the substantive issues as the certificate should issue "only if the applicant has made a substantial showing of the denial of a constitutional right."<sup>79</sup> The focus on the substance of the denial brings the question back to whether the *Avena* decision is the operable law. If *Avena* is the controlling law, then arguably Medellín has established the "substantial showing," and a COA should have issued. This procedural posture is even further complicated by the parties' dispute over whether the statute's language regarding a denial of a "constitutional" right includes or excludes a "treaty" right.<sup>80</sup> With the revelation of the President's memorandum, however, the procedural issues have shifted to whether the Court should grant a stay of the proceedings, dismiss certiorari as improvidently granted, or proceed to the

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74. Brief for Petitioner at 36–37. Note, however, that the United States has since withdrawn from the Optional Protocol that agreed to the jurisdiction of the ICJ. *See supra* text accompanying note 20.

75. Petitioner's Reply Brief at 8–9.

76. Respondent's Brief at 33–35; Brief for the United States at 35.

77. Respondent's Brief at 32–33; Brief for the United States at 33.

78. Respondent's Brief at 8–9.

79. 28 U.S.C. § 2253(c) (2) (2000).

80. Texas argues that only constitutional issues may be appealed, which precludes raising the VCCR claim on appeal. Respondent's Brief at 9–10. Petitioner responds that the issue is not properly before the Court, Petitioner's Reply Brief at 16–18, and that the statute should be interpreted to include treaty claims on appeal. *Id.* at 20–26.

merits. Medellín has moved for a stay,<sup>81</sup> and the Justice Department claims that only the President can decide on compliance with a treaty.<sup>82</sup> Texas, on the other hand, wants the Court to proceed to the merits of the case and affirm the Fifth Circuit's denial of the COA.<sup>83</sup> In an interesting twist, Texas and the Justice Department appear to be at odds over the legitimacy of the President's authority to require the Texas state courts to conduct a hearing.<sup>84</sup>

With the complex issues and the advent of the President's memorandum, one of the underlying substantive issues in *Medellin* is receiving less attention, but is still a critical element of the case. If the *Avena* decision applies in U.S. courts, there is a potential conflict between the ICJ's finding that the treaty is violated if procedural rules bar a hearing and the usual application of the procedural default doctrine to bar claims in habeas cases. The Fifth Circuit relied on the Supreme Court's decision in *Breard*, in which the Court indicated that the procedural default doctrine prevails over the treaty. In their briefs, the parties in *Medellin* address the viability of the *Breard* case in light of the subsequent decisions from the ICJ in *LaGrand* and *Avena*. Medellín argues that *Breard* is either distinguishable because it preceded the ICJ cases or should be overruled. Medellín contends that the subsequent *LaGrand* and *Avena* cases made clear that the United States is not giving full effect to the consular notification rights as required under the treaty if the procedural default rule precludes a hearing on the effect of a VCCR violation.<sup>85</sup> Texas argues in response that the Supreme Court's position in *Breard* still stands. Texas contends that the amended federal habeas statute was passed subsequent to the treaty, is "last in time" and, therefore, is the controlling law.<sup>86</sup> One of the amicus briefs for Medellín counters with the general principle that the Court should attempt to reconcile a potentially conflicting treaty and statute.<sup>87</sup>

There are at least three possible ways in which to reconcile the obligations under the treaty as interpreted by *Avena* and the procedural default doctrine. One possible reconciliation would be to allow

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81. Motion for Stay, filed March 8, 2005.

82. Brief for the United States at 41–45.

83. Response to Petitioner's Motion to Stay at 7.

84. Brief for the United States at 41; Response to Petitioner's Motion to Stay at 4–5 (President's authority is unclear).

85. Brief for Petitioner at 42–45.

86. Respondent's Brief at 10–11.

87. Brief of International Law Experts as *Amici Curiae* in Support of Petitioner at 7–8.

an exception to the procedural default doctrine, as the Court has found with a showing of either cause and prejudice or a miscarriage of justice. A second reconciliation approach would acknowledge that the procedural default rule is not part of the habeas statute; instead it is a judicial doctrine. If the doctrine is not codified, there is arguably no statute to contradict the treaty, and the treaty provisions would be controlling. Yet a third possibility is that, even if procedural default is viewed as part of the statutory scheme for habeas corpus, the judicially-created doctrine predates the amendments and the treaty or its most recent interpretations. Any of these approaches would provide for a review and reconsideration of a VCCR claim as required by the treaty and still preserve in general the doctrine of procedural default.

Even if the Supreme Court or the President's memorandum provide that a hearing on VCCR violations must be conducted despite a procedural default, it would be helpful for clarity and future cases to have Congress amend the habeas statute to provide expressly for a hearing in a VCCR context. This is especially true in light of the dispute between Texas and the Justice Department over the legality of the President's determination and the likelihood that the Supreme Court will not resolve all of the substantive and procedural issues in the *Medellin* case. Moreover, the President's memorandum only covers the fifty-one cases of the Mexican nationals at issue in *Avena*. The Justice Department brief clearly states that, in their view, the merits of the legal issues may still be litigated in future cases.<sup>88</sup> Thus, even the executive approach does not resolve the applicability of the VCCR and the ICJ decisions in the cases of other foreign nationals on death row. Although the procedural default doctrine is not directly embodied in the federal statute and its parameters are defined by case law, there is a revision to a section of the statute that could remedy the current problem. Section 2254 precludes the grant of a writ unless the applicant has exhausted state remedies.<sup>89</sup> Procedural default occurs when the applicant has exhausted state remedies, but can no longer go into a state court to have a hearing on the claim. Section 2254(b)(1) should be amended to add a third subsection (C) [new material in bold] so that the full section would read:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

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88. Brief for the United States at 47–48.

89. 28 U.S.C. § 2254(b)(1).

- (A) the applicant has exhausted the remedies available in the courts of the State;
- (B) or (i) there is an absence of available State corrective process; or  
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
- (C) or the applicant is raising a claim, whether or not raised in state court, that is based on the Constitution or laws or treaties of the United States, and which requires a hearing, or review and reconsideration of the conviction and sentence, on the alleged violation.

With this amendment, individuals would be able to gain access to federal habeas corpus either through exhausting state remedies first or through basing a claim on a law that requires a hearing or review. This new provision would not eliminate the requirement of exhaustion of state remedies because subsection (C) would only apply in those situations where such a hearing or review was required by law. Nor would the amendment eliminate procedural default as a limiting device in most habeas cases. By allowing a hearing under limited circumstances, however, even when the issue was not raised in state court, individuals in the situation of *Breard*, the *LaGrands*, or *Medellin* would be able to have a federal court hear their VCCR claims despite failing to raise the VCCR violation in state court.<sup>90</sup> The United States would be one step closer to compliance with its treaty obligation under the ICJ's interpretation of the VCCR.

## VII. CONCLUSION

The continuing dialogue on compliance with the VCCR is important in its own right and also for the insights this debate provides into post-conviction proceedings in the United States. As the ICJ found in

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90. Other provisions of the habeas statute would also need to be amended to allow for an evidentiary hearing, 28 U.S.C. § 2254(e)(2), and a successive petition, 28 U.S.C. § 2244 (b)(2). As presently written, § 2254(e)(2) precludes evidentiary hearings unless one of two exceptions is met, either "(A)(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Those exceptions are the same as the exceptions for successive petitions. Both provisions should be amended to include a third situation permitting an evidentiary hearing and a successive petition for a VCCR violation with language such as: "Or (3) a claim not previously raised that is based upon a violation of the Constitution or laws or treaties of the United States, which requires a hearing, or review and reconsideration of the conviction and sentence, on the alleged violation."

*Avena*, clemency is an inadequate forum for review and reconsideration of rights under the VCCR. Justice Blackmun, quoted at the beginning of this paper, similarly identified the unregulated nature of clemency as problematic in the enforcement of a constitutional right.<sup>91</sup> The vindication of a right, whether guaranteed by the Constitution or a treaty, cannot be dependent on the unregulated, unreviewable, nonjudicial process of clemency. And yet, the current judicial processes in the United States are likely to be inadequate if the issue is raised in federal habeas corpus. Justice Stevens, also quoted at the beginning of this paper, stated that the use of a preclusionary doctrine in the context of a VCCR violation is "manifestly unfair."<sup>92</sup> There is a manifest injustice in failing to provide a judicial forum for a review of a treaty violation and its impact on the trial. The ICJ clarified in *Avena* that the VCCR requires a judicial review and reconsideration. The inadequacies of clemency and federal habeas corpus proceedings in this context should be a starting point for reevaluating post-conviction relief in the United States and its efficacy in providing fundamental fairness in our criminal justice system.

### POSTSCRIPT

On May 23, 2005, as this essay was about to be printed, the Court issued a *per curiam* opinion dismissing *certiorari* as improvidently granted in the *Medellin* case.<sup>93</sup> The dismissal was not unexpected given the unusual posture of the case and President Bush's memorandum directing state courts to hear the VCCR claims of the Mexican nationals in *Avena*.<sup>94</sup> Nevertheless, the dismissal was a close 5 to 4 decision. Four of the justices would have preferred to stay the proceedings in the Supreme Court pending the outcome in the state court habeas action. In the absence of a majority for a stay, one of the four justices opted to provide the fifth vote for a dismissal (Ginsberg), while the other three justices joined the dissent of Justice O'Connor (Souter, Breyer, and Stevens).<sup>95</sup> Justice O'Connor's dissent took the position that denial of the certificate of appealability by the Fifth Circuit should be vacated and the case remanded to that

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91. *Herrera*, 506 U.S. at 440 (Blackmun, J., dissenting).

92. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting the denial of *certiorari*).

93. 125 S.Ct. 2088 (2005).

94. See discussion *infra*, notes 69-84 and accompanying text.

95. 125 S.Ct. at 2093 (Ginsberg, J., concurring); *id.* at 16 (Souter, J., dissenting); *id.* at 17 (Breyer, J., dissenting, joined by Justice Stevens).

court to decide the issues or to hold the case until the state court proceedings were completed.<sup>96</sup> Justice Souter alone, in his dissent, would have decided the issues on which certiorari was granted as an alternative to a stay or a remand.<sup>97</sup> It is likely that the case will eventually be back before the Supreme Court.<sup>98</sup> At this time, however, any judicial responses to VCCR violations will occur in the lower courts. A judicial solution to the violations of the VCCR, thus, remains unsettled and a legislative response would provide a more timely resolution of compliance with the treaty.

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96. *Id.* at 2105 (O'Connor, J., dissenting).

97. *Id.* at 2106 (Souter, J., dissenting).

98. *Id.* at 2090, n.1 (Court will "in all likelihood have an opportunity" to review the case if Medellin or Texas seek certiorari after state court proceedings); *id.* at 2093 (Ginsberg, J., concurring) (joining per curiam opinion, "recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings . . .").