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## ENFORCING THE DECISIONS OF INTERNATIONAL TRIBUNALS IN THE U.S. LEGAL SYSTEM

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In recent years, the increasing prominence of international courts and tribunals has sparked significant academic debate about the effect that should be given to decisions of such institutions within the United States legal system.<sup>1</sup> Some commentators have wrestled with constitutional questions related to the legal enforceability of such decisions in U.S. courts.<sup>2</sup> Some have looked at broader normative questions about whether participation in international adjudication will advance U.S. interests by fostering respect for the rule of law internationally, or whether it will represent an unwise surrender of U.S. sovereignty to unelected, unaccountable foreign officials.<sup>3</sup> Still others have addressed empirical questions of institutional design, attempting to understand what factors lead nations to submit controversies to third-party dispute settlement and to predict what characteristics of international courts and tribunals are predictive of national compliance with their decisions.<sup>4</sup>

This essay will not delve deeply into these broader debates, some of which I have addressed in other writings.<sup>5</sup>

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1. See, e.g., Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

2. See, e.g., David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003).

3. See, e.g., Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX INT'L L.J. 527 (2003).

4. Eric A. Posner & John C. Yoo, *A Theory of International Adjudication*, 93 CAL. L. REV. 1 (2005).

5. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 499-504 (2003).

Rather, in this short space, I will explore two somewhat narrower observations. The first observation is that the U.S. Supreme Court's attitude towards compliance with decisions of international institutions cannot be divorced from its broader grappling with the role of international and comparative law in the U.S. legal system. The second is that current questions about compliance with decisions of international courts and tribunals must be linked to the broader historical context of U.S. participation in international adjudication.

### I. INTERNATIONAL LAW AND U.S. COURTS TODAY

International cases have been on the Supreme Court's docket in an increasingly prominent way during the past few years. In the October 2003 Term, for example, several of the Court's most closely watched decisions were centrally concerned with international law. In *Sosa v. Alvarez-Machain*,<sup>6</sup> for example, the Court affirmed the vitality of the Alien Tort Claims Act as a tool for enforcement of customary international law on human rights.<sup>7</sup> In the trilogy of cases involving terrorism detainees at Guantanamo and elsewhere, the Court grappled with questions of extraterritorial jurisdiction and the international law of war.<sup>8</sup> And in less prominent but significant cases involving private parties, it addressed matters such as the international scope of U.S. antitrust law<sup>9</sup> and the interpretation of commercial treaties.<sup>10</sup> In the previous two years, controversial decisions on the execution of the mentally retarded,<sup>11</sup> criminalization of homosexual acts,<sup>12</sup> and affirmative action<sup>13</sup> cited foreign and international court decisions as persuasive authority. Such cases have broadened the exposure of and given credence to foreign holdings and their role in U.S. courts.

Commentators have suggested there is a schism on the

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6. 124 S. Ct. 2739 (2004).

7. *Id.* at 2761-62.

8. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

9. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

10. *Olympic Airways v. Husain*, 540 U.S. 644 (2004)

11. *Atkins v. Virginia*, 536 U.S. 304 (2002).

12. *Lawrence v. Texas*, 539 U.S. 558 (2003).

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Court between internationalist and isolationist justices.<sup>14</sup> But even Justice Scalia—perhaps the Justice most associated with the isolationist camp because of his hostility toward the use of foreign sources in interpreting the U.S. Constitution—recently reaffirmed his belief in the importance of respecting foreign decisions in other types of cases.<sup>15</sup> In a case interpreting the Warsaw Convention on air carrier liability, Justice Scalia began his dissent by noting that “[w]hen we interpret a treaty, we accord the judgments of our sister signatories ‘considerable weight’” and chided the majority for failing “to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.”<sup>16</sup> Likewise, in *F. Hoffman-La Roche LTD. v. Empagran S.A.*, the case on extraterritorial application of U.S. antitrust law, Justice Scalia alluded to his belief, more fully articulated in the 1993 *Hartford Fire Ins. Co. v. California* decision about the relevance of international comity in interpreting the scope of U.S. statutes.<sup>17</sup> The trend shows no sign of abating. In 2005 In March 2005, the Court held it was unconstitutional to impose the death penalty on juvenile offenders, referring explicitly to international opinion on the topic.<sup>18</sup> And in December of 2004, the Court granted certiorari in *Medellin v. Dretke* to resolve a split in the lower courts about whether to comply with a decision of the International Court of Justice (“ICJ”) concerning foreign prisoners on death row in the United States.<sup>19</sup>

Because the *Medellin* case involves the question of U.S. court observance and enforcement of the law of international

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14. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1513 (2003).

15. See, e.g., *Olympic Airways*, 540 U.S. at 658 (Scalia, J., dissenting).

16. *Id.*

17. *F. Hoffman*, 124 S. Ct. at 2373 (Scalia, J., concurring).

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

*Id.*; *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

18. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

19. *Medellin v. Dretke*, 125 S. Ct. 1622 (2004).

institutions, it is worth spending some time understanding the context of the case. The Supreme Court's decision to grant certiorari in *Medellin* represented the latest iteration in a series of interactions that have taken place over the last several years between the U.S. judicial system and the ICJ.<sup>20</sup> These cases are by now quite familiar to most international lawyers, but I will recount them briefly here to set the stage for discussion. The story, in some sense, began in the 1960s, when the U.S. ratified the Vienna Convention on Consular Relations.<sup>21</sup> Significantly, the United States also ratified its Optional Protocol, which accepts the compulsory jurisdiction of the ICJ to resolve disputes concerning the interpretation and application of the treaty.<sup>22</sup> At the time of ratification, the U.S. government took the position that the Convention was self-executing, that is that it required no separate implementing legislation to be enforceable in the courts.<sup>23</sup>

The first episode in the sequence leading up to Supreme Court's grant of review in *Medellin* was the *Breard* case in 1998.<sup>24</sup> Angel Breard was a Paraguayan citizen arrested, convicted, and sentenced to death for murder in the state of Virginia.<sup>25</sup> In federal post-conviction proceedings, Breard's claim that he had not been timely informed of his right to obtain assistance from the Paraguayan consulate was rejected on the grounds that he had procedurally defaulted it by not raising it in state court.<sup>26</sup> The Paraguayan government initi-

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20. For recent discussions of such iterative interactions between international and domestic courts, which some have termed dialogue and others dialectic, see Martinez, *supra* note 5, at 499-504; Ahdieh, *supra* note 1, at 2045-49; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120 (2000).

21. Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261, 21 U.S.T. 77, *ratified by United States* Dec. 24, 1969, 21 U.S.T. 77, 185.

22. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, art. I, 596 U.N.T.S. at 488, 21 U.S.T. at 326 (providing that disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice"), *ratified by United States* Dec. 24, 1969, 21 U.S.T. 77, 185.

23. See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

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

25. *Id.* at 372-73.

26. *Id.* at 373.

ated separate proceedings in U.S. district court against Virginia, which were dismissed on Eleventh Amendment sovereign immunity grounds.<sup>27</sup> Paraguay then filed suit against the United States in the ICJ on April 3, 1998.<sup>28</sup> On April 9, the ICJ issued a decision noting jurisdiction and asking that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”<sup>29</sup> Requests for a stay of execution from both Breard and the Paraguayan government reached the U.S. Supreme Court close to the eve of execution.<sup>30</sup> In a brief *per curiam* decision, the Court denied both a stay and plenary review of the merits of the cases, finding that various procedural doctrines barred relief.<sup>31</sup> The Supreme Court expressed the view that “[i]t is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier”<sup>32</sup> and noted that, in general, U.S. courts “should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”<sup>33</sup> Nevertheless, the Supreme Court was not sufficiently concerned about the ICJ’s opinion to stay the execution; the Court denied the stay and the execution was carried out.<sup>34</sup> Because Paraguay terminated its suit after Breard was executed, the ICJ did not have an opportunity to reach the merits of the case.<sup>35</sup>

The issue arose again the following year in *LaGrand*, which involved the execution of two German nationals by the state of Arizona.<sup>36</sup> Again, the ICJ issued provisional meas-

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27. *Id.* at 374.

28. *Id.*

29. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998), 1998 I.C.J. 248, 258, available at [http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus\\_iorder\\_981110.htm](http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_981110.htm) (last visited Aug. 5, 2005).

30. *Breard*, 523 U.S. at 372-74.

31. *Id.* at 375.

32. *Id.* at 378.

33. *Id.* at 375.

34. *Id.* at 378-79.

35. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. at 258.

36. *LaGrand Case* (F.R.G. v. U.S.), 40 I.L.M. 1069, 1112-14 (I.C.J. June 27, 2001).

ures,<sup>37</sup> and the U.S. Supreme Court refused to stay the executions in order to give the ICJ time to decide the case.<sup>38</sup> This time, however, Germany pressed forward with its claims in the ICJ even after its citizens were executed.<sup>39</sup> The ICJ ultimately issued several important rulings: first, that its provisional measures were meant to be binding; second, that the Vienna Convention created individually enforceable rights; and third, that the United States' rigid application of the procedural default doctrine to bar consideration of Vienna Convention violations breached its obligations under the Convention.<sup>40</sup> Notwithstanding the ICJ's decision on the merits in *LaGrand*, lower courts in the United States continued to dismiss Vienna Convention claims.<sup>41</sup> Seeking firmer clarification from the ICJ, the government of Mexico, which had several dozen citizens on death row in the United States, initiated the *Avena* (Mexico v. United States) case.<sup>42</sup> Despite the pendency of this case in the ICJ, the U.S. Supreme Court again denied certiorari in a case involving a Mexican national in the fall of 2003.<sup>43</sup>

Finally, in spring 2004, the ICJ held, in a final judgment in *Avena*, that the prisoners were entitled to *judicial* review and reconsideration of whether the United States' failure to notify them of their rights under the Vienna Convention on Consular Relations had prejudiced their trials.<sup>44</sup> *Avena* was the ICJ's most unequivocal holding that current U.S. practice violated the treaty and that the treaty required specific *judicial* action. Soon after the *Avena* decision, in *Torres v. State*, the Oklahoma Court of Criminal Appeals stayed the execution of a Mexican national and remanded his case for an evidentiary hearing on whether he was prejudiced by the treaty

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37. *Id.*

38. Federal Republic of Germany v. United States, 526 U.S. 111, 111 (1999) (per curiam).

39. *LaGrand Case (F.R.G. v. U.S.)*, 40 I.L.M. at 1090, 1097.

40. *Id.*

41. See, e.g., United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001); State v. Martinez-Rodriguez, 33 P.3d 267 (N.M. 2001).

42. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Judgment of Mar. 31, 2004) ("*Avena*"), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (last visited Aug. 5, 2005).

43. See *Torres v. Mullin*, 540 U.S. 1035 (2003).

44. *Avena*, 2004 I.C.J. at ¶¶ 121-22, 140-141.

violation.<sup>45</sup> By contrast, in *Medellin*, the U.S. Court of Appeals for the Fifth Circuit held that, notwithstanding the ICJ's decision, the Vienna Convention created no privately enforceable rights and that the prisoner's claim was barred by the *habeas* procedural default doctrine.<sup>46</sup>

By granting certiorari in *Medellin*, the Supreme Court finally—six years after *Breard*—showed a willingness to engage with the substance of the ICJ's rulings. However, only time will tell the degree to which the Supreme Court will defer to the ICJ's increasingly blunt statements of opinion in the two courts' iterative dialogue with one another about the United States' obligations under the Vienna Convention. The U.S. government submitted an amicus brief at the merits stage in the Supreme Court suggesting, for the first time, that there was a procedural barrier to the Supreme Court's review based on the requirements of federal habeas law, and moreover declaring that the president had determined that the ICJ's judgment should be given effect in the state courts of Texas.<sup>47</sup> The Court then dismissed the writ as improvidently granted in order to give the Texas state courts a chance to hear the case.<sup>48</sup> Although the Supreme Court again set aside the Vienna Convention questions for another day, it is quite likely that *Medellin* or a similar case will make its way back to the Supreme Court from the lower state courts. Moreover, the Supreme Court's initial decision to hear the *Medellin* case at all suggests something about the importance of the international judicial dialogue itself in shaping the Supreme Court's view of the importance of international issues.

Speculating why the Supreme Court has decided to hear any particular case is a notoriously risky enterprise. Certainly, the split between the Fifth Circuit and the Oklahoma

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45. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). The Governor of Oklahoma subsequently commuted Torres's sentence to life imprisonment, stating that he had considered the Vienna Convention violation and noting in a press release that the decisions of the ICJ were by agreement binding on the United States. See Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres, (May 13, 2004) [available at](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1) [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1) (last visited Aug. 5, 2005).

46. *Medellin*, 371 F.3d at 279-80.

47. Brief for The United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, No. 04-5928 (Feb. 2005).

48. *Medellin v. Dretke*, 125 S.Ct. 2088, 2089 (2005) (per curiam).

Court of Criminal Appeals provided a conventional basis for granting review. But something more may be at work. As discussed above, in the years since *Breard*, the Court has increasingly grappled with the question of the role of international and comparative law across a range of cases, and this may have had a synergistic effect. The more cases involving international issues that come before the Court, the more aware the Court is of the international dimensions of legal problems and the more likely it is to grant review in cases involving international law or to take international law into account in rendering its decisions.

## II. UNITED STATES AND THE HISTORY OF INTERNATIONAL ADJUDICATION

In addition to placing *Medellin* in the broader context of the Supreme Court's turn to international law, it is helpful to situate the question of U.S. involvement with international courts and tribunals in a broader historical context. International adjudication is not a recent innovation. Indeed, the modern history of international adjudication is usually traced to the arbitrations between the United States and Great Britain pursuant to the Jay Treaty of 1795.<sup>49</sup> These were followed by literally dozens of other agreements throughout the nineteenth century in which the United States agreed to submit a significant number of disputes to international arbitration.<sup>50</sup> It is not the intention of this essay to provide any kind of comprehensive analysis of these early arbitrations, or their significance for current U.S. law and practice with regard to compliance with the decisions of international tribunals; that topic can only be done justice in a much longer article.<sup>51</sup> Moreover, there are important differences, both practical and legal, between these early arbitrations and modern international adjudications that belie easy analogies. There is a distinction, for example, between agreeing, after

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49. BARRY E. CARTER, ET AL., INTERNATIONAL LAW 341 (2003) (quoting J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (1959)). The Jay Treaty settled claims between the United States and Britain from the Revolutionary War era. *Id.*

50. See JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY *passim* (1898) (describing arbitrations).

51. Indeed, I hope to undertake a more comprehensive analysis of these cases in a future article.

the fact, to submit a known set of property disputes to an *ad hoc* arbitral tribunal and agreeing *ex ante* to submit all future disputes about broad-ranging trade agreements to compulsory dispute settlement. The power given to the arbitrators and the practical consequences for national sovereignty are lesser in the former situation than in the latter.<sup>52</sup> In addition, there was significant contemporaneous debate about the wisdom and legality of some of the early arbitration treaties that must be taken into account in considering their relevance to current practice.<sup>53</sup>

But three points are worth considering, for they respond to some of the more alarmist concerns in recent literature about international courts and tribunals. The first point is that the possibility that an international arbitral tribunal might in the course of its work have to second-guess the decisions of a national court was not, for the most part, viewed as a fatal impediment to international arbitration. To return to the Jay Treaty example, there was, to be sure, some initial debate about whether the arbitration provisions of the treaty violated either the appointments clause<sup>54</sup> or Article III of the Constitution,<sup>55</sup> but these concerns did not prevent the treaty's ratification, nor did they provoke the same prolonged debate as did the question of the House of Representatives' role in implementing the treaty.<sup>56</sup> In the end, the primary controversy that broke out between U.S. and British arbitrators under Article VI of the Jay Treaty—and the one which led to a collapse of that portion of the arbitration—was not over whether they could set aside the judgments of state and federal courts concerning pre-war debts, but rather whether claimants should first be required to exhaust their remedies in the domestic court system.<sup>57</sup> Moreover, the many nineteenth-century arbitrations involving prize law—that is cap-

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52. See Martinez, *supra* note 5, at 440-41 (discussing differences between arbitration and adjudication).

53. See Golove, *supra* note 2, at 1746; see also David M. Golove, *Treaty-Making and the Nation: the Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1155-61 (1999) (describing controversy over Jay Treaty).

54. U.S. CONST. art. II, § 2, cl. 2.

55. U.S. CONST. art. III.

56. Golove, *supra* note 2, at 1746; see also Golove, *supra* note 52, at 1155-61.

57. JOHN BASSETT MOORE, *INTERNATIONAL ADJUDICATIONS: MODERN SERIES* 233-66 (1931) (describing controversy and collapse of commission).

ture of ships and their cargo in wartime—almost all necessarily involved some review of decisions initially rendered by national prize courts. The arbitral tribunal convened by the United States and Great Britain to resolve claims arising out of the Civil War, for example, reviewed several prize cases that had been heard by the U.S. Supreme Court.<sup>58</sup>

I do not wish to overstate my claim. The kind of jurisdiction granted to modern courts and tribunals may pose distinct problems from both a constitutional and a policy perspective compared to these historical examples. Rather, I simply want to make the narrower point that, in some situations in the past, international arbitral review of national court judgments has taken place without causing a constitutional train wreck.

The second point worth considering is that there was, at various points in the past, a significant degree of acceptance of the notion that domestic courts ought to enforce the decisions of international arbitral tribunals. For example, Justice Story, in the 1835 decision in *Comegys v. Vasse*,<sup>59</sup> explained:

The object of the treaty with Spain . . . was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal.<sup>60</sup>

Likewise, in 1894, in *United States v. La Abra Silver Mining Co.*,<sup>61</sup> the Court of Claims considered claims that had been resolved in the United States' favor by an arbitral tribunal convened between the United States and Mexico, but which the U.S. Congress, in the spirit of fairness, had agreed by statute to allow to be reopened in light of subsequent concerns about fraud.<sup>62</sup> The court explained that

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58. Compare *The Hiawatha*, 67 U.S. (2 Black) 635 (1862), *The Circassian*, 69 U.S. (2 Wall.) 135 (1864), and *The Sir William Peel*, 72 U.S. (5 Wall.) 517 (1866), with JOHN BASSETT MOORE, *INTERNATIONAL ARBITRATION*, 3902, 3911, 3935 (1914).

59. 26 U.S. 193 (1828).

60. *Id.* at 212.

61. 29 Ct. Cl. 432 (1984).

62. *Id.*

[i]t is a general and fundamental principle of the law that the award of an arbitration whether sitting between individuals or nations, in the absence of fraud or mistake, is binding upon the parties to such arbitration. The obligatory efficacy of its judgment is implied in the very existence and purpose of its creation and being.<sup>63</sup>

Again, I want to make clear the limited nature of my claim; I do not contend that this somehow proves that U.S. courts must indiscriminately enforce the judgments of all modern international courts and tribunals to which the United States is a party. Rather, I simply wish to refute the notion that enforcement of such decisions is somehow fundamentally at odds with traditional notions of U.S. sovereignty.

The third point worth considering is that, throughout its history, the United States has demonstrated neither a consistent pattern of obedience and respect for international law and decisions of international courts and tribunals, nor a consistent pattern of defiance and disregard. Some of the examples discussed in the previous few pages show compliance with international law and decisions, others non-compliance. Professor John Yoo has recently argued that compliance with decisions of international tribunals appears to be correlated with the dependence of decision makers; that is, that contrary to popular wisdom, institutions employing independent judges are less likely to engender compliance than those employing dependent judges.<sup>64</sup> The current data seems insufficient to show that this factor, rather than many others potentially at work, provides the predominant explanation for state behavior with regard to international adjudication. Certainly, no one has yet created a model that can accurately *predict* state compliance<sup>65</sup>—much less predict situations in which courts are likely to employ the broader sort of interpretive deference shown by national courts in citing international decisions as persuasive authority. Why, for example, do circuit courts cite decisions of the International Criminal Tribunal for the Former Yugoslavia in Alien Tort Claims Act

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63. *Id.*

64. See Posner & Yoo, *supra* note 4, at 7.

65. Sometimes, even defining compliance is difficult—is the United States, as of Spring 2005, complying with the ICJ's decision in *Avena*? If it is, how should we count its previous non-compliance with *LaGrand*?

cases?<sup>66</sup> Who would have expected, and who knows precisely why it was that the Oklahoma Court of Criminal Appeals and the Oklahoma governor were the first to diverge from other U.S. decision makers and defer to the ICJ's interpretation of Vienna Convention? Why did the Fifth Circuit not follow the same path? Will the U.S. Supreme Court eventually enforce the ICJ's *Avena* decision in *Medellin*, or will the Texas state courts do so pursuant to the President's decree that it is their duty? We will have to wait and see. Many factors will likely come into play, and the Supreme Court may be as much influenced by its recent engagement with international law, or by headlines about negative reaction abroad to U.S. disrespect for international law, as by the structure of the ICJ.

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This essay has attempted to convey some of the richness of U.S. practice, both today and in the past, with regard to observing and enforcing the law of international institutions. The United States has demonstrated neither consistent obedience, nor consistent disregard for such institutions. The attitude of the U.S. courts towards such institutions may be intertwined with their attitude towards international legal problems more generally. As the diversity of international institutional structures increases, and as they interact with a variety of domestic actors—both state and federal executive branch officials, legislators, judges, and private actors—U.S. practice will surely continue to evolve. On balance, one may hope that the United States will continue to show, as it has since its founding, “a decent respect to the opinions of mankind.”<sup>67</sup>

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66. See, e.g., *Ford v. Garcia*, 289 F.3d 1283, 1290 (11th Cir. 2002).

67. THE DECLARATION OF INDEPENDENCE para 1 (U.S. 1776).