

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 06–984 (08A98), 08–5573 (08A99), and 08–5574 (08A99)

JOSE ERNESTO MEDELLIN
06–984 (08A98) v.
TEXAS

ON APPLICATION TO RECALL AND STAY MANDATE AND FOR
STAY

JOSE ERNESTO MEDELLIN
08–5573 (08A99) v.
TEXAS

ON APPLICATION FOR STAY AND PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF
TEXAS

IN RE JOSE ERNESTO MEDELLIN
08–5574 (08A99)

ON APPLICATION FOR STAY AND ON PETITION FOR A WRIT OF
HABEAS CORPUS

[August 5, 2008]

JUSTICE BREYER, dissenting.

The International Court of Justice (ICJ) has held that a treaty that the United States has signed, namely, the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, [1970] 21 U. S. T. 77, T. I. A. S. No. 6820, does not permit execution of this defendant without a further hearing concerning whether Texas’ violation of the Vienna Convention’s obligation to notify the defendant of his right to consult Mexico’s consul constituted harmless error. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. 61–64 (Judgment of Mar. 31). The United States has agreed

BREYER, J., dissenting

that the ICJ's judgments will have "binding force . . . between the parties and in respect of [a] particular case." United Nations Charter, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945). The President of the United States has concluded that domestic courts should enforce this particular ICJ judgment. Memorandum to the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. in *Medellín v. Texas*, No. 06–984, p. 187a.

In *Medellín v. Texas*, 552 U. S. ____ (2008) (six to three vote), this Court, while recognizing that the United States was bound by treaty to follow the ICJ's determination as a matter of *international law*, held that that determination did not *automatically* bind the courts of the United States as a matter of *domestic law* in the absence of further congressional legislation. *Id.*, at _____. In reaching this conclusion the majority, as well as the dissent, recognized that, without the further hearing that the ICJ found necessary, the execution would violate our international treaty commitments. See *id.*, at ____.

Petitioner, who is scheduled to be executed this evening, now asks us to delay the execution in order to give Congress an opportunity to act to cure the legal defect that the Court found in *Medellín*. In my view, several factors counsel in favor of delay. *First*, since this Court handed down *Medellín*, Mexico has returned to the ICJ requesting this Nation's compliance with its international obligations; and the ICJ has asked that the United States "take all measures necessary to ensure that [the Mexican nationals] are not executed" unless and until they "receive review and reconsideration consistent" with the ICJ's earlier *Avena* decision. See *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2008 I. C. J. No. 139, ¶80 (Order of July 16).

Second, legislation has been introduced in Congress seeking to provide the legislative approval necessary to

BREYER, J., dissenting

transform our international legal obligations into binding domestic law. See Avena Case Implementation Act of 2008, H. R. 6481, 110th Cong., 2d Sess. (2008) (referred to committee, July 14, 2008).

Third, prior to *Medellín*, Congress may not have understood the legal need for further legislation of this kind. That fact, along with the approaching election, means that more than a few days or weeks are likely necessary for Congress to determine whether to enact the proposed legislation.

Fourth, to permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises.

Fifth, the President of the United States has emphasized the importance of carrying out our treaty-based obligations in this case; this fact, along with the President's responsibility for foreign affairs, makes the Executive's views of the matter pertinent.

Sixth, different Members of this Court seem to have very different views of what this case is about. In my view, the issue in this suit—what the majority describe as the “beginning premise”—is not whether a confession was unlawfully obtained from petitioner. Cf. *ante*, at _____. Rather, the question before us is whether the United States will carry out its international legal obligation to enforce the decision of the ICJ. That decision requires a further hearing to determine whether a conceded violation of the Vienna Convention (Texas' failure to inform petitioner of his rights under the Vienna Convention) was or was not harmless. Nor do I believe the majority is correct insofar as it implies that Congress has had *four years to consider the matter*. See *ibid.* (“Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín v. Texas*”). To the contrary, until this Court's decision in *Medellín* a few months ago, a member

BREYER, J., dissenting

of Congress might reasonably have believed there was no need for legislation because the relevant treaty provisions were self-executing. It is not realistic to believe Congress could act to provide the necessary legislative approval in only a few weeks' time.

In my view, we should seek the views of the Solicitor General (which may well clarify these matters), and we should grant a stay of sufficient length for careful consideration of those views, along with the other briefs and materials filed in this suit. A sufficient number of Justices having voted to secure those views (four), it is particularly disappointing that no Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution, which execution, as I have said, will place this Nation in violation of international law.