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After Medellin v. Texas, Will U.S. Commitments in International Extradition Cases Be Enforceable?

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I. Introduction

The U.S. Supreme Court's 2008 decision in *Medellín v. Texas*[1] "contains the Court's first extended discussion of the [self-executing treaty] doctrine[2] since [1833]."[3] Instead of clarifying what has been called the "most confounding" issue

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1. Medellín v. Texas, 552 U.S. 491 (2008).
2. *Id.* at 504 (The Supreme Court said that what it meant by "'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 242 (1972) (illustrating that if a treaty provision is self-executing, it binds the states via the Supremacy Clause of the U.S. Constitution); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 765 (1988) (stating that a self-executing treaty is one whose provisions do not require implementing legislation to be effective as domestic law).
3. Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601 (2008); *see also,* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 550

in U.S. treaty law,[4] *Medellín* "raises more questions than it answers."[5] Thus the decision sparked immediate scholarly debate over its significance.[6] The purpose of this article, however, is not to weigh in on the debate over the significance of *Medellín* generally, but rather to focus on what specific effects it may have on U.S. extradition practice.

Whether restrictions[7] placed on extraditions by a foreign state surrendering a fugitive will be honored depends upon whether the extradition treaty is self-executing because then it has "automatic domestic effect" in U.S. courts as a matter of federal law.[8] Currently, U.S. extradition treaties are almost universally regarded as self-executing.[9] That could change if *Medellín* results in lower courts reconsidering whether treaties previously considered self-executing no longer are,[10] and that, in turn, could deleteriously affect the ability of the United States to

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(2008) (opining that "*Medellín* is the Supreme Court's most significant decision on treaty self-execution since *Foster*").

4. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1979).
5. Vázquez, *supra* note 3, at 601.
6. *See, e.g.,* David J. Bederman, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008) (considering *Medellín's* potential impact on the hermeneutics of treaty interpretation); Bradley, *supra* note 3, at 541-550 (analyzing *Medellín's* impact on the self-executing/non-self-executing conundrum); Steve Charnovitz, *Revitalizing the U.S. Compliance Power,* 102 AM. J. INT'L L. 551 (2008) (assessing *Medellín's* potential impact on the President's power to insure compliance with U.S. treaty obligations); Carlos M. Vázquez, *Less Than Zero?* 102 AM. J. INT'L L. 563 (2008) (arguing for a narrow reading of the Court's non-self-execution analysis as "the only way to avoid reducing the majority's presidential power analysis to an absurdity").
7. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1986) [hereinafter RESTATEMENT]. One such restriction is the rule of specialty which limits a state's right to prosecute an extradited defendant to those offenses for which he was extradited or to punish him more severely than he could have been for the same offense in the surrendering state. *Id.*; *See also* CHARLES DOYLE, CONG. RESEARCH SERV., EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 31-32 (2007), http://www.fas.org/sgp/crs/misc/98-958.pdf (illustrating that the rule of specialty is a nearly universal feature of U.S. extradition treaties). In fact, the author's survey of 53 current U.S. extradition treaties found a form of the rule of specialty in each of them.
8. *See supra* note 2 and accompanying text.
9. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 72 (3d ed. 1996) ("Treaties of extradition are deemed self-executing and therefore equivalent to an act of the legislature.").
10. Vázquez, *supra* note 3, at 665 ("[I]nterpreting *Medellín* to have adopted a presumption of non-self-execution would be most problematic with respect to the thousands of past treaties (both bilateral and multilateral) concluded on the opposite assumption.").

extradite fugitives. On the other hand, if post-*Medellín* courts continue to view extradition treaties as self-executing, then *Medellín* could significantly enhance the ability of individuals to enforce treaty provisions in U.S. courts.[11]

Part II of this article will briefly recount the origins of the self-executing treaty doctrine. Part III will examine how the doctrine applies to extradition treaties. Part IV will analyze the *Medellín* opinion, focusing on those aspects of it that may impact extradition treaties. And, finally, Part V will suggest some of the negative consequences *Medellín* could have in future extradition cases.

II. Self-Executing Treaties

The Supremacy Clause[12] was inserted into the Constitution *inter alia* to force the states to comply with U.S. treaty obligations.[13] It makes treaties, along with the Constitution and federal statutes, "the supreme Law of the Land," which "binds all state judges."[14] Based upon statements made by the founders, there seems to be little doubt that they believed that the Supremacy Clause required that all treaties be given direct effect in federal and state courts.[15]

Early Supreme Court cases also showed no hesitation in reaching the conclusion that the Supremacy Clause permitted individuals to judicially enforce treaties.[16] Indeed, Chief Justice Marshall, whose opinion in *Foster & Elam v.*

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11. *See infra* pp. 15-17.
12. U.S. CONST. art. VI, § 2.
13. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

    THE FEDERALIST NO. 80 at 500-01 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).
14. U.S. CONST. art. VI, § 2.
15. Paust, *supra* note 2, at 780 (stating that "as the text of the Constitution and almost all of the Founders seem to affirm, legislation is not constitutionally required in a seemingly relevant circumstance and, as the predominant view of the Framers demonstrates, all treaties are supreme federal law and, potentially, are directly operative").
16. *E.g.*, Ware v. Hylton, 3 U.S. 199 (1796) (holding that individual British creditors could invoke a provision of the U.S.-Great Britain treaty which ended the Revolutionary War to invalidate a Virginia law that extinguished pre-war debts owed to them).

Neilson[17] is widely cited as the first articulation of the self-executing treaty doctrine,[18] had little difficulty in an earlier case concluding that the Supremacy Clause compelled it to overturn a judgment in libel in favor of the United States and order a ship returned to its French owners based on the provisions of a treaty entered into between France and the United States.[19] In so doing, Chief Justice Marshall interpreted the Supremacy Clause to mean that "where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress . . . ."[20]

Nonetheless, modern scholars and courts have concluded that not all treaty provisions can be judicially enforced.[21] For example, courts will abstain from enforcing a treaty provision when it: 1) is "hortatory;"[22] 2) "purports to accomplish something for which the Constitution requires a statute;"[23] or 3) presents a political question and therefore is "nonjusticiable."[24]

Foster adds an additional category of non-self-execution when the need for legislative implementation "has its source in the treaty itself."[25] In deciding whether a treaty between the United States and Spain confirmed title to land in the grantees of the Spanish King, *Foster* delineated the distinction between a treaty provision that is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision,"[26] and one where "the terms of the stipulation import a contract, when

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17. Foster & Elam v. Neilson, 27 U.S. 253 (1829).
18. Paust, *supra* note 2, at 766 (stating that "Chief Justice Marshall invented the concept in 1829"). According to Professor Paust, the term "self-executing" was used for the first time in 1887 in Bartram v. Robertson, 122 U.S. 116, 120 (1887). *Id.*
19. U.S. v. Schooner Peggy, 5 U.S. 103 (1801).
20. *Id.* at 110.
21. Some obligations, it is accepted, cannot be executed by the treaty itself. A treaty cannot appropriate funds . . . and a treaty is apparently not law for this purpose . . . A treaty cannot by itself enact criminal law: enforcement of treaty obligations by penal sanction can be effected only by Congress. It has often been said, too that the United States cannot declare war by treaty . . . .

    LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159 (1972)
22. Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1123 (1992).
23. Vázquez, *supra* note 3, at 630; Vázquez, *supra* note 22, at 1123.
24. Vázquez, *supra* note 3, at 631; Vázquez, *supra* note 22, at 1123.
25. Vázquez, *supra* note 3, at 631.
26. *Foster & Elam*, 27 U.S. at 314.

either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[27]

In the Court's next self-execution case, *United States v. Percheman*,[28] Chief Justice Marshall concluded that Spanish text of the same treaty provision, which just four years earlier in *Foster* had been non-self-executing, was now self-executing.[29] Indeed, Chief Justice Marshall himself admitted that what had seemed clear in *Foster* was perhaps not so clear, when he wrote:

> Although the words 'shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed,' by force of the instrument itself.[30]

Since the decisions in *Foster* and *Percheman*, courts and commentators alike have struggled to differentiate between self-executing and non-self-executing treaties based on the "language of the treaty" test enunciated in *Foster*.[31]

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27. *Id. See also* Paust, *supra* note 2, at 768 (calling this the "language of the treaty" test.); *see also,* Bradley, *supra* note 3, at 541 (observing that this is a "text-centered approach").
28. U.S. v. Percheman, 32 U.S. 51 (1833).
29. *Foster & Elam*, 27 U.S. at 311. The English version of the treaty, which was at issue in *Foster*, provided that "all the grants of land . . . in the said territories ceded by his Catholic majesty *shall be* ratified and confirmed." *Id.*; *see also Percheman*, 32 U.S. at 89. The Spanish translation of the same language was "*shall remain* ratified and confirmed to the persons in possession of them, etc." *Id.*
30. *Percheman*, 32 U.S. at 89.

> When we observe, that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable. In the case of Foster v. Neilson, 2 Pet. 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction, which we now give to the article.

Id.

31. > Despite [Foster's] pedigree, both the theory behind the self-execution doctrine and its mechanics have long befuddled courts and commentators. There is significant uncertainty, for example, concerning the materials that are relevant to the self-execution analysis, whose intent should count in determining self-executing status, the proper presumption that should be applied with respect to self-execution, and the domestic legal status of a non-self-executing treaty.

Bradley, *supra* note 3, at 540.

III. Self-Executing Extradition Treaties

A. Rauscher

The first Supreme Court case to address the issue of the self-executing status of an extradition treaty was *United States v. Rauscher*,[32] in which the Court considered whether the rule of specialty applied in the case of a seaman who had been extradited to the United States from Great Britain.[33] After holding that there was a rule of specialty implicit in the extradition treaty between the United States and Great Britain,[34] Justice Miller, writing for the majority, turned to the self-execution issue. Miller, however, addressed the question from a different perspective than Marshall had in *Foster*. Miller was concerned with "the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations . . . ."[35] According to Miller, all international treaties are contractual because they "depend[] for the enforcement of [their] provisions on the interest and the honor of the governments which are parties to [them]" and in cases of alleged infractions they can "become[] the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war."[36] With treaties of this type, "[i]t is obvious that . . . the judicial courts have nothing to do and can give no redress."[37]

Some international treaties, however, are also the "law of the land." These treaties "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as

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32. U.S. v. Rauscher, 119 U.S. 407 (1886).
33. *Id.* at 409.
34. *Id.* at 419; Convention on Boundaries, the Slave Trade and Extradition art. X, U.S.-Gr. Brit., Aug. 9, 1842, 8 Stat. 572. This issue is discussed in another article by this author. *See* Mark A. Summers, *Rereading Rauscher: Is It Time for the United States to Abandon the Rule of Specialty?*, 48 DUQ. L. REV. 1, 8-14 (2010).
35. *Rauscher*, 119 U.S. at 418. Significantly, in this portion of the opinion, Justice Miller relies almost exclusively on his own opinion two years earlier in The Head Money Cases, 112 U.S. 580, 598 (1884), and the language that he quotes at length in *Rauscher* regarding self-execution comes from that case and not from *Foster*. *Id.*
36. *Id.*
37. *Id.* at 418-19.

between private parties in the courts of the country."[38] Thus, treaties that "prescribe a rule by which the rights of the private citizen or subject may be determined" are the law of the land and applicable in the courts of the United States via the Supremacy Clause.[39]

As Justice Miller's analysis of the self-execution issue in *Rauscher* underscores, in extradition cases there are two potential ways in which treaty violations may be addressed. On the one hand, the failure to abide by an extradition treaty is a demonstration of "bad faith to the country which permitted the extradition"[40] which is normally vindicated by the "action of the respective national governments."[41] Yet, in extradition cases this cannot be the "only mode of enforcing the obligations of the treaty" because a violation of the treaty is also a "fraud upon the rights of the party extradited."[42] Thus, in extradition cases the Supremacy Clause provides a remedy in the federal courts "if the state court should fail to give due effect to the rights of the party under the treaty."[43]

B. The "Rights-Based" v. "Language of the Treaty" Approaches to Self-Execution

For Justice Miller, a treaty is self-executing if it confers "rights . . . which partake of the nature of municipal law."[44] This "rights-based" approach[45] differs from Chief Justice Marshall's self-execution analysis in *Foster* where the language of the treaty[46] is scrutinized to determine whether the treaty contains a contractual

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38. *Id.* at 418.
39. *Id.* at 419.
40. *Id.* at 422.
41. *Rauscher*, 119 U.S. at 407, 431.
42. *Id.*
43. *Id.* at 431-32.
44. Indeed, this language is similar to that used by Chief Justice Marshall in a case predating *Foster* when he wrote: "Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected." Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809).
45. Professor Paust calls this the "rights under a treaty" test. Paust, *supra* note 2, at 771; *see also* Leslie Henry, *When Is A Treaty Self-Executing*, 27 MICH. L. REV. 776,778 (1928-29) (stating that "an agreement in a treaty that the rights of citizens shall be so and so does not come under Marshall's class for that involves no action by the political side of the government").
46. *See supra* note 27 and accompanying text.

promise which must be executed by the legislature before it can be applied by a court. How the treaty-based rule is used may explain the different approaches to self-execution analysis.

When, as in *Rauscher*, the treaty-based rule is invoked defensively—to preclude the government from prosecuting—the less stringent "rights-based" approach applies and the treaty provision need only impose an "obligation on the state" and confer a "primary right" in the individual to enforce that obligation.[47] By contrast, if the treaty provision is used offensively—as the basis for an action—then either the treaty itself, a statute or the common law must create a right of action in order for an individual to base a claim upon it.[48] Consequently, in extradition cases, which generally follow the "rights-based" approach, treaties "have been given effect without any implementing legislation, their self-executing character assumed without discussion."[49]

IV. Medellín

A. Background

In 2004, the Supreme Court granted *certiorari*[50] to determine whether Medellín could enforce the judgment of the International Court of Justice (ICJ) in *The Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.).*[51] In *Avena,* the ICJ had ordered the United States to "provide, by means of its own

47. Vázquez, *supra* note 22, at 1116. In *Owings*, the defendant invoked the treaty in defense against an action of ejectment. *Owings*, 9 U.S. (5 Cranch) at 345-49. In *The Head Money Cases*, the treaty was also used defensively, in an attempt to invalidate a statute which called for the collection of a duty on foreign passengers landing in the United States. *The Head Money Cases*, 112 U.S. at 596-600 (1884).
48. Vázquez, *supra* note 22, at 1134.
49. RESTATEMENT, *supra* note 7, at § 111, rptr.'s note 5 and cases cited therein:

> Provisions in treaties of friendship, commerce, and navigation, or other agreements conferring rights on foreign nationals . . . have been given effect without any implementing legislation, their self-executing character assumed without discussion.This has been true from early United States history (citations omitted) . . . .

Rauscher is among the cases cited by the RESTATEMENT as falling into this category.
50. Medellín v. Dretke (*Medellin I*), 544 U.S. 660, 661 (2005) (per curiam).
51. The Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

choosing, review and reconsideration of the convictions and sentences"[52] of Medellín and fifty-one other Mexican nationals whose rights under the Vienna Convention on Consular Relations (VCCR) had been violated.[53] It was not disputed that Texas had not informed Medellín of the rights guaranteed by the VCCR. Texas, however, refused to review Medellín's conviction[54] because he had defaulted under its procedural rules.[55]

Before oral argument in *Medellín I*, President George W. Bush issued a Memorandum to the U.S. Attorney General which provided that:

> [T]he United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[56]

Thereafter, the Supreme Court dismissed the writ in *Medellín I* as improvidently granted because "[t]his state-court proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding" and because "[t]he merits briefing in this case also has revealed a number of hurdles Medellín must surmount before qualifying for federal habeas relief . . . ."[57] When the Texas Court of Criminal Appeals dismissed Medellín's subsequent *habeas corpus* petition because "neither the *Avena* decision nor the President's Memorandum was "'binding federal law'" that invalidated Texas'

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52. *Id.* at 72.
53. Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 261. Art 36(1)(b) provides in pertinent part that:

> [T]he 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 the State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph . . . .

Id.
54. *Medellín*, 552 U.S. at 501 (2008). Medellin was convicted and sentenced to death for the brutal gang rape and strangulation of a 14-year-old girl. Shortly after his arrest and after he had signed a written waiver of his *Miranda* rights, Medellín "gave a detailed written confession." *Id.*
55. *Id.* at 502.
56. *Id.*
57. *Medellín I*, 544 U.S. at 662.

procedural rules, Medellín petitioned for[58] and the Court granted *certiorari* a second time.[59]

This article will focus specifically on three aspects of the *Medellín* opinion that may directly impact future cases involving U.S. extradition treaties: 1) a treaty is self-executing only if it "contains language plainly providing for domestic enforceability;"[60] 2) "while the President has an array of political and diplomatic means available to enforce international obligations . . . [t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress;"[61] and 3) treaties are either self-executing, *i.e.*, they "have automatic domestic effect as federal law upon ratification,"[62] or non-self-executing, *i.e.*, they are "not domestic law."[63]

B. Three Aspects of Medellin That May Affect U.S. Extradition Treaties

1. Self-Executing Treaties Must Contain Language Plainly Providing for Domestic Enforceability

The *Medellín* Court held that a self-executing treaty must contain "language plainly providing for domestic enforceability."[64] And while it described its textual

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58. *Medellín,* 552 U.S. at 504 (quoting *Ex parte* Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006)).
59. *Id.*
60. *Id.* at 526; *see also id.* at 519 (its text must affirmatively "indicate that the President and Senate intended for the agreement to have domestic effect"); *id.* at 505 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.")); *id* at 521 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.").
61. *Id.* at 525-526 (citations omitted); *see also id.* at 516 (emphasis in the original) ("The point of a non-self-executing treaty is that it 'addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court."); *Id.* at 526 ("[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law-through passage of legislation by both Houses of Congress, combined with . . . the President's signature . . .").
62. *Id.* at 505 n.2.
63. *Id.* at 532.
64. *Supra* note 60.

approach to treaty interpretation as "hardly novel,"[65] it is clear that this sort of textual clarity was not a feature of any of its prior self-execution cases.[66] Neither of the cases the Court cited in support of this "time-honored approach"—*Foster* nor *Percheman*—contained such a requirement. In them, if the language of the treaty is in the form of an executory contract, that, in turn, evidences a need for legislative execution. In the cases where the courts used a "rights-based" approach to self-execution, there is little, if any, textual analysis.[67]

Nonetheless the *Medellín* Court says that it did not intend it to affect the outcomes in at least some self-execution cases.[68] Indeed, the Court took pains to refute dissenting Justice Breyer's charge that its holding could "threaten the application of provisions in many existing commercial and other treaties"[69] by observing that "we have held that a number of the ("Friendship, Commerce and Navigation") Treaties cited by the dissent . . . are self-executing . . . based on the 'language of the[se] Treat[ies].'"[70] Yet the specific cases cited by the Court do not discuss self-execution, much less the need for "language plainly providing for domestic enforceability."[71] Indeed, those treaties, and the cases interpreting them,

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65. *Medellín*, 552 U.S. at 514.
66. John Quigley, *President Bush's Directive on Foreigners Under Arrest: A Critique of Medellin v. Texas*, 22 EMORY INT'L L. REV. 423, 450 (2008) (stating that "[f]or over two centuries the Supreme Court has been finding treaty provisions to be self-executing where no mention of domestic enforcement appears in the treaty").
67. *See supra* note 49 and accompanying text.
68. *Medellín*, 552 U.S. at 521 (asserting that "neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court's opinion").
69. *Id.* at 547-551.
70. *Id.* at 519-522 (citation omitted) (alteration in original) (quoting Sumimoto Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 189-90 (1982)). The *Sumimoto* Court did not discuss whether a treaty provision, which gave Japanese and American companies the reciprocal right to employ "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice" when operating in the other country, was self-executing. *Id.* at 181. Indeed, consistent with the "rights-based" approach, the Court stated that "[c]learly [the treaty] only applies to companies of one of the Treaty countries operating in the other country." *Id.* at 182. The opinion also contained language that would have undercut *Medellín's* holding: "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Id.* at 184-85 (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).
71. *Kolovrat*, 366 U.S. at 187 (declaring that "[t]his Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect"); Clark v. Allen, 331 U.S. 503 (1947) (dealing primarily with whether the treaty had been abrogated

have been cited as examples of the "rights based," rather than the "text-based," approach to self-execution employed by the *Medellín* Court.[72]

So, does *Medellín* leave the "rights-based" approach to self-execution untouched, which would mean that extradition treaties would continue to be self-executing?[73] Or, does it impose a requirement for textual clarity regarding domestic enforceability in these cases as well, a requirement that few, if any, extradition treaties could satisfy?[74]

2. Only Congress Can Execute a Non-Self-Executing Treaty

According to the *Medellín* Court, "while the President has an array of political and diplomatic means available to enforce international obligations . . . [t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[75] This statement potentially signals a substantial incursion of the President's power to carry out the international obligations of the United States.[76]

It is also in this portion of the opinion where the Court's analysis is most flawed[77] because it assumes that only Congress can execute a non-self-executing treaty obligation.[78] In fact, there is substantial authority that the action taken by the

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by World War I).

72. *See, e.g.*, *supra* note 49.

73. At least one commentator has concluded otherwise. Bradley, *supra* note 3, at 547 ("The Court seems to be clearly rejecting the argument that . . . a non-self-executing treaty merely fails to provide a right of private action and thus can be enforced by courts when such a cause of action is not necessary, such as when a treaty is invoked defensively in a criminal case . . . .").

74. *See infra* note 116 and accompanying text.

75. *Medellín*, 552 U.S. at 525-526 (citations omitted); *see also id.* at 516 (emphasis in the original) ("The point of a non-self-executing treaty is that it 'addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court."); *id.* at 526 ("The terms of a non-self-executing treaty can become domestic law only in the same way as any other law-through passage of legislation by both Houses of Congress, combined with . . . the President's signature . . . .").

76. Bederman, *supra* note 6, at 538 (observing that *Medellín* is a "rare defeat" for presidential powers in foreign relations).

77. Charnovitz, *supra* note 6, at 552 (concluding that "because the Court posed too broad a question, its reasoning went astray").

78. There was clearly no "original" understanding that treaties could be executed only by Congress. In the very first U.S. extradition case, President John Adams advised a federal judge to extradite the defendant pursuant to the U.S.-Great Britain extradition treaty that had not been implemented by Congress. *See* John T. Parry, *The Lost History of*

President in *Medellín* is entirely consistent with his constitutional responsibilities in the area of foreign affairs.[79] Accordingly, the ICJ decision in *Avena* should have been seen as an authoritative interpretation of a treaty by an international court that concededly had jurisdiction to decide the question before it.[80] As such, and as the *Medellín* majority acknowledged, the *Avena* judgment "constitute[d] an *international* law obligation on the part of the United States."[81] Article 94 of the U.N. Charter[82] makes that decision binding on the United States, whether or not article 94 is self-executing.[83] Consequently, by virtue of the Supremacy Clause the

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International Extradition Litigation, 43 VA. J. INT'L L. 93, 108-14 (2002). As a result, Congress debated whether to censure Adams. *Id.* at 111. Then Congressman, soon-to-be Chief Justice, John Marshall, author of the self-executing treaty doctrine, mounted an impassioned defense of the president which staved off censure. Statement of Rep. John Marshall, 1 ANNALS OF CONG. 596-618 (Joseph Gales ed., 1799). During his speech, in language that could apply equally well to the facts in *Medellín*, Marshall stated:

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object although the particular mode of using the means has not be prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.

Id. at 613-14.

79. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38-48, *Medellín I*, 544 U.S. 660 (No. 04-5928):

> Because compliance with the ICJ's decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President determined to exercise his constitutional foreign affairs authority and his authority under Article 94 of the U.N. Charter to establish that binding federal rule without the need for implementing legislation.

Id. at 42; *see also* Quigley, *supra* note 66, at 429-30 ("The United States' position [that the President had the inherent power to execute the treaty obligation] was consistent with Supreme Court case law on federal efforts to compel a state to comply with a treaty obligation.").

80. Vázquez, *supra* note 6, at 565 (noting that the case for judicial enforcement of the *Avena* judgment via the President's Memorandum was strong "[b]ecause *Avena* was concededly a binding final judgment").

81. *Medellín*, 552 U.S. at 504 (emphasis in original).

82. U.N Charter, art. 94, para. 1.

83. Vázquez, *supra* note 6 at 568 (arguing that "a presidential power to require compliance with final ICJ judgments is . . . based on the understanding that Article 94, even if non-self-executing, is the law of the land").

judgment is binding on Texas[84] as the "law of the land."[85] President Bush's Memorandum was thus no more than an instruction to Texas to do what it was already legally obligated to do.

The *Medellín* Court, however, viewed the issue as whether the President's memorandum was an act that "'stem [med] from an act of Congress or from the Constitution itself.'"[86] The Court brushed aside the argument that the "President's constitutional role 'uniquely qualifies' him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision."[87] While acknowledging that the foreign policy interests that the President sought to protect were "plainly compelling,"[88] the Court concluded that because article 94 of the U.N. Charter is non-self-executing,[89] then "[w]hen the President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate."[90] Accordingly, under "Justice Jackson's familiar tripartite scheme"[91] from *Youngstown Sheet & Tube*, presidential power was at its "lowest ebb" because the memorandum was "incompatible with the expressed or implied will of Congress."[92] Thus,

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84. Charnovitz, *supra* note 6 at 559 (quoting Justice Stevens' concurring opinion in *Medellín*, 552 U.S. at 536, "Indeed, Justice John Paul Stevens suggested in his concurring opinion that the 'ICJ's decision falls on each of the States as well as the Federal Government.'").

85. The Supreme Court could have found that under the Constitution's Supremacy Clause, which states that treaties are the supreme law of the land, the Article 94(1) obligation in Avena is self-executing against Texas because the president had agreed to give effect to the ICJ judgment, which was itself an international law obligation of the United States.

Id.

86. *Medellín*, 552 U.S. at 524 (quoting Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 585 (1952) and Dames & Moore v. Regan, 453 U.S. 654, 668 (1981)).

87. *Medellín*, 552 U.S. at 523-524.

88. *Id.*

89. U.N CHARTER, art. 94, para. 1 (emphasis added) ("Each member of the United Nations *undertakes to comply* with the decision of the International Court of Justice in any case to which it is a party."). It was the "undertakes to comply" language in art. 94 that, according to the *Medellín* Court, is "'a *commitment* on the part of the U.N. Members to take *future* action through their political branches to comply with an ICJ decision'" and thus is non-self-executing. *Medellín*, 552 U.S. at 508 (emphasis in original) (quoting Brief for the United States as Amicus Curiae at 34, *Medellín I*, 544 U.S. 660 (No. 04-5928)).

90. *Medellín*, 552 U.S. at 527. The Senate, of course, does not "ratify" a treaty. It only gives its "advice and consent" to the President who "make[s]" the treaty. U.S. CONST. art. 2 cl. 2. Thus, this statement by the Court "incorrectly magnifies the role of the Senate, thus reducing that of the President." Quigley, *supra* note 66, at 429 n.62.

91. *Medellín*, 552 U.S. at 524.

92. *Id.* at 525.

> [t]he non-self executing character of a treaty constrains the President's ability to comply with the treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means so long as they are consistent with the Constitution.[93]

If taken literally, this means that courts can ignore a non-self-executing treaty obligation of the United States, so long as Congress has not ordered compliance.

3. Treaties Are Either Self-Executing or Non-Self-Executing

The *Medellín* Court takes a bipolar approach to the question of a treaty's status as individually enforceable domestic law. For it, either treaties are self-executing and have "automatic domestic effect" as domestic law,[94] or they are non-self-executing and thus are "not domestic law" at all.[95] There is, however, another alternative, which is characteristic of the approach taken by many courts in extradition cases, and that is that the treaty is self-executing and therefore federal law, but the individual seeking to enforce it does not have "standing" to do so.[96]

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93. *Id.* at 530. In *Dames & Moore*, 453 U.S. at 668-69 (1981), the Court observed, quoting *Youngstown Sheet & Tube*, 343 U.S. at 579, 637, that "the validity of the President's action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'" Since the United States ratified the U.N. Charter in 1945 and never before had the executive sought, or the legislature passed, implementing legislation for Article 94, the approach recommended by the Restatement is particularly apt:

> Therefore if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that event, a finding that a treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.

RESTATEMENT, *supra* note 7, § 111 rptr.'s note 5.

94. *Medellín,* 552 U.S. at 505 n.2.

95. *Id.* at 532.

96. The lower courts have split on the question whether individuals have "standing" to seek to enforce the rule of specialty in extradition cases. Some courts hold that individuals have standing. United States v. Levy, 905 F.2d 326, 328, n. 1 (10th Cir. 1990); United States v. Feng, 2009 WL1254670 (D. Kan. 2009). Others hold that individuals have standing to the extent that the sending state might have protested the violation of the treaty. United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 2005); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.1986). Finally, there are courts that hold that individuals have standing only when the sending state actually protested the violation. United States v. Kaufman, 874 F.2d 242, 243 (5th Cir. 1989); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1988),

Although the Court's opinion is in this regard is hardly a model of clarity, *Medellín* may cause the lower courts to reconsider this position as well.

Because Mexico exercised the right of diplomatic protection on behalf of one of its nationals when it brought an action against the United States in the ICJ, under international law only Mexico could seek to enforce that judgment.[97] And, the *Medellín* Court did cite some leading ICJ diplomatic protection cases, but not for the proposition that Medellín did not have standing to enforce an ICJ judgment.[98] In another portion of the opinion the Court also seemed to acknowledge the distinction between self-execution and standing when it observed that "[e]ven when treaties are self-executing . . . the background presumption is that '[they] . . . generally do not create private rights or provide for a cause of action in domestic courts.'"[99]

In light of this recognition what does one make of the Court's frequent repetition of the statement that self-executing treaties have "automatic domestic effect as federal law"?[100] Can it mean anything other than individuals must have standing to enforce that law? It is especially tempting to read *Medellín* that way in light of the dictum in the Court's opinion in *United States v. Alvarez-Machain,*[101] an extradition case. The defendant in *Alvarez-Machain* argued that his kidnapping in Mexico, after which he was transported to the United States for prosecution, violated the U.S.-Mexico extradition treaty.[102] The Ninth Circuit, in line with its prior cases, held that Alvarez-Machain had standing because Mexico had protested

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vacated on other grounds, 10 F.3d 338 (6th Cir. 1993); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981).

97. The Barcelona Traction Case (Belgium v. Spain), 1970 ICJ 3, 44 (Feb. 5)("[A] State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.").

98. *Medellín*, 552 U.S. at 510-516.

99. *Id.* at 505 n. 3 (quoting RESTATEMENT, *supra* note 7, § 907 cmt. a).

100. Charnovitz, *supra* note 6, at 552-553(noting that the *Medellín* Court used the terms "automatic" and "automatically" thirteen times when referring to the enforceability of self-executing treaties in domestic courts, whereas a computer word search revealed no usage of those words in any prior Supreme Court self-execution case).

101. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

102. *Id.* at 658.

his abduction.[103] Although standing was not an issue before the Supreme Court, Chief Justice Rhenquist opined nevertheless that:

> The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation . . . [N]o importance was attached to whether or not Great Britain had protested the prosecution of Rauscher....[104]

Alvarez-Machain thus strengthens the argument that *Medellín* should be read as eliding the distinction between self-execution and standing and that any additional standing requirements heretofore imposed by the lower courts are superfluous.[105]

V. Conclusions

Medellin refocuses self-executing treaty analysis on whether the treaty "contains language plainly providing for domestic enforcement"[106] and this may cause the lower courts to re-examine their general acceptance of extradition treaties as self-executing.[107] It is, however, difficult to predict which direction the post-*Medellín* courts will take.[108] Perhaps some courts, which have followed the "rights

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103. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 (9th Cir. 1991).
104. *Alvarez-Machain,* 504 U.S. at 667.
105. This would be consistent with the Court's approach to standing in cases involving individual enforcement of other rights. *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (Rhenquist, J.):

> Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.

106. *Medellin*, 552 U.S. at 526; *see also* Quigley, *supra* note 66, at 450-51.
107. RESTATEMENT, *supra* note 7, § 111, rptr.'s note 5 ("Therefore if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.").
108. As one commentator has concluded, "[*Medellín*] does relatively little to articulate clear canons of construction and may actually further muddle the distinctions between

based" approach to self-execution in extradition cases,[109] will stand pat based on the Court's assurance that "neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words . . . ."[110] Yet that statement is hard to square with the Court's repeated assertions that treaties must contain language regarding domestic enforceability.[111]

On the other hand, if courts read *Medellín* as requiring language in the treaty regarding domestic enforceability, the results would be at odds with the plain language of the Supremacy Clause which makes all treaties the "law of the land."[112] Consequently, commentators, both pro- and anti-*Medellín*, have argued that it cannot really mean what it says[113] because otherwise it "would be inconsistent with the Supreme Court's prior cases stretching back to *Ware v. Hylton* and including some cases the *Medellín* Court endorsed."[114]

And, as if to highlight *Medellín's* potential to befuddle the lower courts, Professor Vázquez has identified at least five different ways *Medellín* could be read, each of which "is consistent with some aspects of the majority's analysis but inconsistent with other aspects."[115] But one thing is for sure, if *Medellín's* novel

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international agreements as contracts between nations and as essentially legislative texts." Bederman, *supra* note 6, at 530.

109. *Supra* note 49.

110. *Medellín*, 552 U.S. at 521.

111. *See supra* note 60 and accompanying text.

112. Bradley, *supra* note 3, at 541 ("The narrower interpretation of the decision, that non-self-executing treaties are simply not judicially enforceable, appears to be preferable because it is easier to reconcile with the text of the Supremacy Clause of the U.S. Constitution, which provides that 'all' treaties made under the authority of the United States shall be the supreme law of the land.").

113. *Compare* Vázquez, *supra* note 3, at 661("So understood, *Medellín* is not an example of *Foster*-type non-self-execution at all, but instead an example of non-self-execution as nonjusticiability.") *with* Bradley, *supra* note 3, at 541 ("[T]he decision is best read as requiring self-execution to be resolved on a treaty-by-treaty basis, without resort to any general presumption.").

114. Vázquez, *supra* note 3, at 653.

115. *Id.* They are: 1) "a treaty is non-self-executing unless its text clearly specifies that it has the force of domestic law," *id.* at 652-54; 2) unless a treaty "required direct judicial enforcement[,] . . . it was non-self-executing and hence not enforceable in the courts without prior implementation," *id.* at 654-56; 3) "[p]ortions of the *Medellín* opinion suggest that the majority decided the issue based on its general impression that the parties contemplated legislative implementation," *id.* at 656-57; 4) "a treaty is to be regarded as non-self-executing only if there is affirmative evidence of an understanding that it was not intended to be directly enforceable," *id.* at 657-60; and 5) "*Medellín* is not an example of *Foster*-type non-self-execution at all, but instead an example of non-self-execution as

take on treaty interpretation causes lower courts to revisit their prior self-executing treaty decisions, then few, if any, existing extradition treaties will be found self-executing since almost no treaties of any kind refer to the means of domestic enforcement.[116]

If that is the case, then *Medellín's* other holding—that a non-self-executing treaty may be executed only by an act of Congress—could render certain provisions in extradition treaties, including the rule of specialty, entirely unenforceable, just as Justice Breyer predicted in his dissenting opinion in *Medellín*: "At worst [*Medellín*] erects legalistic hurdles that can threaten the application of provisions in many existing . . . treaties and make it more difficult to negotiate new ones."[117]

The *Medellín* Court says that the President remains free to "comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution."[118] When it comes to forcing a state to comply with an international treaty obligation of the United States, it is hard to imagine what those other constitutional means might be. The dissent assumed that the President retained the power to bring a lawsuit against a state in order to carry out a treaty obligation.[119] But if the self-executing treaty doctrine applies to the executive, as well as to private individuals,[120] then on what basis could the executive sue if the treaty is non-self-executing? Of course the President can always intervene as *amicus curiae* or advise the state of the United States' international obligations,[121] but if the state ignores his counsel, as it did in *Medellín*, the United States remains in default of its

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nonjusticiability," *id.* at 660-65.

116. Professor Vázquez' exhaustive research revealed only one U.S. treaty that contained language specifically addressing the issue of domestic enforcement. Vázquez, *supra* note 3, at 654 n. 249; *see also,* Quigley, *supra* note 66, at 450 ("Treaties rarely address domestic implementation.").

117. *Medellín*, 552 U.S. at 549.

118. *Id.* at 530.

119. *Id.* at 565 (quoting Sanitary District of Chicago v. United States, 266 U.S. 405, 425 (1925)).

120. *See* Quigley, *supra* note 66, at 429-30 ("Never before had the federal courts viewed self-execution as relevant in this context. Rather, they had required treaty provisions to be self-executing only when invoked by a private party.").

121. *See* HENKIN, *supra* note 21, at 165:

> When a treaty is relevant to a case before a court, the Executive can intervene, if only as *amicus curiae*, to call the obligations of the United States to the court's attention. The Executive Branch has also communicated with state governors and legislatures to prevent actions that might violate international obligations of the United States.

international obligation.[122] And, although Congress is also constitutionally bound by U.S. treaty obligations, it seems unlikely that it will pass legislation each time a treaty obligation must be enforced.[123]

This state of legal purgatory could be especially damaging in extradition cases and particularly in those involving the death penalty. A state's willingness to extradite a defendant to the United States depends in part on an understanding that U.S. courts will enforce its extradition treaties.[124] In other cases, the surrendering state may demand a specific assurance from the executive that, for example, the death penalty will not be carried out.[125] These representations must also be honored by the courts.[126] If, in the wake of *Medellín,* extradition treaties are found to be non-self-executing,[127] then neither the defendant nor the executive will be able to assert a treaty-based right in court. Yet, just such action is necessary to force states to comply with unpopular restrictions placed on prosecutions in extradition cases:

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122. *See* RESTATEMENT, *supra* note 7 § 111, rptr's note 5 (stating that "a finding that a treaty is not self-executing is a finding that the U.S. has been and continues to be in default, and should be avoided").

123. Indeed, the Supreme Court denied Medellín's application for a stay of execution because:

> It is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence, and 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 holding in *Medellín*....

Medellín v. Texas, 129 S. Ct. 360, 361 (2008).

124. The U.S. reputation for following the rule of specialty is already suspect, especially in death penalty cases. Speedy Rice & Renée Luke, *U.S. Courts, The Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 SANTA CLARA L. REV. 1061, 1096-97 (2002).

125. *Id.*

126. *See* Soering v. United Kingdom (A/161), 11 E.H.R.R. 439, 445-46 (1989). In connection with an extradition request, a Virginia prosecutor submitted an affidavit promising that "a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out" and by diplomatic note the U.S. government "undertook to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honored." *Id.*

127. In at least one post-*Medellín* case, the court indicated that the self-executing status of an extradition treaty is no longer a given, when, after citing *Medellín*, it stated: "Unless extradition conditions or restrictions are grounded in self-executing portions of a treaty, they do not have the 'force and effect of a legislative enactment' that the defendant has standing to assert in the courts of this country." United States v. Valencia-Trujillo, 573 F.3d 1171, 1181 n. 3 (11th Cir. 2009).

> The doctrine of specialty provides a powerful tool for foreign governments to prevent an individual found in their jurisdiction from being sentenced to death after extradition to the United States. This tool will be effective only if foreign governments are unequivocal and unyielding in requiring written assurance of no death penalty in every extradition and are prepared to appear in U.S. domestic courts to defend their international rights.[128]

Medellín makes wielding this "powerful tool" even more problematic.

128. Rice & Luke, *supra* note 124, at 1097.

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