No. 04-5928

In The Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICUS CURIAE* SENATOR JOHN CORNYN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Senator John Cornyn represents Texas in the United States Senate.[1] He is a member of the Senate Judiciary Committee, which has responsibility for Article III judicial nominations and all Title 28 legislation. A determination that the judiciary of the United States could be subject to binding mandates issued by the International Court of Justice would have significance to Senator Cornyn, as a member of the United States Senate and the Senate Judiciary Committee, and to his constituents. As a former member of the Texas Supreme Court, Senator Cornyn also has a distinct perspective of the disruption flowing from an international tribunal's oversight of state criminal justice systems.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Medellin is a Mexican national convicted of capital murder and sentenced to death by the State of Texas. His direct appeal and state habeas corpus petition were unsuccessful. He sought a writ of habeas corpus in federal district court, arguing that his conviction and sentence violated Article 36 of the Vienna Convention on Consular Relations, which requires state prosecutors to notify a detained foreign national of his right to request

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person other than counsel or *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

consular assistance from his own country and, if he so requests, to promptly inform the consul post of that country. While petitioner's federal habeas petition was pending, the Government of Mexico initiated proceedings against the United States in the International Court of Justice ("ICJ"), invoking the Optional Protocol of the Convention, which vests in the ICJ "compulsory jurisdiction" over bilateral disputes arising out of the Convention's "interpretation or application." Mexico sought enforcement of Article 36 specifically on behalf of petitioner and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings dating back to 1979. *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), No. 128, 2004 I.C.J. 1 (Mar. 31, 2004) (P.A. 174a-274a).

Finding that the United States had breached its obligations under Article 36, the ICJ entered a "final judgment" that, in petitioner's words, "expressly adjudicated Mr. Medellin's own rights. . . ." Brief of Petitioner ("Pet. Br.") at 10. The ICJ denied Mexico's request for "annulment" of petitioner's conviction and sentence, but ordered that the United States provide "review and reconsideration" of the conviction and sentence pursuant to a "process . . . which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention," P.A. 262a, *Avena* ¶ 136, without regard for state procedural default rules.

According to petitioner, the ICJ's final judgment in *Avena* is the last word in this case. It announces the "rule of decision in Mr. Medellin's case," Pet. Br. at 19, and "the courts of the State of Texas and other state and federal courts throughout the land" are bound to obey and to

enforce it. Pet. Br. at 13. Petitioner does not mince his words in arguing that the ICJ sits atop even *this Court* in the federal judicial hierarchy for purposes of resolving this and other "disputes concerning the 'interpretation' and 'application' of the Convention" *as supreme federal law*. Pet. Br. at 37. As petitioner puts it:

> The courts are an organ of the United States and hence are bound by its treaty commitments under both international law and the United States Constitution. . . . By operation of the treaty obligations [in the Vienna Convention] undertaken by the political branches, the courts of the United States now must "comply with the [*Avena*] decision," . . . by treating the *Avena* judgment as conclusive of Mr. Medellin's rights under the Convention. . . . It is therefore incumbent upon this Court to bring the state and federal courts of the United States into line with [the ICJ's judgment in *Avena*].

Pet. Br. at 36-37.[2]

[2] *See, e.g.,* Pet. Br. at 23 ("The obligation of the constituent organs and political subdivisions of the United States to comply with the interpretation and application of the Vienna Convention and the *Avena* judgment therefore follows as fully from United States law as from international law."); Pet. Br. at 33 ("Here, the United States submitted to the compulsory jurisdiction of the ICJ in disputes concerning the interpretation and application of the Vienna Convention. It therefore must comply with the ICJ's interpretation and application of the Convention in *Avena*."); Pet. Br. at 35 ("It follows that the binding interpretation and application of the self-executing obligations of the Vienna Convention in the *Avena* Judgment must be given effect in the courts of the United States."); Pet. Br. at 40 ("That right is a federal right, by virtue of the status of the Vienna Convention as preemptive federal law under the Supremacy Clause and the agreement of the United States that decisions of the ICJ are binding cases concerning the interpretation and application of the Convention.").

Even the contemporary observer, accustomed to global security and trade alliances and modern international government structures, gasps at petitioner's radical argument. But consider how the Framers and the members of the state ratifying conventions would have reacted to the claim that the federal government would be empowered under the new Constitution to subject state criminal convictions to binding judicial review, and indeed *annulment*, not only by "one Supreme Court" composed of Article III judges enforcing constitutional norms, but also by a super-supreme international court composed of elected representatives of foreign countries enforcing treaty obligations.

Nothing more need be said to know that petitioner's argument, notwithstanding its impressive *amicus* support, "strain[s] the Constitution and the law to a construction never imagined or dreamed of" by those who framed and ratified it. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Framers carefully confined the immense power of judicial review to Article III judges whose appointment requires the dual action of the President and the Senate and whose independence is safeguarded by life tenure and protected salaries. If petitioner's understanding of the binding nature of the ICJ's "rule of decision" in *Avena* is correct, then the Optional Protocol of the Vienna Convention is, to that extent, unconstitutional.

ARGUMENT

I. VESTING THE ICJ WITH BINDING JUDICIAL POWER WOULD VIOLATE ARTICLE III.

If "state and federal courts throughout the land," including this Court, are bound to enforce the *Avena* order, then the ICJ has exercised "judicial power" in contravention of Article III's command that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. As Justice O'Connor has observed, "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'" Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 42-43 (Fall 1995-Winter 1996) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

A. Foreign Tribunals Cannot Exercise Control Over This Court.

Under the judicial hierarchy established by Article III, this Court sits as the final arbiter of all questions of federal law, including questions that arise under treaties that become federal law through the combined operation of the Treaty and Supremacy Clauses. For more than two centuries, this constitutional architecture has not been questioned. But the ICJ lays claim to be the "one supreme Court" envisioned by Article III, at least with respect to questions relating to the scope of the United States'

obligations under the Vienna Convention. The ICJ's effort to exercise jurisdiction over this Court cannot be squared with the plain language, the history, or the purposes behind Article III.

Article III establishes one – and only one – "supreme Court." The plain meaning of the term "supreme" is not subject to debate – it was clearly intended to establish one court as the "*last* resort of justice" with "*ultimate* appellate jurisdiction." John Jay, Draft of Letter From Justices of the Supreme Court to George Washington, 15 Sept. 1790, 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 293-94 (1857) (emphases in original). And all other courts exercising federal judicial power must be "inferior" to this Court. Thus, it has long since been understood that this Court "is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States." *Gordon v. United States*, 117 U.S. 697, 700 (1865). Justice Jackson's famous aphorism aptly captures this simple truth: "We are not final because we are infallible, but we are infallible only because *we are final*." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (emphasis added).

One corollary of this Court's role as the ultimate arbiter of federal law is that "it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874). This tenet dates back to the Founding. In 1792 in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), five of the six Justices, sitting as members of circuit courts, considered the constitutionality

of a federal statute that authorized pensions for disabled veterans of the Revolution. The statute provided that the lower federal courts were to determine the appropriate disability payments, but conferred upon the Secretary of War the authority to review the decisions. Although Congress repealed the law before this Court could rule upon its constitutionality, the circuit court decisions uniformly held that the statute was unconstitutional because it threatened the independence of the federal courts by subjecting their decisions to review by non-Article III actors. As Justice Iredell explained, the statute "subject[ed] the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution" because "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested. . . ." *Id.* at 413. *See also id.* at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("Revision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the court."). It necessarily follows that if Congress cannot review the decisions of the Supreme Court, it cannot delegate such authority to another body, including a foreign court.

Article III, Section 2 makes clear that this Court's authority extends to federal questions that involve the interpretation and application of international law and "treaties." As St. George Tucker explained in 1803, "No one doubted the necessity and propriety of a federal judiciary, where an ultimate decision might be had upon such

questions as might arise under the *law of nations*, and eventually embroil the American nation with other sovereign powers. . . ." ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, vol. I app. at 350 (1803) ("BLACKSTONE'S COMMENTARIES") (emphasis added). In his COMMENTARIES ON THE CONSTITUTION, Justice Story explained the benefits of this system: "The Constitution has wisely established, that there shall be one Supreme Court, with a view to uniformity of decision in all cases whatsoever, belonging to the judicial department, whether they arise at the common law or in equity, or within the admiralty and prize jurisdiction; whether they respect the doctrines of mere municipal law, or constitutional law, or the *law of nations*." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1591 (1833) (emphasis added).

In short, under the structure established by the Constitution, there is no room for a non-Article III tribunal (or even another Article III tribunal) to review the decisions of this Court, even in cases implicating treaties and the law of nations. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-19 (1995) ("[T]he record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review *only* by superior courts in the Article III hierarchy. . . .") (emphasis added).[3]

[3] The ICJ order at issue in this case relates to Mexican nationals convicted of capital murder. As the ICJ recognized, three of these felons have completely exhausted all judicial remedies, *Avena*, ¶ 20, and thus

(Continued on following page)

B. Allowing The ICJ To Issue Orders To This Court Would Undermine The Judiciary's Independence.

Petitioner's sweeping conception of the ICJ's authority over this Court would also undermine one of the central purposes of Article III. This Court has consistently acknowledged that Article III serves "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985)). The Framers viewed the "absolute independence of the judiciary" as "one of the fundamental principles" of our constitutional system of government. BLACKSTONE'S COMMENTARIES, vol. I app. at 354. In recognition of the importance of this principle, this Court has consistently held that the Constitution "commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that

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these cases have been finally adjudicated. Nevertheless, the ICJ purports to order that these cases be reopened for "review and reconsideration of the conviction and sentence." *Avena*, at p. 61. But in *Plaut*, this Court emphasized that the Constitution "'gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'" 514 U.S. at 218-19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)). Accordingly, the ICJ's claimed authority to reopen cases that have been finally resolved by the courts of this country constitutes an independent violation of Article III.

independence." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality opinion).

These protections take the form of a requirement that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. In FEDERALIST NO. 78, Hamilton emphasized the importance of life tenure as the cornerstone of an independent judiciary:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. . . .
>
> . . .
>
> . . . Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.

THE FEDERALIST NO. 78, at 469-71 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Hamilton further explained that the election of judges, either directly or indirectly through the people's representatives, was fundamentally inconsistent with an independent judiciary because "there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the

Constitution and the laws." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton).

The ICJ suffers from the very evils from which the Framers sought to protect the federal judicial system. The ICJ's members are elected by the United Nations, in separate but simultaneous ballots by both the General Assembly and the Security Council. ICJ Statute, June 26, 1945, arts. 4-10, 59 Stat. 1055. Moreover, the term of an ICJ judge is limited to nine years. ICJ Statute, June 26, 1945, art. 13, 59 Stat. 1055. Under this regime, an ICJ judge seeking election or reelection must curry the favor not only of his or her own country, but of a majority of countries in the General Assembly and the Security Council. This appointment process accompanied by limited tenure is the very antithesis of the independence guaranteed by Article III.

C. The Court's Precedents Foreclose Petitioner's Argument That ICJ Judgments Bind The Courts Of This Country.

Although this Court has upheld congressional delegations of judicial authority to federal administrative agencies and other non-Article III entities in narrowly defined circumstances, none of those cases support the validity of an international tribunal of elected foreign officials exercising binding judicial power over this Court and all other American courts. Indeed, the reasoning of these cases confirms that such authority cannot be delegated by Congress to a non-Article III court.

This Court's decision in *Schor* is particularly instructive. There, the Court held that the "limited jurisdiction that the [Commodities Futures Trading Commission

("CFTC")] asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III." 478 U.S. at 857. As this holding suggests, several limiting principles were critical to the Court's decision sustaining the delegation to the CFTC of adjudicatory authority over state law counterclaims. First, the parties had willingly submitted to the CFTC's jurisdiction. Second, the ruling of the CFTC was "initial" in that it was subject to the "supervision" and "control" of Article III reviewing courts. *Id.* at 855. Third, the ruling related to "'a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" *Id.* at 856 (citation omitted). Fourth, the delegation of authority to hear state law counterclaims yielded significant efficiencies that were necessary to realize "the purposes of the reparations procedure," which was intended to provide a streamlined administrative dispute resolution mechanism between commodities futures brokers and their clients. *Id.*[4]

[4] These same concerns underlay the Court's decision in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985): (1) the Court emphasized that no "unwilling defendant" would be subject to the arbitration process at issue because it applied only to registrants that "explicitly consent" to the process, *id.* at 591, 592; (2) the decisions were subject to judicial review, albeit limited to the partiality of the arbitrators and the requirements of due process, *id.* at 592-93; (3) the subject matter at issue was highly technical and was part of a "complex regulatory scheme" implicating questions "'peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" *Id.* at 589 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)); and (4) the arbitration process was necessary to ensure the "prompt" and "inexpensive" resolution of the issues at stake. *Id.* at 590.

Obviously, none of these considerations counsel in favor of the delegation to the ICJ of binding, final judicial authority over federal law issues arising under the Vienna Convention. First, the State of Texas did not willingly submit to the jurisdiction of the ICJ. Second, the ruling of the ICJ is not "initial," but rather purports to be "final and without appeal." ICJ Statute, June 26, 1945, art. 60, 59 Stat. 1055. Third, the interpretation of federal treaty obligations falls well within the expertise of the federal judiciary, and no resort to the expertise of a foreign tribunal is necessary. Fourth, there are no efficiency gains to be realized by adding another layer of judicial review to the habeas corpus process.

In short, this Court's approval of certain narrow congressional delegations of adjudicatory authority to expert federal administrative bodies in no way validates the sweeping delegation by treaty of binding, final adjudicatory authority over federal law issues to an international tribunal composed of elected representatives of foreign nations.

II. VESTING THE ICJ WITH BINDING JUDICIAL POWER WOULD VIOLATE THE APPOINTMENTS CLAUSE.

Nor can Petitioner's contentions regarding the binding nature of the ICJ's judgment in *Avena* be squared with the Appointments Clause of Article II, Section 2 of the Constitution. Because it is undisputed that the judges of the ICJ were not appointed in a manner that comports with that clause, the ICJ simply cannot constitutionally exercise the

judicial power to issue binding orders enforcing federal law in state criminal cases.

The Appointments Clause provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. This Court has emphasized on numerous occasions that the Appointments Clause "is more than a matter of 'etiquette or protocol,'" but rather "is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). *See also Freytag v. Commissioner*, 501 U.S. 868, 878, 880 (1991); *Ryder v. United States*, 515 U.S. 177, 182 (1995).

Buckley and subsequent decisions make clear that an official who "exercise[es] significant authority pursuant to the laws of the United States is an 'officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). *See also Edmond*, 520 U.S. at 662;

Freytag, 501 U.S. at 881.[5] If such an officer is considered to be a "principal" officer, Article II requires that he be appointed through the process of Presidential nomination and Senate confirmation. If the officer is considered to be an "inferior" officer, Article II authorizes Congress to provide for his appointment directly by the President alone, by the "Courts of Law," or by the "Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. *See Morrison v. Olson*, 487 U.S. 654, 670 (1988).

There can be no doubt that under petitioner's conception of the Vienna Convention, the ICJ in *Avena* exercised "significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, when it ordered the United States to "review and reconsider" petitioner's conviction and sentence. Again, petitioner's entire case is predicated on the proposition that the Vienna Convention is "self-executing" and enforceable as a matter of *federal* law as well as international law, and that ICJ decisions interpreting and applying its provisions have binding force and effect as *federal* law, both in state and federal courts.

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[5] *See also* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87, 102 (1998) (hereinafter "*Yoo, New Sovereignty*"); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1335-37 (2002) (hereinafter "*Yoo, Rejoinder*"); Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1302 (1992) (hereinafter "*Morrison*"); Jim C. Chen, *Appointments With Disaster: The Unconstitutionality of Bi-National Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1481 (1992) (hereinafter "*Chen*"). *See generally* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 109-10 (2000) (hereinafter "*Ku*").

See supra, at 2-3.[6] Indeed, petitioner goes so far as to argue that the ICJ's decision requires this Court either to ignore or to overrule its decision in *Breard v. Greene*, 523 U.S. 371 (1998), which held that an Article 36 claim is subject to a state's procedural default rules. Pet. Br. at 44. Obviously, if petitioner is correct, the ICJ is vested with "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. *See also Chen*, 49 WASH. & LEE L. REV. at 1481 ("[A]s adjudicators of rights arising under treaties and statutes of the United States, [members of adjudicatory panel established under United States-Canada Free Trade Agreement] exercise at least as much authority as special trial judges in the Tax Court, who are considered inferior officers of the United States rather than mere employees."); *Morrison*, 49 WASH. & LEE L. REV. at 1302. It necessarily follows that ICJ judges must be qualified as "officers" of the United States within the meaning of the Appointments Clause.

And it is clear, moreover, that ICJ judges must qualify as "principal" officers, as opposed to "inferior" officers. As this Court held in *Edmond*, "in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who are appointed by Presidential

[6] *Cf.* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1572 (2003) (hereinafter "Bradley") ("Some commentators have nevertheless argued that the [ICJ's order in the *Avena* and *LeGrand* cases] were binding on the United States and should have been enforced by U.S. authorities, including the Supreme Court. In effect, these commentators argue that the orders had the status of self-executing federal law that automatically superseded the relevant state law.").

nomination with the advice and consent of the Senate." 520 U.S. at 663; *see also id*. at 667 (Souter, J., concurring in part) ("Because the term 'inferior officer' implies an official superior, one who has no superior is not an inferior officer."). The ICJ is not subject to any direct or even indirect supervision by any principal officer of the United States, and its decisions are not reviewable by any United States official or court. To the contrary, ICJ decisions, according to petitioner, are binding on all American courts and officials, both state and federal. Because ICJ judges must be principal officers under petitioner's theory of the case, the Appointments Clause requires that they be appointed through Presidential nomination and Senate confirmation.

Ultimately, however, the characterization of the ICJ judges as principal or inferior officers has no bearing on the outcome of this case, since it is undisputed that the judges were not appointed in accordance with the Appointment Clause's requirements for *either* principal officers or inferior officers. As noted earlier, the fifteen member judges of the ICJ are elected to their positions by members of the United Nations General Assembly and that body's Security Council. Thus, whether considered inferior or principal officers, the "appointment" of the judges of the ICJ simply does not comport with the requirements of the Appointments Clause.

Finally, some commentators have suggested that the Appointments Clause does not apply at all to individuals who are not employed within the federal government.[7]

[7] *See*, *e.g.*, *Ku*, 85 MINN. L. REV. at 118 n.166; Memorandum from Assistant Attorney General Walter Dellinger to the General Counsels of the Federal Government, *The Constitutional Separation of Powers*

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This suggestion, however, is flatly inconsistent with one of the key purposes of the Appointments Clause – to bolster the accountability and responsiveness of government officers by ensuring that those who exercise governmental authority are properly appointed by officials who can be held politically accountable for their actions. As this Court noted in *Ryder*, 515 U.S. at 182, the Appointments Clause "is a [bar] against one branch aggrandizing its power at the expense of another branch, but it is more: 'it preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" 515 U.S. at 182 (quoting *Freytag*, 501 U.S. at 878). "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.[8]

Because the "structural interests protected by the Appointments Clause are not those of any one branch of government but of the entire Republic," *Freytag*, 501 U.S. at 880, Congress cannot evade the requirements of the

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Between the President and Congress, 1996 OLC LEXIS 6, at *67-75 (May 7, 1996).

[8] *See also Edmond*, 520 U.S. at 660 ("[T]he Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."); *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) ("[I]n the Framers' thinking, the process on which they settled for selecting principal officers would ensure 'judicious' appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments."); THE FEDERALIST NO. 77 (Alexander Hamilton) (Clinton Rossiter ed.); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1525 (1833); *Bradley*, 55 STAN. L. REV. at 1563; *Yoo*, *New Sovereignty*, 15 CONST. COMMENTARY at 105; *Yoo, Rejoinder*, 90 CALIF. L. REV. 1336.

Appointments Clause and undermine its purposes by effectively transferring the power to appoint officials to an international organization. Thus, "[v]iolation of the Appointments Clause occurs not only when . . . Congress may be aggrandizing *itself* (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, *without* aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies." *Weiss*, 510 U.S. at 196 (Scalia, J., concurring in part) (emphases in original). *See also Printz v. United States*, 521 U.S. 898, 922-23 (1997). Lodging the power to exercise significant federal authority in an international body composed of elected representatives of foreign nations runs contrary to the democratic accountability principles underlying the Appointments Clause and undermines its purpose to "ensure that those who wielded [the appointment power] were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.[9]

[9] This Court has held in analogous contexts that the federal government may not avoid the structural requirements of the Constitution by transferring duties arising under federal law to other governmental entities. Thus, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 266 (1991), this Court found that the fact that a board of review overseeing the board of directors for an airports authority was created and empowered as a matter of state law did not shield federal legislation concerning the board of review from scrutiny – and invalidation – under the separation of powers doctrine, since the federal legislation called upon the states at issue to establish the board of review as a condition to the transfer of federal property. This Court held that the circumstances underlying the establishment of the board of review indicated that that board "necessarily exercise[d] sufficient federal power as an agent of Congress to mandate separation-of-power scrutiny. Any other conclusion would permit Congress to evade the 'carefully crafted' constraints of the Constitution, simply by delegating primary responsibility for execution

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In sum, acceptance of petitioner's view of the binding judicial power of the ICJ would lead inexorably to the conclusion that the federal government violated the Appointments Clause in delegating such power under federal law to an international tribunal.

CONCLUSION

For the foregoing reasons, petitioner's interpretation of the ICJ's authority under the Vienna Convention raises grave constitutional questions and thus should not be adopted. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979). If the Court were to adopt petitioner's interpretation, the Court should rule that the ICJ's exercise of federal judicial power under the Optional Protocol of the Vienna Convention is unconstitutional.

Respectfully submitted,

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of national policy to the States. . . ." *Id.* at 269-70 (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). For the reasons discussed above, a similar analysis obtains here.